

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1053 (Sub-No. 1X)

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

Digest:¹ This decision denies Michigan Air-Line Railway Co.'s request to terminate service over, and to eliminate, an approximately 5.45-mile rail line in Oakland County, Mich.

Decided: May 17, 2011

By petition filed on January 28, 2011, Michigan Air-Line Railway Co. (MAL Railway) seeks 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. Notice of the filing was served and published in the Federal Register on February 17, 2011 (76 Fed. Reg. 9,402-03). On March 9, 2011, American Plastic Toys, Inc. (APT), a shipper on the line, opposed the petition. On March 29, 2011, MAL Railway filed both a petition for leave to file a surreply and a surreply. Additionally, 2 parties filed notices of intent to file offers of financial assistance (OFAs) in this proceeding. Nevada Central Railroad (NCR) filed its notice on March 16, 2011. It subsequently filed a notice to withdraw its OFA on April 22, 2011. APT filed its OFA notice on April 19, 2011.

We will deny MAL Railway's petition because MAL Railway does not provide the Board with sufficient evidence regarding the revenues and costs associated with the line, thereby making it impossible to determine what burden, if any, MAL Railway incurs in continuing to operate the line, while APT remains an active shipper on the line.

PRELIMINARY MATTERS

In its March 29, 2011 filing, MAL Railway seeks leave to file a surreply in response to statements APT makes in its reply. MAL Railway's surreply is technically a reply to a reply, which is normally impermissible under Board rules. 49 C.F.R. § 1104.13(c). However, because MAL Railway's surreply addresses allegations first asserted in APT's reply, and because it establishes a more complete record, we will accept MAL Railway's surreply.

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).

With respect to the notices of intent to file OFAs, we will permit NCR to withdraw its notice, and we will deny APT's notice as moot due to our denial of MAL Railway's petition for exemption.

BACKGROUND

MAL Railway is a Class III common carrier, and has operated the line that is the subject of this proceeding since 2006, when it acquired it from Coe Rail, Inc.² In November 2009, Browner Turnout Co. (Browner) purchased all of the issued and outstanding shares of common stock of MAL Railway from Railmark Holdings, Inc. (Railmark). Until the acquisition by Browner, Railmark had owned all of MAL Railway's stock. Following its acquisition, Browner transferred the MAL Railway stock to RKB Holdings, Inc. Pet. 5; Pet., Exh. E.

MAL Railway's line extends approximately 5.45-miles 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. rail line. The only shipper on the line is APT, located in Walled Lake, Mich. APT receives inbound shipments of plastic pellets in hopper cars. It ships its outbound traffic via motor carrier. In 2008, APT received 67 inbound carloads via the line, while in both 2009 and 2010, it received 52 inbound carloads. Pet. 5-6.

MAL Railway does not provide rail service on the line itself. Rather, it relies on a third party "Service Provider," Railmark Holdings, Inc. d/b/a Rail Freight Solutions (RFS), which provides service on the line on behalf of MAL Railway.³ MAL Railway states: "[A]s the certified common carrier by rail, MAL Railway is responsible for the actions of RFS in providing service to APT." Surreply 2. However, MAL Railway did not submit its contract, or other relevant information showing its relationship with RFS, to allow the Board to independently assess their relationship.

In its petition, MAL Railway asserts that continued operation of the line will be a burden on MAL Railway and on interstate commerce. It argues that the Board should grant its petition for an abandonment exemption because, in accordance with 49 U.S.C. § 10502(a), regulation is not necessary to carry out the transportation policy of 49 U.S.C. § 10101, and because the transaction is limited in scope and will not result in an abuse of market power. In support of this argument, it states: "Over the past several years, traffic volume has decreased substantially." Pet. 5. MAL Railway also indicates in its petition that APT does not object to its abandonment of the line. In a verified statement attached to its petition, MAL Railway's president, R. Robert

² Michigan Air-line Railway Co.—Acquisition and Operation Exemption—Rail line of Coe Rail, Inc., FD 34902 (STB served July 24, 2006).

