

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-57 (Sub-No. 55X)

SOO LINE RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN MILWAUKEE COUNTY, WI

Decided: February 8, 2005

By petition filed on October 21, 2004, Soo Line Railroad Company (Soo Line) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 5-mile line of railroad known as the West Allis Line, extending from milepost 88.2 +/- (near the State Highway 41 crossing in Milwaukee) to milepost 93.2 +/- (near North 123rd Street in Wauwatosa), in Milwaukee County, WI. Notice of the filing was served and published in the Federal Register on November 10, 2004 (69 FR 65245). By letter dated November 3, 2004, Avalon Rail, Inc. (Avalon), filed comments on the proposed abandonment. Soo Line responded on December 23, 2004, and it supplemented its response by letter dated January 26, 2005. A request for imposition of a notice of interim trail use (NITU) was filed by the Wisconsin Department of Transportation (WisDOT) on behalf of the Wisconsin Department of Natural Resources (WisDNR). We will grant the petition for exemption, subject to trail use, environmental, and standard employee protective conditions.

BACKGROUND

Soo Line states that the West Allis Line is part of a rail corridor originally developed in 1864 by the Milwaukee and St. Paul Railroad Company, which later became the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The line, which subsequently became part of the Soo Line, was once part of a larger segment serving Milwaukee, WI. It currently passes through residential, commercial and industrial areas. Soo Line states that, while there is some commercial activity in this part of urban West Allis, WI, there is no longer a need for its rail service over the subject trackage by the businesses and industries in the area because they are effectively being served by motor carriers and another rail carrier.

According to Soo Line's petition, it has not provided service on this line since October 2001, and there has been no overhead traffic for the past 5 years. Soo Line states that Ryerson Steel, the only former customer directly located on the line, has not received any traffic for the past 2 years and has no future need for the line. The line connects to a spur track at milepost 89.7 that is owned by the Whitnall Summit Company. Avalon, a rail car repair facility, is the only remaining shipper located on the connecting spur track. Soo Line states that, since

October 2001, Avalon has been using the Union Pacific Railroad Company (UP) as its primary source of transportation. Soo Line points out that in 2003, Avalon's rail volume was estimated at 40 switch moves, which were handled, and will continue to be handled, by UP. Soo Line states that the rail revenue generated by this traffic is nominal. Soo Line further states that Tallmadge-Regenco, also a former customer on the connecting spur track, has not received any traffic from Soo Line in a number of years.

Soo Line is seeking abandonment authority because the line is no longer viable. Soo Line states that the line is in very poor condition and would need brush and tree removal, surfacing, crossing repair, and the insertion of 4,000 ties to continue operating at the Federal Railroad Administration (FRA) class 1 level of 10 miles per hour. Soo Line contends that the amount of potential traffic on the line is not sufficient to cover the costs of repairs and provide an adequate return on its investment. Soo Line states that there are no urban development plans that would justify leaving the track in place. According to Soo Line, it has a need on other parts of its rail system for the rail currently in place on the West Allis Line, and it has asked for an expedited decision on its abandonment request in order to allow salvage operations to commence.

In its November 3, 2004 letter, Avalon expresses concerns about the proposed abandonment. It challenges Soo Line's statement that Avalon has not used the subject trackage since October 2001. Avalon claims that it had expected a delivery of a railcar the week it was notified that the West Allis Line had been embargoed in July 2003.¹ Avalon states that, because of the embargo, it was forced into using UP to meet its clients' needs, even though Soo Line rather than UP serves the depot in Milwaukee. Avalon indicates that it has had some difficulty in using UP's rail line, in view of the condition of the UP line and the fact that Avalon has had to incur the costs, along with its clients, for reconstructing a curve over the last year to receive certain railcars without damage. Avalon also claims that track from the West Allis Line extending at least 12 car lengths must be left in place for UP to be able to switch multiple railcars and equipment in and out of the West Allis location. Avalon adds that there are a number of businesses adjacent to the line that are interested in Soo Line's rail service.

In response, Soo Line clarifies that it officially ceased performing line haul operations over the West Allis Line in October 2001 due to track conditions. Its records indicate that the last, and only, line haul revenue load in 2001 on the West Allis Line was one load of dry fertilizer, but that this service was not for Avalon. As for operations involving Avalon, before the embargo in 2003, Soo Line states that it moved Avalon's rail cars to and from the Milwaukee

¹ An embargo is a notification to the railroad industry and affected shippers by a carrier that, in the carrier's opinion, a disability exists that temporarily prevents it from providing service. An embargo is issued by a railroad through notice to the Association of American Railroads.

Amtrak Station and Avalon, all within the Milwaukee switching district. Subsequent to the embargo, Avalon has been jointly served by UP and Soo Line under a pre-existing agreement for switching, under which Soo Line delivers the Avalon cars from the Milwaukee Amtrak Station to UP and then UP handles the cars in and out of the Avalon facility via UP's line. Soo Line also points out that the West Allis Line connects with its main line in the west and with its Muskego Yard in the east, and, therefore, it is redundant for through freight service.

In its response to Avalon's claim that, if the proposed abandonment is approved, there needs to be track extending at least 12 car lengths for UP to be able to switch multiple railcars and equipment in and out of the West Allis location, Soo Line explains that it will begin discussions with Avalon about leaving 12 car lengths of track in place. Soo Line states that it is exploring a lease or sale arrangement for the needed track with the Whitnall Summit Company, Avalon's landlord, and that an agreement appears likely. In response to Avalon's contention that there are a number of businesses adjacent to the line that are interested in Soo Line's rail service, Soo Line states that, although it had received some requests for rail service from a few potential customers, they were unable to reach agreement on the freight rates, and the potential customers are continuing to use motor carrier transportation.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our 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 under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. The record shows that the last line haul revenue load moved over the West Allis Line in 2001. Having fallen into disrepair, the West Allis Line, which is redundant to a Soo Line main line, has been embargoed since July 2003, and no one has challenged the lawfulness of the embargo. Avalon, the last active shipper served in part by the line, continues to receive switching service from Soo Line and UP. Soo Line has committed to negotiate with Avalon's landlord to make sure adequate track remains available to accommodate Avalon's switching needs and, regardless, Avalon will continue to have access to the UP system. Finally, there is no credible evidence of potential future traffic that would warrant rehabilitating the line and keeping it in service.

By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving Soo Line of the cost of maintaining and operating a line that is no longer used and allowing it to apply its assets more

productively elsewhere on its rail system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the transaction is not necessary to protect shippers from an abuse of market power. As discussed above, the West Allis Line has been embargoed since July 2003. Avalon, the last active shipper served by the line, continues to receive switching service jointly from Soo Line and UP, and it has access to the UP rail system. Alternative transportation service, including motor carrier service and other rail service, is presently being used to meet area shipping needs. Nevertheless, to ensure that the shippers named in the record are informed of our action, we will require Soo Line to serve a copy of this decision on Ryerson Steel, Avalon, and Tallmadge-Regenco within 5 days of the service date and to certify to the Board that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

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 set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

To allow the Board to meet its obligations under the National Environmental Policy Act and the National Historic Preservation Act, Soo Line has submitted environmental and historic reports with its petition. The environmental materials indicate that the quality of the human environment would not be affected significantly as a result of the proposed abandonment. See 49 CFR 1105.7, 1105.8. Soo Line also 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. And the Board's Section of Environmental Analysis (SEA) has independently examined and verified all of the available environmental information.

SEA issued an Environmental Assessment (EA) for public review and comment on December 20, 2004. In the EA, SEA recommended that four environmental conditions be imposed on any decision authorizing abandonment and concluded that, with the recommended mitigation, abandonment of the line would not significantly affect the quality of the human environment.

Specifically, as SEA noted in the EA, WisDNR has indicated that ordinarily approvals might be required for grading, wetland fill and erosion control activities, and that proper erosion control measures should be used and maintained during and after any track, tie, or culvert removal. In addition, WisDNR has suggested that areas of disturbed soils should be restored to original grade and reseeded as soon as possible with native species where appropriate. Also, WisDNR has recommended that rails and ties be recycled, and that all waste material be disposed of in an appropriate manner. Inasmuch as the railroad has indicated that any materials

that are not recycled or reused would be disposed of in compliance with applicable Federal and state laws, SEA has recommended a condition requiring Soo Line to consult with WisDNR regarding abandonment and salvage procedures, including erosion control measures.

