

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 303 (Sub-No. 43X)

WISCONSIN CENTRAL LTD.—ABANDONMENT EXEMPTION—IN
BARRON COUNTY, WIS.

Digest:¹ This decision allows Wisconsin Central Ltd. to end its common carrier obligation to provide freight rail service over approximately 0.80 miles of rail line in Barron County, Wis.

Decided: March 25, 2014

By petition filed on December 16, 2013, Wisconsin Central Ltd. (WCL) seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon approximately 0.80 miles of rail line, extending from milepost 55.2 to milepost 56.0 in Rice Lake, Barron County, Wis. (the Line). Notice of the exemption was served and published in the Federal Register on January 3, 2014 (79 Fed. Reg. 423). No one has objected to the proposed abandonment.

On February 6, 2014, the Wisconsin Department of Transportation (WisDOT) requested issuance of a notice of interim trail use (NITU) for the Line on behalf of the Wisconsin Department of Natural Resources (WisDNR).² WCL responded, indicating that it intends to negotiate for interim trail use/rail banking.

As discussed further below, the Board will grant the exemption subject to trail use, environmental, and standard employee protective conditions.

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).

² The deadline for filing trail use/rail banking requests was January 23, 2014. However, the Board will accept WisDOT's late-filed submission because it has not delayed the proceeding and will not prejudice any party. See Wheeling & Lake Erie Ry.—Aban. Exemption—in Stark Cnty., Ohio, AB 227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

BACKGROUND

WCL states that there are no shippers on the Line and no reasonable possibility for the development of rail traffic. The Line (and certain other trackage) was leased to Progressive Rail Inc. (Progressive Rail) from 2004 to 2012. The Board approved Progressive Rail's petition to discontinue rail service over the Line (and the additional leased trackage) effective November 2, 2012.³ Progressive Rail, Inc.—Discontinuance of Service Exemption—in Barron Cnty., Wis., AB 1101X (STB served Oct. 3, 2012). Progressive Rail indicates that there was no traffic on the Line from November 20, 2011, to December 1, 2012.⁴ Further, WCL's Manager-Network Strategies testifies that since December 2, 2012, WCL has had sole control over the Line and there has been no traffic over it.⁵ The WCL line north of milepost 56.0 was authorized for abandonment in Wisconsin Central Ltd.—Abandonment Exemption—in Douglas, Washburn, & Barron Counties, Wisconsin, AB 303 (Sub-No. 12X) (ICC served Apr. 20, 1993), and WCL states that the line became a trail except for a small portion of trackage immediately north of milepost 56.0, for which abandonment was consummated but the track was left in place to allow room for switching.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) 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 the proposed abandonment under 49 U.S.C. § 10903 is not necessary to carry out the RTP here. The Line is no longer needed for rail service, as shown by the lack of traffic over the Line and the lack of objection to WCL's petition. By minimizing the administrative expense of the application process, an exemption in this case would minimize the need for Federal regulatory control over the rail transportation system, expedite regulatory decisions, and reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). Thus, an exemption would also help to ensure the development and continuation of a sound

³ Although WCL states the discontinuance of service exemption was effective December 2, 2012, the Board's decision states that it was effective November 2, 2012.

⁴ Petition, Ex. C.

⁵ Petition, Ex. D. WCL states that, but for the fact that the Line was under the control of Progressive Rail for part of the two-year period before WCL filed its petition, WCL could have sought an exemption pursuant to the two-year out-of-service class exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments.

rail transportation system, foster sound economic conditions in transportation, and promote efficient railroad management, consistent with 49 U.S.C. §§ 10101(4), (5), and (9). Other aspects of the RTP would not be adversely affected by the use of the exemption process.

We also find that regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power.⁶ As explained above, there are no shippers on the Line and there is no opposition to the proposed abandonment.

Employee protection. Under 49 U.S.C. § 10502(g), the Board may not use its 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 on WCL the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979).

Environmental review. WCL has submitted a combined environmental and historic report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA issued an Environmental Assessment (EA) on February 14, 2014, recommending that three conditions be imposed on any decision granting abandonment authority. First, OEA states that the U.S. Army Corps of Engineers (Corps) advises WCL to contact Mr. Daniel Seemon of the Corps' Saint Paul Regulatory Office concerning any permits that may be required prior to the onset of any salvage activities. To address the Corps' concerns, OEA recommends a condition that WCL consult with the Corps prior to initiating salvage operations to determine if a Corps permit is needed.

OEA also notes that WisDNR cautions that the area of the proposed abandonment passes through or is adjacent to an area of contaminated soils. OEA therefore recommends a condition that WCL consult with the WisDNR to ensure that its concerns are addressed regarding the possible presence of contaminated soils in the area of the proposed abandonment.

OEA states that WisDOT, in commenting on the proposed abandonment, requests that WCL comply with its salvage policies and procedures. WisDOT advises that during salvage, any surveying and mapping equipment should be protected. WisDOT states that WCL must also

⁶ Because we find that regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power, we need not determine whether the proposed abandonment is limited in scope.

remove rail, ties, and ballast at state highway crossings and would need to obtain a WisDOT permit prior to doing so. WisDOT also states that during this process, WCL would be responsible for traffic management, and any salvage activities would need to be coordinated with the WisDOT Regional Maintenance section. Finally, WisDOT remarks that it encourages preservation of the Line for future transportation needs consistent with existing land use plans. To address WisDOT's concerns, OEA recommends a condition requiring that, prior to commencement of any salvage activities, WCL consult with WisDOT regarding the protection of surveying and mapping equipment during salvage, safety and salvage operations at state highway intersections, and WisDOT salvage procedures and requirements.

Comments on the EA were due by March 17, 2014. None were filed. Accordingly, based on OEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, would not significantly affect either the quality of the human environment or the conservation of energy resources.

Interim trail use. As indicated above, WisDOT filed a request on behalf of WisDNR for the issuance of a NITU for the Line under the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29 to provide time to negotiate with WCL for acquisition of the right-of-way for use as a recreational trail and for rail banking. WisDNR has submitted a statement of willingness to assume full responsibility for the management of the right-of-way, for any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor 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, as required by 49 C.F.R. § 1152.29. WisDNR has also acknowledged that the use of the right-of-way for trail purposes is subject to the trail sponsor's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on February 10, 2014, WCL states that it does not object to the issuance of a NITU to WisDNR.

Because WisDOT and WisDNR's request complies with the requirements of 49 C.F.R. § 1152.29 and WCL is willing to enter into interim trail use negotiations, we will issue a NITU for the Line. The parties may negotiate an agreement during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached within 180 days, WCL may fully abandon the Line, subject to the conditions imposed below. See 49 C.F.R § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

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), an offer of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations takes priority over interim trail use/rail banking. Accordingly, if an OFA is timely

filed under 49 C.F.R. § 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 C.F.R. § 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 C.F.R. § 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 WCL of the above-described Line, subject to the employee protective conditions set forth in Oregon Short Line and the conditions that WCL shall, prior to the commencement of any salvage activities: (1) consult with the Saint Paul Regulatory Office of the Corps and comply with any reasonable requirements of the Corps; (2) consult with WisDNR to ensure that its concerns are addressed regarding the possible presence of contaminated soils in the area of the proposed abandonment; and (3) consult with WisDOT regarding the protection of surveying and mapping equipment during salvage, safety and salvage operations conducted at the intersection of state highways, and WisDOT salvage procedures and requirements.
2. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.
3. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities described in ordering paragraph 2 above.
4. If an agreement for interim trail use/rail banking is reached by September 23, 2014, the parties shall jointly notify the Board within 10 days that an agreement has been reached, 49 C.F.R. § 1152.29(d)(2) and (h), and interim trail use may be implemented. If no agreement is reached by that time, WCL may fully abandon the Line, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29(d)(1).
5. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the rail line covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.
6. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by April 4, 2014, subject to time extensions authorized

under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,600. See 49 C.F.R. § 1002.2(f)(25).⁷

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.”**

8. Provided no OFA has been received, this exemption will be effective on April 26, 2014.

9. Petitions to stay must be filed by April 7, 2014. Petitions to reopen must be filed by April 16, 2014.

10. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), 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 March 27, 2015, 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 one-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.

By the Board, Chairman Elliott and Vice Chairman Begeman.

⁷ Consistent with our precedent, and given the apparent lack of need for the Line by any shipper, any person seeking to file an OFA must provide evidence that there is some shipper that would make use of common carrier service. See, e.g., CSX Transp.—Abandonment Exemption—in Washington Cnty., Md., AB 33 (Sub-No. 727X) (STB served Oct. 24, 2013); Union Pac. R.R.—Abandonment Exemption—in Pottawattamie Cnty., Iowa, AB 33 (Sub-No. 300X) (STB served Jan. 20, 2012); CSX Transp.—Abandonment Exemption—in Chesterfield & Darlington Cntys., S.C., AB 55 (Sub-No. 703X) (STB served Jan. 19, 2011).