

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-303 (Sub-No. 25X)

WISCONSIN CENTRAL LTD.--ABANDONMENT EXEMPTION--
IN LANGLADE, MENOMINEE AND SHAWANO COUNTIES, WI

Decided: January 4, 2001

By petition filed on September 19, 2000,¹ Wisconsin Central Ltd. (WCL) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903² to abandon a line of railroad known as the White Lake-Shawano Line, between milepost 280 north of White Lake and milepost 314.3 north of Shawano, a distance of 34.3 miles, in Langlade, Menominee, and Shawano Counties, WI. The Wisconsin Department of Transportation (WisDOT),³ on behalf of the Wisconsin Department of Natural Resources (WisDNR),⁴ requests issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act).⁵ In addition, comments were filed by the Stockbridge-Munsee Community, Band of Mohican Indians (Stockbridge-Munsee Community) and the Menominee Tribal

¹ Notice of the filing was served and published in the Federal Register on October 6, 2000 (65 FR 59892).

² WCL's petition states that it seeks exemption from the provisions of 49 U.S.C. 10903-05, thus evidently including exemption from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. On October 16, 2000, WCL filed a letter clarifying that it seeks exemption only from the provisions of 49 U.S.C. 10903.

³ WisDOT is the designated state agency for rail matters in the State of Wisconsin. It has the statutory right to acquire for present or future transportation, recreational, or scenic purposes any property used in operating a railroad that is abandoned in Wisconsin.

⁴ WisDNR is the lead state agency responsible for designating, acquiring, developing, and maintaining a system of state trails for public use.

⁵ WisDOT also initially filed a reply in opposition to WCL's proposed abandonment, to which WCL responded. WisDOT has subsequently stated that it no longer objects to WCL's petition for exemption.

Enterprise (MTE).⁶ We will grant the exemption, subject to trail use, environmental, historic preservation, and standard employee protective conditions.

BACKGROUND

WCL, a Class II rail carrier and wholly owned subsidiary of Wisconsin Central Transportation Corporation, operates approximately 2,000 miles of rail lines in four upper midwestern states.

⁶ MTE is the business arm of the Menominee Indian Tribe of Wisconsin (Menominee Tribe), a federally recognized Indian tribe occupying a reservation in Menominee County. Stockbridge-Munsee Community is likewise a federally recognized tribe. Its reservation covers approximately two townships in Shawano County. The line traverses both reservations.

WCL lists eight shippers that are either on the line, or that have recently used the line “to a noticeable extent,” as follows:

SHIPPER	CARLOADS		
	1998	1999	2000 (as of 9/12/00)
Besse Forest Products ⁷	235	204	0
Robbins, Inc. ⁸	11	14	9*
MTE	16	4	40
Bedrock Express Ltd. ⁹	0	0	53
Farm Bureau Cooperative ¹⁰	102	116	68
Keith Bentley Trucking ¹¹	10	14	6
Timber Products Company	16	8	4
Gresham Cooperative	32	24	18
Total	422	384	198

*As of 8/31/00.

According to WCL, the above shippers, including Growmark, have been served with a copy of the exemption petition and either have indicated that they do not object to the proposed abandonment or have not indicated any opposition. WCL asserts that all overhead traffic can be rerouted to other lines.

WCL states that three additional shippers used the line in the past to move freight “on a non-permanent basis.” In 1999, WCL moved 9 carloads for Mead Publishing Paper Division (Mead), 17 carloads for Packaging Corporation of America (PCA), and 18 carloads for International Paper (IP), which includes the companies formerly known as Champion International and Thilmany Paper. WCL has not moved any cars for Mead or PCA in 2000, and

⁷ WCL now serves this shipper from a station in Wausau, WI.

⁸ WCL is discussing with this shipper the possibility of providing service from facilities in Ishpeming, MI, or Wisconsin Rapids, WI.

⁹ This shipper is a new customer receiving service at a station at Thornton, which is milepost 312.6 on the southern end of the line. WCL is currently making other arrangements to provide service to this shipper.

