

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-364 (Sub-No. 14X)

MID-MICHIGAN RAILROAD, INC.—ABANDONMENT EXEMPTION—
IN KENT, IONIA, AND MONTCALM COUNTIES, MI

Decided: June 5, 2008

By petition filed on February 20, 2008, Mid-Michigan Railroad, Inc. (MMRR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 24.70-mile rail line (the Line) between milepost 103.20 at Lowell, MI, and milepost 78.50, at Greenville, MI, at the end of the line in Kent, Ionia, and Montcalm Counties, MI. MMRR also seeks an exemption from the offer of financial assistance (OFA) procedures of 49 U.S.C. 10904. Notice of the filing was served and published in the Federal Register on March 11, 2008 (73 FR 13069). On March 6, 2008, West Michigan Trails and Greenways Coalition (WMTGC) filed a request for the issuance of a notice of interim trail use (NITU) for that portion of the Line from milepost 103.20 near Lowell to milepost 81.32 near Greenville, a distance of 21.88 miles in Kent, Ionia, and Montcalm Counties, MI. We will grant the exemption from 49 U.S.C. 10903, subject to historic preservation, trail use, and standard employee protective conditions, but will deny the request for an exemption from 49 U.S.C. 10904.

BACKGROUND

MMRR states that it acquired the Line from CSX Transportation, Inc. (CSXT) and began operations in 1987. According to MMRR, in the first full year of operations the Line generated about 3,500 carloads, but traffic has precipitously declined to the point where none moved in 2007 or in 2008 (up to the date of the filing of MMRR's petition).

Petitioner states that, although Frigidaire Corporation (Frigidaire) shipped 846 carloads over the Line in 2004, 1,002 carloads in 2005, and 98 carloads through March 2006, that shipper moved its facilities in April 2006 to Mexico and South Carolina. MMRR adds that the only active shipper on the Line, Crop Production Services (CPS), received only one carload in 2006 (December) and none in 2007 or in 2008 (prior to the date of the filing of MMRR's petition). MMRR is thus projecting forecast year traffic at one car per year by excluding the Frigidaire traffic that has been permanently diverted from the Line and including the CPS traffic. Petitioner asserts that there is no longer a demand for rail service on the Line, but adds that truck service is

available to area shippers over the numerous highways and local roads crossing and paralleling the Line.

According to MMRR, upon receipt of abandonment authority, it plans to salvage the track and materials on the Line, which it asserts have an estimated net liquidation value of \$2,460,777. Petitioner would, however, leave in place the ties, bridges, and culverts necessary for interim trail use/rail banking as it has entered into a Memorandum of Understanding (MOU) to sell the Line to WMTGC for that purpose. MMRR claims that abandoning the Line will permit it to save: (1) rehabilitation costs of \$125,000; (2) annual maintenance costs of \$123,500; and (3) opportunity costs of \$656,811.

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 in this case. 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 [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction under 49 U.S.C. 10903 is not necessary to protect shippers from an abuse of market power. CPS, the only shipper on the Line, has not used rail service since December 2006 and one other former shipper, Frigidaire, closed its facility on the Line in March 2006. Nevertheless, to ensure that CPS is informed of our action, MMRR will be required to serve a copy of this decision on that shipper within 5 days of the service date of this decision and notice, and to certify to us that it has done so. In light of the market power finding, we need not determine whether the proposed abandonment is limited in scope.

As indicated, petitioner also seeks an exemption from the OFA provisions of 49 U.S.C. 10904. In support, MMRR argues that this abandonment should be exempted from the OFA provisions because there has been no rail service over the Line since December 2006, the Line is no longer required for common carrier rail service, and there is another public use for the Line as it has entered into a MOU with WMTGC, which seeks to acquire the Line for interim trail use/rail banking.

The OFA provisions reflect a Congressional desire to preserve, whenever possible, any prospect for continuing or resuming rail freight service on corridors that would otherwise be abandoned. See Redmond-Issaquah R.R. Pres. Ass'n v. STB, 223 F.3d 1057, 1061-63 (9th Cir. 2000). While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have

been granted when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.¹

Here, however, petitioner has not justified an exemption from the OFA procedures. It is well-established that OFAs to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking.² Thus, the desire to establish a trail on the Line does not justify an exemption from the OFA process here. Because we find no reasonable basis that would justify departure from Congress's objective of providing an opportunity for maintaining rail service, petitioner's request for exemption from the OFA provisions at 49 U.S.C. 10904 will be denied and the OFA process will be allowed to proceed.

As previously noted, WMTGC has submitted a request for issuance of a NITU for that portion of the Line extending from milepost 103.20 near Lowell to milepost 81.32 near Greenville under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29, in order to negotiate with MMRR for rail banking and interim trail use of the right-of-way. WMTGC 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 would be subject to possible future reconstruction and reactivation of the right-of-way for rail service, as required under 49 CFR 1152.29. Also, as noted earlier, MMRR has entered into a MOU with WMTGC and, if the abandonment petition for exemption is granted, it plans to sell the Line to WMTGC for interim trail use/rail banking, thus signifying its consent to negotiate with WMTGC for interim trail use.