³ In its petition, MAL Railway refers only to its "Service Provider," and does not refer to RFS by name. In its March 9, 2011 reply, however, APT indicates that the service provider is actually RFS. Reply 8. In its surreply, MAL Railway confirms that fact. Surreply 2.

Butler, states: “APT informed me that because of their declining use of the Railroad, as well as its declining use by other shippers, they did not intend to protest an abandonment.” Pet., Exh. D.

MAL Railway further states in its petition that it does not receive any revenues from operation of the line and that it cannot verify the actual cost of providing service to APT, because it is not a party to the transportation contract between APT and RFS. Pet. 6. MAL Railway states that during the forecast year (the 2011 calendar year), its combined maintenance and rehabilitation costs associated with the line will total \$208,700 (\$21,900 for maintenance costs, and \$186,800 for rehabilitation costs). Pet. 7. MAL Railway argues that, because it does not receive any revenues from the line’s operation, this full amount will accrue to it as a loss. Id. MAL Railway calculates opportunity costs associated with continued operation of the line to be \$1,021,711 during the forecast year.⁴ It acknowledges that APT may incur harm as the result of the line’s abandonment, but argues that “in balancing the harm to itself and interstate commerce, against the harm to the sole remaining shipper and local interests, the balance clearly favors abandonment.” Pet. 10. MAL Railway also indicates that rail/truck transload services are available to APT as a transportation alternative in the event that the line is approved for abandonment and rail service ceases. Pet. 6, 9; Surreply (Exhibits 1, 3, and 4, attached to Exhibit A).

APT objects to the proposed abandonment. It argues that granting MAL Railway’s petition would frustrate various aspects of the transportation policy established at 49 U.S.C. § 10101 and would lead to an abuse of market power. Reply 6-8, 16. APT states that the 2008-2010 traffic figures cited by MAL Railway in its petition are not representative, and were the result of “generally poor economic conditions.” Reply 4. APT expects to receive increasing volumes of shipments as economic conditions improve. Id. It also argues that trucking for inbound shipments would not be financially viable. Id. Moreover, it contends that Browner acquired MAL Railway in 2009 with no intent to operate the line, but rather to abandon and sell it for trail use. Reply 5.

APT argues that MAL Railway’s claim that it does not generate any revenue from the line is a “distortion,” and that MAL Railway “intentionally divorced itself from the service revenue when it acquired the line.” Reply 9. APT further argues that MAL Railway’s service provider, RFS, “appears dedicated to driving APT away from the rail line” (Reply 12), has increased rates, and has been unresponsive to service requests. Reply 4. APT also states that MAL Railway has inflated maintenance costs by deferring maintenance on the line (Reply 10) and disputes the validity of the appraisal MAL Railway used in calculating its opportunity costs associated with continued operation of the line. Reply 10-11.

APT further argues that MAL Railway’s petition contains false and misleading information. Among other things, APT claims that: (1) it never consented to the proposed

⁴ MAL Railway calculated this amount from the asserted net liquidation value of the line, \$5,925,500, multiplied by a 17.24 percent nominal rate of return. Pet. 9. The correct rate of return is 15.58, and MAL Railway’s opportunity cost is therefore overstated. See Railroad Cost of Capital–2009, STB Ex Parte No. 558 (Sub-No. 13) (STB served Oct. 29, 2010).

abandonment of the line; (2) contrary to MAL Railway's statement, MAL Railway knows the amount of revenues generated by the line; (3) MAL Railway understates APT's use of the line and is aware that traffic is increasing; (4) certain photos contained in an exhibit to MAL Railway's petition, which are supposed to depict the line proposed for abandonment, actually depict portions of a previously abandoned line; and (5) the verified statement of R. Robert Butler and MAL Railway's Combined Environmental and Historic Report contain false and misleading statements. Additionally, APT argues that MAL Railway does not accurately represent the status of and information related to efforts by local entities to acquire the line for use as a recreational trail.