¹⁰ WCL also moved 9 cars in 1998, 5 in 1999, and none to date in 2000, to this shipper’s facility for Growmark, Inc. (Growmark). WCL is attempting to arrange alternative service from its facilities in Merrill, WI.

¹¹ WCL will serve this shipper at WCL’s facilities in Merrill.

has moved 30 carloads for IP in early 2000. WCL states that IP has indicated that it no longer will require service on the line. WCL further states that some shippers other than those identified above that have used the line occasionally in the past are not expected to need service on the line in the future.¹²

While not opposing the abandonment,¹³ both MTE and Stockbridge-Munsee Community oppose interim trail use of the line over their respective reservations. MTE contends that the Trails Act does not authorize the taking of Indian lands absent a clear statement of Congressional intent to abrogate the treaty under which the lands were reserved. Alternatively, MTE contends that interim trail use would be tantamount to creation of a new easement, which can only be done by the U.S. Department of the Interior. Stockbridge-Munsee Community contends in addition that, as a provider of governmental services, it would be burdened with the provision of resources to the trail, that the Rails-to-Trails process improperly excludes the tribe from the negotiation process, and that a trail would facilitate illegal hunting and fishing on its lands.

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. 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 WCL of the cost of owning and maintaining the line and allowing it to use 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 affected adversely.

Regulation of the transaction is not necessary to protect shippers from the abuse of market power because the shippers located on the line to be abandoned have not objected and

¹² For Wolf River Valley Seeds, WCL moved 8 carloads in 1998, 3 carloads in 1999, and none in 2000. For Agawa Forest Products Ltd., WCL moved 13 carloads in 1998, and none in 1999 or 2000. For Timber Company, WCL moved 1 carload in 1999, and none in 1998 or 2000. WCL has served each of these shippers with a copy of the petition for exemption.

¹³ Stockbridge-Munsee Community actually supports the abandonment because it wants to acquire the land.

apparently will be provided with alternative service by WCL.¹⁴ To ensure that the shippers are informed of our decision, however, we will require WCL to serve a copy of this decision on them within 5 days of the service date and to certify to us that it has done so.

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

WCL 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, and has consulted with appropriate agencies and individuals to verify the railroad's report and to obtain additional information and comments regarding the potential environmental effects of the proposed abandonment.¹⁵ SEA served an environmental assessment (EA) on November 17, 2000. In the EA, SEA recommends, and we agree, that 10 specific environmental and historic preservation conditions should be imposed. These conditions are set out in the first ordering paragraph below.

No comments to the EA were filed by the December 18, 2000 due date. Accordingly, based on SEA's recommendations, 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 has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. We note that, although there has been interest expressed in future reuse of the right-of-way, no one has sought a public use condition, and none will be imposed.

As noted, WisDOT, on behalf of WisDNR, requests issuance of a NITU for the right-of-way involved in this proceeding. WisDNR has submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that the 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 our Trails Act regulations at 49 CFR 1152.29. WCL, responding to the request, states that it is willing to negotiate with WisDNR for interim trail use.

¹⁴ Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

¹⁵ The Menominee Tribe has provided written comments to SEA which have been considered in the preparation of the environmental assessment.

MTE does not want us to permit WCL and WisDNR to negotiate regarding trail use because, in its view, conversion of the property from a rail corridor to a trail would abrogate a treaty without Congressional approval, or would create a new easement without Department of Interior approval. But as we have said before, our authority under the Trails Act is purely ministerial. Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990); 16 U.S.C. 1247(d); 49 CFR 1152.29. We do not determine whether a trail will be established, and indeed, if a trail is established, we do not regulate the activities on the trail, nor do we determine the conditions under which the trail will be operated.