As the EA also notes, WisDOT has indicated that, if the rail line were abandoned, Soo Line should comply with the WisDOT Abandoned Railroad Line Salvage and Clean-Up Policy/Standards/Procedures; protect surveying benchmarks and monumentation; remove rail, ties and ballast at the crossings of state highways; restore state highways at abandoned crossings; and coordinate highway crossing abandonment activities with WisDOT. Therefore, SEA has recommended that Soo Line be required to consult with WisDOT regarding salvage and abandonment procedures.

In addition, as the EA explained, the National Geodetic Survey (NGS) has advised that one geodetic station marker has been identified that might be affected by the proposed abandonment. Therefore, SEA has recommended that Soo Line be required to notify NGS 90 days prior to salvage activities to plan for the potential removal of that geodetic station marker.

With respect to the historic review process, the Wisconsin Historical Society (the State Historic Preservation Officer or SHPO) requested additional information from Soo Line, which Soo Line submitted in a letter dated November 15, 2004. Pending completion of the SHPO's review of all the available information, SEA recommended in the EA the imposition of an historic preservation condition requiring that the railroad retain its interest in and take no steps to alter the historic integrity of the right-of-way until completion of the section 106 process of the National Historic Preservation Act.

After the EA was issued, the SHPO advised that no historic properties would be affected by the proposed abandonment. Accordingly, SEA has determined in a Post Environmental Assessment (Post EA) dated January 24, 2005, that the proposed abandonment would not affect historic properties listed in or eligible for inclusion in the National Register of Historic Places, and that the previously recommended historic preservation condition is no longer necessary. No comments were received raising any concerns about the analysis, conclusions, or other recommended conditions in this EA.

We have reviewed the EA and Post EA and agree with SEA's environmental analysis and recommendations, including SEA's conclusion that, with its final recommended mitigation, this abandonment would not significantly affect either the quality of the human environment or the conservation of energy resources. Accordingly, SEA's final recommended environmental mitigation will be imposed with minor clarifying changes.

SEA has indicated in its EA that the right-of-way may be appropriate for other public use under 49 U.S.C. 10905. No one has sought a public use condition, however, and none will be imposed.²

As previously noted, WisDOT, on behalf of WisDNR, filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). WisDNR has submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service, as required under 49 CFR 1152.29. By letter filed on January 27, 2005, Soo Line states that it is willing to negotiate with WisDNR for interim trail use. Because WisDOT's request complies with the requirements of 49 CFR 1152.29, and Soo Line is willing to enter into interim trail use negotiations, we will issue a NITU authorizing the parties to negotiate an agreement for interim trail use/rail banking during the 180-day period prescribed below. If the parties reach an agreement, no further Board action is necessary. If no agreement is reached within 180 days, Soo Line may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

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 Right-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986), offers 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 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2),(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and interim trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, the interim 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 Soo Line of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that Soo Line shall: (1) comply with the terms and conditions for implementing interim trail use/rail banking, as set forth below; (2) prior to conducting any abandonment or salvage activities, consult with WisDNR regarding abandonment and salvage procedures, including erosion control measures; (3) prior to

² Public use requests were due no later than 20 days after publication of the notice of the petition in the Federal Register, or by November 30, 2004.

conducting any abandonment or salvage activities, consult with WisDOT regarding salvage and abandonment procedures; and (4) notify NGS 90 days prior to salvage activities to plan for the potential removal of the one geodetic station marker that has been identified on the line that could be affected by this abandonment.

2. Soo Line is directed to serve a copy of this decision and notice on Ryerson Steel, Avalon, and Tallmadge-Regenco within 5 days after the service date of this decision and notice and to certify to the Board that it has done so.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user 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.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice and there is no superceding OFA, interim trail use may be implemented. If no agreement is reached by that time, Soo Line may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by February 18, 2005, 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 the filing fee, which currently is set at \$1,200. See 49 CFR 1002.2(f)(25).

8. 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.”**

9. Provided no OFA has been received, this exemption will be effective on March 10, 2005. Petitions to stay must be filed by February 23, 2005, and petitions to reopen must be filed by March 7, 2005.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), Soo Line 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 Soo Line's filing of a notice of consummation by February 8, 2006, 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 1-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 Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary