

SERVICE DATE - OCTOBER 22, 1997

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-440X

WISCONSIN & MICHIGAN RAILWAY COMPANY--DISCONTINUANCE  
OF SERVICE EXEMPTION--IN ASHLAND AND IRON COUNTIES, WI AND  
GOGEBIC COUNTY, MI

Decided: October 8, 1997

This decision grants Wisconsin Central, Ltd.'s (WCL) petition to reopen this proceeding as necessary to conform prior decisions in the proceeding to the court decision in Wisconsin Cent. Ltd. v. Surface Transp. Bd., 112 F.3d 881 (7th Cir. 1997). The decision also denies a request by the Wisconsin Department of Natural Resources (WisDNR), acting through the Wisconsin Department of Transportation (WisDOT), for a notice of interim trail use (NITU).

BACKGROUND

Soo Line Railroad Company (Soo) originally owned and operated the subject line of railroad, known as the Mellen-Bessemer Branch, extending between milepost 411.0 near Mellen, WI, and milepost 443.38 near Bessemer, MI. Soo received authority from the Interstate Commerce Commission (ICC)<sup>1</sup> to abandon the line in January 1987.<sup>2</sup> WCL purchased the line from Soo in October 1987, but never operated it. On July 26, 1991, WCL leased the line to Wisconsin & Michigan Railway Company (WIMI). After obtaining the lease, WIMI filed a notice with the ICC announcing its intent to renew service on the line and seeking an exemption from the statutory approval requirements for the initiation of service. WCL was not a party to the ensuing proceeding, and the ICC's decision granting WIMI the exemption did not bestow any operating rights on WCL. The ICC observed that WCL had purchased the line but had never used it. Wisconsin & Michigan Ry. Co.--Operation Exemption--Between Mellen, WI and Bessemer, MI, Finance Docket No. 31928 (ICC served Sept. 16, 1991).

WIMI began common carrier operations over the line on June 12, 1992. The line did not prove profitable, however, and, less than three years later, WIMI decided to cease operations. Accordingly, on February 16, 1995, WIMI filed a petition with the ICC seeking an exemption to discontinue service over the line. No shipper opposed WIMI's request and, on May 5, 1995, the ICC served a decision granting WIMI the exemption it sought, thus permitting it to terminate service over the line without further proceedings.

Although no one opposed WIMI's request to discontinue service, the three counties served by the line filed comments. Commenters queried whether WCL would retain any residual common carrier obligation once WIMI ended service on the line, expressed the hope that the line would remain intact, and reported that a task force had been formed to study present and future need for service on the line. In response to these queries, WIMI wrote to the ICC that WCL did not have a common carrier obligation in regard to the rail line and that, upon a grant of authority to discontinue service, WCL could remove the line or sell it outside the provisions of the Interstate Commerce Act.

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<sup>1</sup> Effective January 1, 1996, the ICC was abolished in accordance with the ICC Termination Act of 1995 (ICCTA) and the ICC's remaining functions were transferred to the Surface Transportation Board (STB or Board), a newly created agency within the Department of Transportation. See Pub. L. No. 104-88, 109 Stat. 803 (1995). Section 204 of the ICCTA provides that matters arising prior to the effective date of the ICCTA shall be governed by the Interstate Commerce Act (ICA) as it stood prior to amendment by the ICCTA. 109 Stat. 822-29, 942.

<sup>2</sup> Soo Line Railroad Company--Abandonment Exemption--In Ashland and Iron Counties, WI and Gogebic County, MI, Docket No. AB-57 (Sub-No. 2X) (ICC served Jan. 27, 1987).

In the May 5, 1995 decision granting WIMI the exemption thus permitting it to end its operations, the ICC stated that, when operations began under WIMI's lease from WCL, the line returned to the national rail system. The ICC added that WCL still owned the line and presumably would obtain abandonment authority from the ICC should WCL decide to remove any track from the line. This additional language caused WCL to seek leave to intervene and to ask the ICC to reopen the proceeding for the limited purpose of deleting the language in the May 5 decision suggesting that WCL retained a common carrier obligation. In a decision served September 21, 1995, the ICC allowed WCL to intervene, but denied its petition to reopen and declined to delete the language regarding a residual common carrier obligation. WCL then sought review of the ICC's decisions before the U.S. Court of Appeals for the Seventh Circuit.

#### THE COURT REVIEW AND AGENCY RESPONSE

On review, the court, in a decision issued April 30, 1997, held that, even though WCL is a carrier, it did not incur a common carrier obligation with regard to this abandoned line by leasing it to another carrier. As such, the court concluded, WCL had not subjected itself to ICC jurisdiction. The court thus granted WCL's petition for review of the ICC's decisions and reversed those decisions to the extent that they had concluded that WCL had a common carrier obligation vis-a-vis the line and would need abandonment authority if WCL wished to remove the track.

Accordingly, in light of the court's decision, we will grant WCL's petition for limited reopening of this proceeding. On reopening, we vacate statements regarding WCL's position as a rail common carrier with respect to the line. The following two statements are hereby vacated from the May 5, 1995 decision:

WCL still owns the line, and presumably will obtain abandonment authority from the Commission should it decide to remove any track from the Mellen-Bessemer Branch. (pages 2-3).

It appears that when operations began pursuant to the notice in Finance Docket No. 31928, supra, [WIMI's lease from WCL] the line returned to the national rail system. (page 3, n.5).

We will also vacate the September 21, 1995 decision to the extent that the discussion and conclusions therein impose a common carrier obligation on WCL either to provide service or to seek abandonment authority for this line.

#### NOTICE OF INTERIM TRAIL USE

By petition filed August 26, 1997, WisDNR, through WisDOT, requests a notice of interim trail use (NITU) for interim highway, bicycle, pedestrian, and other trail purposes and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29. The notice pertains to that portion of the Mellen-Bessemer Branch between milepost 411.0 near Mellen, WI, and milepost 436.61 at the Wisconsin State Line in Hurley, WI, a distance of about 25.61 miles in Ashland and Iron Counties, WI. WisDOT states that WisDNR will use or preserve the land corridor and related real property for interim public transportation and recreational purposes (including highway, pedestrian, and other trail use), subject to restoration for railroad purposes.

As part of its request, WisDOT asserts that WCL is ready, willing and able to negotiate the sale of the corridor for rail or non-rail purposes. We note, however, that WCL previously argued, and the court concluded, that the ICC (and thus the Board) lacks jurisdiction over both WCL and the line itself.<sup>3</sup> We cannot conclude that we have no jurisdiction over the line for one purpose (imposing a common carrier obligation), but find that we have jurisdiction for another purpose (authorizing trail use). Accordingly, because we have no jurisdiction over the line in these

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<sup>3</sup> Indeed, according to WisDOT, WCL has agreed to negotiate a NITU "although not submitting to Board jurisdiction." NITU petition at p. 2.

circumstances in order to issue a NITU, the WisDOT request will be denied. See Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1262 (1996).

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

It is ordered:

1. WCL's petition for partial reopening is granted.
2. The May 25, 1995 and the September 21, 1995 decisions in this proceeding are hereby vacated to the extent discussed above.
3. The WisDOT/WisDNR petition for a NITU is denied.
4. This decision is effective on the service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary