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SERVICE DATE - LATE RELEASE NOVEMBER 22, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-55 (Sub-No. 576X)

CSX TRANSPORTATION, INC.--ABANDONMENT EXEMPTION--  
IN GUERNSEY COUNTY, OH

Decided: November 22, 1999

By petition filed on August 4, 1999, CSX Transportation, Inc. (CSXT or petitioner) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon an approximately 7.79-mile portion of its Louisville Service Lane, Central Ohio Subdivision, between milepost BP-49.49 near Cambridge and milepost BP-41.70 at the end of the track at Gibson, in Guernsey County, OH. Notice of the institution of an exemption proceeding was served and published in the Federal Register at 64 FR 46227 on August 24, 1999. On September 13, 1999, Wampum Hardware Co. (Wampum) filed a reply in opposition to the petition. On October 5, 1999, CSXT filed a reply to Wampum's opposition.<sup>1</sup> The United Transportation Union (UTU) requests imposition of labor protective conditions. We will grant the petition, subject to environmental and standard employee protective conditions.

BACKGROUND

CSXT presently operates as part of its Louisville Service Lane its Central Ohio Subdivision, which is a 60.3-mile branch main line extending between Newark, OH, and Gibson, OH. CSXT seeks to abandon the 7.79-mile end segment of this Subdivision. According to petitioner, there is only one shipper on the line, Wampum, which has made very little use of rail service in recent months. Wampum operates an explosives distributorship for the mining industry at Gibson, at the end of the line. Before problems were encountered with its Midwest supplier, Wampum used rail transportation in addition to trucks to handle its inbound shipments of ammonium nitrate. Truck transportation is used exclusively on all outbound shipments. CSXT asserts that abandonment will relieve it of the costs of owning and maintaining an underutilized line of railroad.

TRAFFIC, REVENUES, AND COSTS

CSXT states that Wampum received 68 rail carloads of ammonium nitrate in 1997 and 64 carloads in 1998, but only 6 carloads during the first 6 months of 1999. CSXT also states that, between September 1997 and September 1998, Wampum received between 6 and 9 carloads each

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<sup>1</sup> Although a reply to a reply (i.e., a rebuttal) is not contemplated by our exemption rules, Wampum did not move to strike the pleading. Under the circumstances, and in the interest of compiling the most complete record possible, we will accept and consider CSXT's pleading.

month by rail. However, beginning in October 1998, Wampum received no more than 3 shipments by rail in any given month and, during a couple of months, Wampum received no shipments by rail. It is clear from these figures, CSXT contends, that the shipper has recently diverted its shipments from rail almost exclusively to truck.

CSXT states that it suffered an avoidable loss from operations during 1998 of \$70,931. CSXT estimates that, even based on Wampum's receiving 64 carloads per year via rail, it will have an avoidable loss from operations in a forecast year of \$12,468 and an overall loss including economic costs of \$84,725.<sup>2</sup> Petitioner adds, however, that, based on recent actual traffic, a projection of 64 carloads in the forecast year is "extremely optimistic."

Wampum, in its opposition, claims that CSXT has not shown that the cost of operating the line exceeds the revenue from that shipper's traffic.<sup>3</sup> Wampum also claims that CSXT has failed to make a *prima facie* case that the line would be operated at any loss. Wampum argues that petitioner has failed to adequately explain and support its forecast and base year operating costs, particularly its forecast year transportation costs and the components of its return on value.

Wampum further asserts that CSXT has wrongly assumed that forecast year traffic on the line would be the same as that in the base year, i.e., 64 carloads. According to Wampum, the recent decline in its rail traffic is a temporary phenomenon caused by a quality problem with ammonium nitrate at Wampum's traditional Midwest supplier. Wampum states that it has been receiving its ammonium nitrate by truck from the nearby Pittsburgh, PA area while its Midwest supplier is making plant improvements to eliminate the problem. Wampum claims that the Pittsburgh area supplier is in the process of being sold to another company, and Wampum is uncertain whether it would be able to receive ammonium nitrate from that new owner on favorable terms. According to Wampum, it is likely, therefore, that it would resume the receipt of that commodity by rail from its traditional Midwest supplier upon completion of improvements to its plant, which is imminent.

