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SERVICE DATE - NOVEMBER 6, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-31 (Sub-No. 32X)

GRAND TRUNK WESTERN RAILROAD INCORPORATED
--ABANDONMENT EXEMPTION--IN OAKLAND COUNTY, MI

Decided: November 2, 1998

By petition filed July 20, 1998, Grand Trunk Western Railroad Incorporated (GTW) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 3.1-mile portion of its line of railroad known as the Jackson Spur, extending between milepost 35.3 at Pontiac and milepost 38.4 at Sylvan Lake, in Oakland County, MI (the Line). Notice of the institution of an exemption proceeding was published in the Federal Register at 63 FR 42486 on August 7, 1998. The City of Pontiac (Pontiac) and the City of Sylvan Lake (Sylvan Lake) request issuance of a notice of interim trail use (NITU) and imposition of a public use condition. Sylvan Lake and the Oakland County Board of Commissioners (the Oakland Commissioners) request expeditious consideration of the petition. The United Transportation Union (UTU) requests imposition of labor protective conditions. We will grant the petition, subject to environmental, public use, and labor protective conditions, and deny issuance of a NITU.

BACKGROUND

According to GTW, there are only two active shippers on the Line. Until May of 1998, GTW served Powers Distributing Company, Inc. (Powers), located between milepost 37.34 and milepost 37.36. Traffic for Powers consisted of shipments of beer totaling 266 carloads in 1996, 222 carloads in 1997, and 74 carloads in the first 4 months of 1998. GTW states that, on May 1, 1998, Powers relocated to a GTW siding in Orion Township, MI, on GTW's Cass City Subdivision. GTW states that it will continue to provide Powers with rail service at this location. The other shipper is Cadillac Brick Company (Cadillac) at milepost 38.4. GTW served Cadillac prior to the issuance of an embargo notice on May 16, 1997. That portion of the Line between milepost 37.36 and milepost 38.4 was embargoed due to soft track conditions. Traffic for Cadillac consisted of shipments of bricks totaling 341 carloads in 1995, 386 carloads in 1996, and 159 carloads in 1997.¹ In a letter dated June 11, 1998, Cadillac states that it has made alternative arrangements for its traffic and that it no longer requires rail service over GTW's Jackson Spur. It appears that Cadillac now uses CSX Transportation, Inc.'s reload facility at Wixom, MI, to move its traffic.

¹ In June of 1997, Cadillac filed an informal complaint with the Board alleging that Canadian National Railway Company/GTW had improperly imposed the embargo and was using the embargo to effect an unlawful abandonment of the Line. Subsequently, on June 11, 1998, Cadillac notified the Board's Office of Compliance and Enforcement that their dispute had been resolved, and requested that the matter be closed.

GTW claims that the Line requires a level of rehabilitation and maintenance which is not justified by the low volume of traffic and poor revenues generated by the Line. According to GTW, revenues of \$175,900 were generated in 1997, down from \$351,200 in 1996. GTW estimates its losses as \$118,200 in 1996, \$101,999 in 1997, and \$56,000 for the first 4 months of 1998. To continue to provide service over the Line at excepted track status, GTW estimates a minimum expenditure of \$150,000 for rehabilitation of trackage and highway at-grade crossings. In addition, GTW estimates the net liquidation value of the Line to be \$270,000 (\$232,000 for the underlying real estate and \$38,000 for the net salvage value of track and other materials).

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.

We conclude that 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 the abandonment process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Moreover, an exemption will permit GTW to avoid the costs of rehabilitating this unprofitable line and to apply its assets more productively elsewhere on its system, thereby promoting safe and efficient rail transportation, fostering sound economic conditions, and encouraging efficient management [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy are not affected adversely.

Because shippers Cadillac and Powers appear to have alternative rail service and do not oppose the proposed abandonment, we find that regulation is not necessary to protect shippers from an abuse of market power. Nevertheless, to ensure that the shippers are informed of our decision, we will direct GTW to serve a copy of this decision on Cadillac and Powers within 5 days of the service date of this decision and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

UTU requests imposition of labor protective conditions. Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of a statutory obligation to protect the interests of its employees. Accordingly, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), as a condition to granting this exemption.

GTW 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 impacts of the proposed abandonment. 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 action on the quality of the human environment. SEA served an environmental assessment (EA) on September 22, 1998. In the EA, SEA indicated that the U.S. Department of Commerce, National Geodetic Survey (NGS), has identified several geodetic station markers that could be affected by the proposed abandonment. Therefore, SEA recommends that a condition be imposed requiring GTW to consult with NGS at least 90 days prior to disturbing or destroying any geodetic markers. SEA also has indicated that the right-of-way may be suitable for public use under 49 U.S.C. 10905.²

Comments in response to the EA were due October 19, 1998. The Michigan Department of Environmental Quality (MDEQ) commented that salvage activities must comply with soil stabilization requirements. Therefore, SEA recommends that a condition be imposed requiring GTW to comply with the soil stabilization requirements of Act No. 347, Soil Erosion and Sedimentation Control Public Acts of 1974. We will impose the conditions recommended by SEA. Based on SEA's recommendation, as supplemented, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or conservation of energy resources.

On August 31, 1998 and September 3, 1998, Pontiac and Sylvan Lake filed requests seeking issuance of a notice of interim trail use/rail banking (NITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and imposition of a 180-day public use condition under 49 U.S.C. 10905.

Both Pontiac and Sylvan Lake submitted statements of financial responsibility and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation for rail service as required under 49 CFR 1152.29. By letters filed September 4 and September 17, 1998, GTW responded that it objects to the issuance of a NITU and that it is not willing to negotiate an agreement with either Pontiac or Sylvan Lake. Because 16 U.S.C. 1247(d) permits only voluntary trail use, the Board cannot issue a NITU in this proceeding. See Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986) (Trails).

Pontiac and Sylvan Lake also request imposition of a 180-day public use condition requiring GTW to leave intact all trail-related structures (i.e., bridges, trestles, culverts, and tunnels, but not tracks, ties, and signal equipment). They assert that conversion to a recreational trail is consistent with local land use plans and could provide an extension to an existing nature/fitness trail from West Bloomfield Township into Pontiac. The parties state that a 180-day period is needed to review title

² Trail use and public use requests were due no later than 20 days after publication of the notice of the petition for exemption in the Federal Register, or by August 27, 1998.

information, complete a trail plan, and commence negotiations with GTW. Both Pontiac and Sylvan Lake have met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed, commencing with the effective date of this decision.

We note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, GTW is not required to deal exclusively with Pontiac and Sylvan Lake, but may engage in negotiations with other interested persons.

The parties should note that operation of the public 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) (Trails), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 U.S.C. 1152.27(c)(1), the effective date of this decision will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the lines are sold under the OFA procedures, the petition for abandonment exemption will be dismissed and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the public use process may proceed.

Sylvan Lake and the Oakland Commissioners request expedited consideration of the petition so that the removal of track can occur prior to the scheduled resurfacing of Orchard Lake Road in August of 1998. Because the Board is required to prepare an EA (normally 60 days to prepare and serve and 30 days for public comment), we are usually unable to issue a decision any sooner than the 110-day deadline. We will, however, make the exemption effective in 20 days rather than the customary 30 days.

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 GTW of the above-described 3.1-mile rail line, subject to: (1) the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979); (2) the condition that GTW consult with NGS and provide 90 days' notice prior to disturbing or destroying any geodetic markers; (3) the condition that GTW, during salvage activities, shall comply with the soil stabilization requirements of Act No. 347, Soil Erosion and Sedimentation Control Public Acts of 1974; and (4) the condition that GTW leave intact all trail-related structures (i.e., bridges, trestles, culverts, and tunnels, but not tracks, ties, and signal

equipment), for a period of 180 days from the effective date of this decision, to enable any state or local governmental agency or any other interested person to negotiate the acquisition of the line for public use.

2. The requests by Pontiac and Sylvan Lake for issuance of a NITU are denied.

3. GTW must serve a copy of this decision on Cadillac and Powers within 5 days after the service date of this decision and certify to the Board that it has done so.

4. An OFA under 49 CFR 1152.27(c)(1)³ to allow rail service to continue must be received by the railroad and the Board by November 16, 1998, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a \$1,000 filing fee. See 49 CFR 1002.2(f)(25).

5. 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.**"

6. Provided no OFA has been received, this exemption will be effective on November 26, 1998. Petitions to stay must be filed by November 18, 1998. Petitions to reopen must be filed by December 1, 1998.

7. Pursuant to the provisions of 49 CFR 1152.29(e)(2), GTW 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 GTW's filing of a notice of consummation by November 6, 1999, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If any legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

³ See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997).