In its surreply, MAL Railway admits that "Browner . . . acquired MAL Railway with the intent of ultimately abandoning the [l]ine and discontinuing service" (Surreply 11), and does not reassert its claim that APT consented to abandonment. Further, MAL Railway does not deny that it has knowledge of the revenues generated by the line. MAL Railway rebuts APT's claims that it has understated APT's use of the line and it denies APT's claim that the photos do not depict the line. It also defends the validity of the appraisal it used to calculate opportunity costs and it does not directly address APT's claims regarding the Combined Environmental and Historic Report.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without prior Board 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. As discussed below, because MAL Railway has not provided sufficient evidence for us to make these findings, we deny its petition.

In any abandonment case, whether authority is sought by application or petition for exemption, the railroad must demonstrate that the line in question is a burden on interstate commerce. Typically, the types of abandonment and discontinuance proposals that are authorized through the exemption process are those where shippers do not contest the abandonment or, if they do contest it, the revenue from the traffic on the line is clearly marginal compared to the cost of operating the line. The petitioner "bears the burden of showing that keeping the line in service . . . would impose a burden on it that outweighs the harm that would befall the shipping public, and the adverse impacts on rural and community development, if the rail line were abandoned."⁵

Here, MAL Railway does not provide sufficient evidence to compare the revenue from the traffic on the line with the cost of operating the line, and therefore does not demonstrate that

⁵ Wyo. and Colo. RR Co., Inc.—Aband. Exemption—In Carbon Cnty., Wyo. AB 307 (Sub-No. 5X), slip op. at 4 (STB served Nov. 10, 2004) (citations omitted).

the line is a burden on interstate commerce. While in its petition MAL Railway states that it does not know how much revenue the line generates, in its surreply it acknowledges that APT was paying \$7,250 a month to RFS for service as of March 2011, and that this flat rate is “necessary to cover RFS’s fixed costs and seasonal expenses.” Surreply 6. MAL Railway claims, however, that because all revenues are paid directly to RFS, MAL Railway derives no revenues from the operation of the line. Petition 6; Surreply 8. We agree with APT that MAL Railway’s claim that it receives no revenue is a “distortion.” Reply 9. The fact that APT pays \$7,250 per month for rail service indicates that the line generates revenue of at least this amount, which would accrue to MAL Railway if it operated the line itself. Under the circumstances, MAL Railway’s decision not to retain any revenues is puzzling. Moreover, we consider all revenues generated by the line when evaluating whether to grant abandonment. A carrier cannot assign its revenues to an operator to make its lines appear unprofitable and, thus, suitable for abandonment.

The record of the line’s operating costs is also inadequate. MAL Railway provides 2 exhibits that reference operating costs. A January 14, 2010 letter from Railmark (d/b/a RFS) to APT (attached as Exhibit 1 to Exhibit A of MAL Railway’s surreply) states in part:

[T]he rate for direct rail service for the first three months of this year is \$6,500 Per Month. This rate covers all of your normal first quarter rail movements and also reflects our actual cost of being able to provide that direct service to your plant.

Additionally, MAL Railway provides (attached as Exhibit 2 to Exhibit A of its surreply) an itemized “Schedule of Costs to Service APT for 1st Q 2010.” According to this exhibit, RFS’s operating cost is \$6,500 (presumably, per month rather than for the entire quarter, although this is not clearly indicated in the exhibit). MAL Railway offers no explanation regarding the methodology RFS used to calculate its operating costs. See 49 C.F.R. §§ 1152.31-34. It is unclear if the calculations include maintenance costs, which MAL Railway states are \$21,900 annually, and which the Board must consider when calculating a line’s operating profit or loss. Because MAL Railway does not provide sufficient information to document the line’s revenues and operating costs, we cannot accurately calculate the line’s operating profit or loss.

MAL Railway also argues that the opportunity and rehabilitation costs associated with continued operation of the line weigh in favor of a grant of its petition. It states that opportunity and rehabilitation costs will be \$1,021,711 and \$186,800, respectively, during the forecast year. We cannot accept MAL Railway’s opportunity cost calculation due to questions regarding the assessed value of the line’s real estate, which is a key component of the opportunity cost. APT states that it was not provided with a copy of the appraisal of the line, and further contends that the appraisal is out of date and that the value that MAL Railway assigns to the line’s real estate “is no longer accurate in the current Michigan economic environment.” Reply 11.⁶ We also

⁶ Additionally, as noted in footnote 4, above, MAL Railway overstates the nominal rate of return used to calculate opportunity costs.

cannot accept MAL Railway's claimed \$186,800 in rehabilitation costs, as it has not provided adequate documentation to support them.

In sum, APT, an active shipper, has sufficiently challenged MAL Railway's petition for exemption and there remain enough unresolved questions to lead us to deny the petition based upon this record. Because we are denying MAL Railway's petition for the reasons discussed above, we do not need to address APT's remaining allegations.

Finally, we note that even if MAL Railway had provided sufficient evidence, we would not permit MAL Railway to consummate any abandonment authority granted as to the line until the status of RFS as the line's operator was clarified. As indicated in MAL Railway's petition, RFS, not MAL Railway, is providing the service on the line. It appears that RFS may be performing common carrier service and may have held itself out to the public to fulfill a common carrier obligation, in which case it should have first obtained authorization from the Board in order to do so.⁷ MAL Railway did so in 2006, when it acquired the line from Coe Rail and began service as a common carrier. Mich. Air-Line Ry.—Acquisition and Operation Exemption—Rail Line of Coe Rail, Inc., FD 34902 (STB served July 24, 2006). But it does not appear that RFS or Railmark obtained Board authority to operate the line in place of MAL Railway or to fulfill its common carrier responsibilities, following Browner's 2009 acquisition of MAL Railway. Because we are denying MAL Railway's petition, and because MAL Railway has a continuing obligation to serve APT, we will require that MAL Railway and RFS provide the Board with an explanation and supporting documentation (e.g., the contract between them) regarding the nature of RFS's operations by June 7, 2011. We will also require, by the same date, MAL Railway and RFS to show cause why the Board should not find that RFS is operating in violation of 49 U.S.C. § 10902.

Denial of this petition is without prejudice to MAL Railway refiling an appropriate abandonment application or a petition for exemption that cures the defects found in the current proposal, including the lack of participation by RFS as discussed above. Any new filing must be submitted under a new docket subnumber accompanied by an appropriate filing fee. Our denial of MAL Railway's petition moots labor protection, environmental issues, and APT's notice of intent to file an OFA.⁸

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

⁷ See 49 U.S.C. § 10902; 49 C.F.R. § 1150, Subpart E; Kan. City Transp. Co. LLC—Lease and Assignment of Lease Exemption—Kan. City Term. Ry. and Kaw River RR, Inc.; FD 34830 (STB served May 23, 2007).

⁸ The Board reminds APT that if it believes that MAL Railway is not providing adequate service, it may utilize the services of the Board's Rail Customer and Public Assistance Program (reachable at (866) 254-1792 or by e-mail at rcpa@stb.dot.gov) in an effort to resolve such concerns. Additional information regarding the program is available to rail customers, carriers, and other interested entities on the Board's website at www.stb.dot.gov.

It is ordered:

1. MAL Railway's petition for exemption is denied.
2. MAL Railway's petition for leave to file a surreply and admit its surreply into evidence is granted.
3. NCR is permitted to withdraw its notice of intent to file an OFA.
4. APT's notice of intent to file an OFA is denied as moot.
5. MAL Railway is directed to serve copies of this decision on RFS and APT so that they are received by RFS and APT within 5 days after the service date of this decision and to certify contemporaneously to the Board that it has done so.
6. MAL Railway and RFS are ordered to provide to the Board, no later than June 7, 2011, the contract between them and any other documentation showing their relationship and to show cause why the Board should not find that RFS is operating in violation of 49 U.S.C. § 10902.
7. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.