On this basis, Wampum argues, its forecast year rail traffic is likely to amount to approximately 80 carloads -- the same amount of traffic that moved in the 12-month period before it experienced quality problems. Wampum notes that this forecast year traffic volume exceeds CSXT's estimate by 25%, and it asserts that the additional revenues from this increase in traffic "might well result in an operating profit" for petitioner in the forecast year. Wampum argues that, because CSXT's evidence is unsupported, unexplained, and, in some cases, incorrect, there is an

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<sup>2</sup> Petitioner's revenue and cost data for a base year (1998) and a forecast year (7/1/99 to 6/30/00) are contained in an Exhibit E attached to CSXT's petition.

<sup>3</sup> Wampum also asserts that CSXT, in presenting its data, has used forecast and base year time frames that do not comply with Board regulations. While true, the cited regulations apply to applications and not to a petition for exemption as before us, and, more importantly, the time frame departures cited by Wampum are not significant here in any event.

inadequate record here on which to grant the petition. Therefore, Wampum argues that the petition must be denied outright.<sup>4</sup>

In reply, CSXT points out that, although Wampum projects a 25% increase in traffic in the forecast year that would result in increased revenues, it fails to account for the increased avoidable costs for handling that traffic. CSXT also argues that Wampum has failed to justify its projected 80-carload figure for the forecast year -- particularly in light of the fact that no carloads are moving via rail today and none may move in the future. It notes that the "temporary" quality problem with Wampum's former Midwest ammonium nitrate supplier has been ongoing for a year, and that there is no suggestion that the problem has been or is about to be solved. CSXT also points out the confusion, uncertainty, and speculation surrounding this whole situation. Indeed, CSXT expresses its belief that the shipper here merely wants rail service left in place to hold down truck rates from a potential new supplier in Pittsburgh.

#### 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.

There is virtually no traffic moving over the line at the present time. Nor is there any assurance from the lone protestant that there will be any traffic in the future. Wampum's assertion that this situation is temporary is belied by the shipper's own presentation. Wampum's testimony indicates that it would revert to rail service only if its current supplier in Pittsburgh, which ships by truck, is sold to a new company that fails to give Wampum terms as favorable as those it now receives. The resumption of rail service is further contingent on Wampum's Midwest supplier solving problems that caused Wampum to drop that supplier. Given these factors, the record does not support Wampum's forecast that the line will carry 80 cars annually.

CSXT's forecast year data show that the revenue from carrying 64 cars annually over the line would fail to cover the cost of providing that service. Wampum challenges one of the elements in CSXT's forecast year submission, the cost of transportation (employee wages, fuel, etc.), by noting that this item is higher than the comparable figure used by CSXT in computing its base year. But, as CSXT points out, the cost figure for maintenance of way and structures for the forecast year is significantly lower than for the base year, resulting in significantly lower total avoidable costs for the forecast year.

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<sup>4</sup> In support, it cites Boston and Maine Corporation--Abandonment Exemption--In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 75X) (STB served Dec. 31, 1996).

Moreover, CSXT's projected transportation costs are within reason for hauling 64 cars a year. Indeed, the railroad's service to Wampum presents some unusual characteristics that would produce higher than usual costs. CSXT serves Wampum on an as-needed basis by a local train operating out of Newark, OH, with a three-man crew. On those days when the local serves Wampum, a relief crew must be called to pick up the train on its return run to Newark because the regular crew would have to violate hours of service requirements to perform the task.

Service to Wampum is difficult for another reason. In order to serve the shipper's facility, the crew must pull the train between Cambridge and Gibson, as there is no run around track (a track that would permit the railroad to move the locomotive from one end of the train to the other) between Cambridge and Gibson. Once the crew has finished switching Wampum, the crew must push the train back to Cambridge, a less efficient procedure than pulling it. This procedure, according to CSXT, has required the payment of overtime.

CSXT has made its case that any revenues it can reasonably expect to earn from providing service over this line will not cover the cost of providing that service. The line is a burden on interstate commerce. Its abandonment has been justified.

Detailed scrutiny 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 application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. Moreover, an exemption will foster sound economic conditions and encourage efficient management by allowing CSXT to avoid operating and maintaining an uneconomic rail line and to use its assets more productively elsewhere on its system [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy are not affected adversely.

Regulation of the transaction is not necessary to protect shippers from an abuse of market power. The sole shipper on the line, Wampum, has made minimal use of rail service in recent months and is currently moving no traffic by rail over the line. Wampum continues to experience quality problems with its Midwest supplier -- the source of its rail traffic -- and has switched to truck service to move its inbound ammonium nitrate. Although Wampum has stated that completion of improvements to its supplier's plant is "imminent," Wampum has provided no specific time frame as to when rail traffic will again move and in what volume. Consequently, what the record before us does show is that no rail traffic is presently moving and that none may move in the future.

Although Wampum claims that abandonment would seriously harm it (due to increased truck freight charges) and the area mining industry, there is no support for this allegation on the record. While Wampum's transportation costs may increase as a result of the abandonment, it is well settled that a railroad will not be required to operate a segment of trackage at a loss simply to prevent shippers from incurring higher transportation costs by truck. See CSX Transportation, Inc.-- Abandonment Exemption--In Harrison County, WV, STB Docket No. AB-55 (Sub-No. 563X) (STB served Sept. 25, 1998). However, to ensure that Wampum is informed of our action, we will direct CSXT to serve a copy of this decision on Wampum within 5 days of its service date, and to

certify to us that petitioner has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

We note that 49 U.S.C. 10904 provides a mechanism for those who want to continue rail service that the Board has authorized to be discontinued or abandoned. Under section 10904, any financially responsible person (and all government agencies are deemed to be financially responsible) may file an offer of financial assistance (OFA). Should Wampum or any other interested party wish to retain the line, it may acquire the line or subsidize its continued operation under the OFA procedures contained in 49 U.S.C. 10904 and 49 CFR 1152.27.

#### LABOR PROTECTION

UTU requests the imposition of labor protective conditions. Under 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.

#### ENVIRONMENTAL ISSUES

CSXT 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, analyzed the probable effect of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on October 1, 1999. In the EA, SEA indicated that the United States Fish and Wildlife Service recommends that, if salvage operations involve the cutting of dead trees or trees with cavities or exfoliating bark, such cutting should not take place between April 15 and September 15 in order to avoid disturbing the breeding habitat of the Indiana Bat, a Federally listed endangered species. The United States Environmental Protection Agency states that all debris resulting from salvage operations must be removed from the right-of-way, streams and wetlands, and appropriate measures employed to prevent or control spills of fuels, lubricants, or any other pollutants into any watercourse. The United States Army Corps of Engineers (Corps) notes that the line crosses Leatherwood Creek and its tributaries at 17 locations and is adjacent to several large wetland complexes at three separate locations. The Corps states that, if dredge or fill material is placed in any of these areas, a permit under section 404 of the Clean Water Act would be required.

SEA therefore recommended that the following conditions be placed on any decision granting abandonment authority: (1) if salvage operations require the removal of dead trees or trees with cavities or exfoliating bark, the railroad shall not engage in such cutting between April 15 and September 15; (2) CSXT shall remove all debris from salvage operations from the right-of-way, streams and wetlands, and shall employ appropriate measures to prevent or control spills of fuel,

lubricants or other pollutants into any watercourse; and (3) if salvage operations require the placement of fill or dredge material into streams or wetlands, CSXT shall consult the United States Army Corps of Engineers, Huntington District, prior to commencement of the salvage operations to determine if permits are required.

No comments have been received in response to the EA. Based on SEA's recommendation, 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.

SEA states that, following the line's abandonment, the right-of-way may be suitable for other public use under section 10905. However, no one has sought a public use condition and none will be imposed.<sup>5</sup>

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

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 CSXT 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: (1) if salvage operations require the removal of dead trees or trees with cavities or exfoliating bark, CSXT shall not engage in such cutting between April 15 and September 15; (2) CSXT shall remove all debris from salvage operations from the right-of-way, streams and wetlands, and shall employ appropriate measures to prevent or control spills of fuel, lubricants or other pollutants into any watercourse; and (3) if salvage operations require the placement of fill or dredge material into streams or wetlands, CSXT shall consult the United States Army Corps of Engineers, Huntington District, prior to commencement of the salvage operations to determine if permits are required.

2. CSXT is directed to serve a copy of this decision on Wampum Hardware Co. within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1)<sup>6</sup> to allow rail service to continue must be received by the railroad and the Board by December 2, 1999, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C.

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<sup>5</sup> 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 September 13, 1999.

<sup>6</sup> 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).

10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,000. See 49 CFR 1002.2(f)(25).

4. 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.”**

5. Provided no OFA has been received, this exemption will be effective December 22, 1999. Petitions to stay must be filed by December 7, 1999, and petitions to reopen must be filed by December 17, 1999.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT 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 CSXT's filing of a notice of consummation by November 22, 2000, 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 no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams  
Secretary