Rather, the Trails Act--which on its face applies to all railroad rights-of-way, and makes no exclusion for rights-of-way through Indian reservations--requires the Board to facilitate the Congressional objective of “preserv[ing] established railroad rights-of-way for future reactivation of rail service” by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal responsibility for a right-of-way for use in the interim as a trail. 16 U.S.C. 1247(d). See National Ass’n of Reversionary Property Owners v. STB, 158 F.3d 135, 137-139 (D.C. Cir. 1998); Birt v. STB, 90 F.3d 580, 583 (D.C. Cir. 1996). What that means is that the Board must impose a NITU when (1) a trail sponsor has agreed to assume financial responsibility for the property and liability for use of a right-of-way as a trail, and has agreed to keep the right-of-way available for the possible reactivation of rail service, and (2) the railroad has agreed to negotiate with the trail sponsor. The NITU gives the trail sponsor and the railroad time to negotiate an interim trail use agreement. If trail use is implemented, then the right-of-way remains under the jurisdiction of the Board, and reversionary property interests do not vest even though the conditions for abandonment are otherwise met.

The issuance of a NITU, however, does not mean that interim trail use will actually be implemented. If MTE wants to argue that interim trail use cannot take place on Indian lands, or that the Department of Interior was improperly excluded from the process, it is free to do so in a court of competent jurisdiction. But we see no basis for saying that we should not perform our limited responsibilities under the Trails Act whenever an Indian reservation is involved.

Stockbridge-Munsee Community argues that it is being improperly excluded from the trail negotiations, that it would be burdened by having to service the trail, and that a trail would facilitate illegal activities on its lands. But given our ministerial role, we cannot require the railroad to negotiate with anyone other than the trail sponsor. And if Stockbridge-Munsee Community has concerns about other issues such as trail maintenance or activities on the trail, it can seek redress under other federal, state, or local laws.

Accordingly, as WisDOT’s request complies with the requirements of 49 CFR 1152.29, and WCL is willing to enter into negotiations, we will issue a NITU for the above-described line. The parties may negotiate an interim trail use 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, WCL 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 interim 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 Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986), OFAs 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 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). 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 interim trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, the 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 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), subject to the condition that WCL shall comply with the terms and conditions for implementing interim trail use/rail banking set forth below, and subject to the conditions that WCL shall: (1) obtain all necessary U.S Army Corps of Engineers permits prior to beginning any work in wetlands or waterways along the line pursuant to the Clean Water Act, 42 U.S.C. 7401; (2) obtain any required local water permits, including any permits required from the Menominee Tribe to work around rivers and streams on the reservation; (3) use proper erosion control measures during salvage, including any track, tie, bridge, or culvert removal, and develop, make part of the project salvage plans, and forward to WisDNR for review, an erosion control plan for the right-of-way; (4) consult with WisDNR regarding: (a) the need to restore all areas of disturbed soil within the right-of-way, (b) restoration of the right-of-way to its original grade, if not used for alternative public use or a trail, and (c) re-seeding the right-of-way, as soon as possible, using native species where appropriate; (5) follow Best Management Practices in streambeds to adequately protect water quality; (6) protect the integrity of the West Branch of the Wolf River in Neopit during salvage; (7) consult with the WisDNR regarding whether fills should be removed and the original contours and vegetation re-established, if future use of the right-of-way is not for transportation or trail purposes; (8) immediately discontinue all salvage activities on the line within the reservations if archeological items are uncovered during salvage, and notify the Stockbridge-Munsee Community, the Menominee Tribe, and the Historic Society of their discovery in compliance with the Section 106 process of the National Historic Preservation Act, 16 U.S.C. section 470f; (9) notify the National Geodetic Survey prior to any salvage activities that will disturb or destroy any geodetic markers on the right-of-way, and allow the National Geodetic Survey 90 days from the issuance of any decision granting abandonment authority in this proceeding to survey the line for any historical benchmarks or monumentation

pursuant to a request by WisDOT; and (10) comply with WisDOT's Abandoned Railroad Line Salvage and Clean-up Policy/Standards/Procedures to ensure cleanup of salvage debris.

2. WCL must serve a copy of this decision on all the line's shippers within 5 days after the service date of this decision and 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, 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.

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, interim trail use may be implemented. If no agreement is reached by that time, WCL may fully abandon the line, provided the conditions imposed in this proceeding 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 January 12, 2001, 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).

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 February 4, 2001. Petitions to stay must be filed by January 22, 2001, and petitions to reopen must be filed by January 30, 2001.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), WCL 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 WCL's filing of a notice of consummation by January 5, 2002, 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 not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

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

Vernon A. Williams
Secretary