Because WMTGC's request complies with the requirements of 49 CFR 1152.29, and MMRR is willing to enter into trail use negotiations, we will issue a NITU for that portion of the Line. The parties may negotiate an agreement during the 180-day period described below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days (and if the portion of the Line is not purchased pursuant to an OFA), MMRR 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 Trails, 2 I.C.C.2d at 608, OFAs to acquire rail lines for continued rail service take priority over interim trail use/rail banking. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the

¹ Norfolk Southern Railway Company—Abandonment Exemption—In Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No. 293X), slip op. at 6 (STB served Nov. 6, 2007); see also CSX Transportation, Inc.—Abandonment—In Barbour, Randolph, Pocahontas, and Webster Counties, WV, STB Docket No. AB-55 (Sub-No. 500) (STB served Jan. 9, 1997) and Southern Pacific Transportation Company—Discontinuance of Service Exemption—In Los Angeles County, CA, Docket No. AB-12 (Sub-No. 172X), et al. (ICC served Dec. 23, 1994).

² See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails).

effective date of this decision and notice 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 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 process does not occur, the trail use process may proceed.

MMRR has submitted an environmental report with its petition and has served the report on a number of appropriate Federal, state, and local agencies as required by the Board's environmental rules. See 49 CFR 1105.7(b). Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on April 18, 2008.

MMRR also submitted a historic report and has served the report on the Michigan Historical Center, State Historic Preservation Officer (SHPO), pursuant to 49 CFR 1105.8(c).³ On January 18, 2008, via telephone, the SHPO stated that MMRR had not provided sufficient materials for it to offer an opinion regarding the proposed abandonment. As a result of MMRR's re-filing, the SHPO, in a letter dated February 6, 2008, acknowledged receipt of the historic report and requested that MMRR complete an application form for section 106 review, as required by its office.⁴ Upon receipt of the application form, the SHPO will begin its review process under section 106 of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

SEA stated that, because of the issues raised by the SHPO, it requires further consultation to determine if the Line and/or any of its associated structures may be potentially eligible for listing on the National Register of Historic Places (National Register). Accordingly, SEA recommended a condition requiring MMRR to retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects with the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the National Register until completion of the section 106 process.

Several comments to the EA were filed by the May 19, 2008 due date. After discussing them in a Post-Environmental Assessment, however, SEA recommends no additional conditions or modifications to the condition recommended in the EA. The condition recommended by SEA in the EA will therefore be imposed. 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. Finally, although SEA has indicated in the EA that the right-of-way may be suitable for public use under 49 U.S.C. 10905, no one has sought a public use condition, and none will be imposed.⁵

³ Guidance regarding the Board's historic preservation review process is available on the Board's web site at <http://www.stb.dot.gov/stb/envornment/preservation.html>.

⁴ The form can be downloaded from the SHPO's website (<http://www.michigan.gov/shposection106>).

⁵ Public use requests were due by no later than 20 days after publication of the notice in the Federal Register, or by March 31, 2008.

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 these exemptions, we will impose the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

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 MMRR of the above-described Line, subject to the conditions that MMRR shall: (1) comply with the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979); (2) comply with the terms and conditions for implementing trail use/rail banking as set forth below; and (3) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures and objects within the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the National Register until completion of the section 106 process of the NHPA. MMRR shall report back to SEA regarding any consultations with the SHPO and the public. MMRR may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition.

2. Petitioner's request for exemption from the provisions of 49 U.S.C. 10904 is denied.

3. MMRR is directed to serve a copy of this decision and notice on CPS by June 16, 2008, and to certify to the Board that it has done so.

4. 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 the management of, for 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.

5. 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.

6. 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.

7. In the absence of an OFA that leads to the purchase or subsidy of the Line under 49 U.S.C. 10904, if an agreement for interim trail use/rail banking is reached by December 8, 2008, interim trail use may be implemented; if no trail use agreement is reached by that time, MMRR may fully abandon the Line, provided the conditions imposed above are met.

8. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by MMRR and the Board by June 19, 2008, 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 \$1,300. See 49 CFR 1002.2(f)(25).

9. 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.”**

10. Provided no OFA has been received, this exemption will be effective on July 9, 2008. Petitions to stay must be filed by June 24, 2008, and petitions to reopen must be filed by July 7, 2008.

11. In the absence of a successful OFA or an agreement under the Trails Act, pursuant to the provisions of 49 CFR 1152.29(e)(2), MMRR 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 MMRR’s filing of a notice of consummation by June 9, 2009, 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 Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary