

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-227 (Sub-No. 8X)

WHEELING & LAKE ERIE RAILWAY COMPANY--ABANDONMENT EXEMPTION--
IN HURON COUNTY, OH

Decided: November 27, 1996

By petition filed September 13, 1996, Wheeling & Lake Erie Railway Company (W&LE or petitioner) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad between milepost 0.0 at Huron Junction in Norwalk, OH, and milepost 2.3 near Milan, OH (the "Milan Branch"), a distance of approximately 2.3 miles in Huron County, OH. We will grant the exemption, subject to an environmental condition and standard employee protective conditions.

BACKGROUND

W&LE states that the Milan Branch is currently embargoed because of track conditions and would require significant repair and rehabilitation to be returned to service. According to W&LE, flooding in 1995 resulted in a substantial washout of a large, 20-foot embankment at approximately milepost 1.86, which caused the line to be embargoed on November 6, 1995. W&LE estimates the cost to repair the flood damage and to bring the line to FRA class 1 standards at approximately \$400,000.¹

According to W&LE, the only shipper on the line prior to the embargo and for the last several years was Midwest Wood Treating, Inc. (Midwest), which received inbound shipments of lumber (46 in 1994 and 24 in 1995). According to petitioner, since the embargo, Midwest has been receiving inbound lumber shipments via rail/truck transload from Norfolk and Western Railway Company at Avery, OH, and no longer requires rail service on the branch. W&LE states that, after the abandonment, rail service will continue to be available from W&LE at Norwalk, approximately two miles from Midwest's facility, in addition to the service at Avery. Petitioner asserts that there is no reasonable prospect for developing sufficient rail traffic to allow profitable operations on the line in the future.

W&LE states that it has reached an agreement with the City of Norwalk (the City) to transfer the Milan Branch right-of-way for \$260,000. The City will use the right-of-way corridor for a water line to be constructed from the Huron River to the Norwalk city reservoir, and for construction of an adjacent sewer line. W&LE states that prompt approval and consummation of the proposed abandonment would allow the City to begin this important public works project in 1996, and would provide a needed cash infusion to W&LE.

¹ Petitioner acknowledges, however, that a State of Ohio railroad inspector estimated in May 1996 that it would cost \$166,000 to reopen the Milan Branch and assure "safe operation." W&LE points out that even this figure is still substantial.

In addition, W&LE states that, on September 11, 1996, the Ohio Rail Development Commission approved a \$1 million joint railroad/shipper/state project designed to alleviate congestion on W&LE's line between Spencer and Carey, OH, by extending W&LE's Hiles Siding west of Spencer from 3000 feet to 8000 feet to allow longer trains to meet and pass on the line. W&LE intends to contribute to the project by providing 10,000 feet of rail from this abandonment. W&LE requests expedited action on its petition so that it may complete the project during the current work season.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without 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 of this transaction under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of filing an abandonment application, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. By allowing W&LE to avoid costly rehabilitation expenses on this low-volume line, and to apply its assets more productively elsewhere on its system, an exemption will promote safe and efficient rail transportation, foster sound economic conditions, and encourage efficient management [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. Midwest, the only shipper located on the line, has not objected to the abandonment and appears to have adequate transportation alternatives. To ensure that Midwest is notified of our action, however, we will direct W&LE to serve a copy of this decision on Midwest within 5 days of its service date and to certify to us that it has done so.

Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope, although the proposed abandonment appears to satisfy that criterion as well.

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).

W&LE 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 impact of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and

analyzed the probable effect of the proposed abandonment on the quality of the human environment.

An environmental assessment (EA) was served on October 22, 1996. In the EA, SEA noted that the United States Department of Interior, Fish and Wildlife Service (FWS) states that the proposed abandonment lies within the range of the Indiana bat, bald eagle, lakeside daisy and piping plover. According to FWS, because of the project's location, however, the abandonment should have no effect on the bald eagle, lakeside daisy and piping plover. FWS does recommend that if trees with cavities or exfoliating bark are encountered in the project area, they and surrounding trees should be saved wherever possible. If they must be cut, they should not be cut between April 15 and September 15. SEA recommends that this condition be imposed on any decision granting abandonment authority. We agree and will impose this environmental condition.

SEA also has concluded that the proposed abandonment, if implemented, and subject to the recommended condition, will not significantly affect either the quality of the human environment or the conservation of energy resources, and that the right-of-way may be suitable for other public use following abandonment.

Comments on the EA were due on November 8, 1996, but none was received. Accordingly, based on SEA's recommendations, 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 line may be suitable for other public use under 49 U.S.C. 10905, no one has requested a public use condition, and none will be imposed.² Nevertheless, we will provide a 10-day period after Federal Register publication for interested persons to request a public use condition.

W&LE has requested expedited consideration of this petition. No one has protested the abandonment or indicated any desire that service be continued over the line. That being the case, we see no indication on the present record that we would receive a request to stay, reconsider or reopen the decision. Nor would we expect to receive an offer of financial assistance (OFA). Because W&LE has contracted to sell the line to a public body, we would not expect to receive a request for a public use condition. Nor do we expect W&LE to consent to a request for interim trail use. We have not received a request that we exempt W&LE from the provisions of sections 10904-05, so we will not do so. We have, however, expedited consideration of the petition and will make the decision and the exemption effective in 15 days, rather than the customary 30, in order to permit W&LE to consummate the abandonment authority promptly if no public use request or notice of intent to file an OFA is filed.

² On October 3, 1996, Erie MetroParks (Erie) filed a request for public use and trail use under this docket number. However, because Erie's interest is only between mileposts not on the Milan Branch (i.e., between mileposts H-4.2 and H-10.6), we will not consider that request further here.

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 W&LE of the above-described line, subject to: (1) the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979); and (2) the condition that if trees with cavities or exfoliating bark are encountered in the project area, they and surrounding trees should be saved wherever possible. If they must be cut, they should not be cut between April 15 and September 15.

2. Notice will be published in the Federal Register on December 5, 1996.

3. W&LE must serve a copy of this decision on Midwest Wood Treating, Inc., within 5 days of the decision's service date, and certify to us that it has done so.

4. Provided no formal expression of intent to file an offer of financial assistance has been received, the exemption will be effective on December 20, 1996.

5. Formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2)³ and requests for a notice of interim trail use/rail banking under 49 CFR 1152.29 must be filed by December 16, 1996; petitions to stay must be filed by December 16, 1996; requests for a public use condition in conformity with 49 CFR 1152.28(a)(2) must be filed by December 16, 1996; and petitions to reopen must be filed by December 26, 1996.

6. If a formal expression of intent to file an OFA has been timely submitted, the effective date of the exemption will be automatically stayed until 40 days after publication (see 49 CFR 1152.27(c)(i)). An OFA to allow rail service to continue must be received by the railroad and the Board within 30 days after publication, subject to time extensions authorized under 49 CFR 1152.27(c)(2)(ii)(C) and (D). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2).

7. 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."

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

³ See Exempt. of Rail Abandonment--Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).