

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-68 (Sub-No. 4X)

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY–ABANDONMENT
EXEMPTION–IN MARQUETTE COUNTY, MI

Decided: January 19, 2005

By petition filed on October 22, 2004, Lake Superior & Ishpeming Railroad Company (LS&I) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a segment of a line of railroad known as the Republic Subdivision, extending from Humboldt Jct. (milepost 85.6) south approximately 8.9 miles to the end of the line at Republic Mine (milepost 94.5), in Marquette County, MI. Notice of the filing was served and published in the Federal Register on November 5, 2004 (69 FR 64632). A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by the Michigan Department of Natural Resources (MI-DNR). We will grant the petition for exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

The Republic Subdivision is comprised of three segments totaling 24.98 miles. Segment One extends from LS&I Jct. (milepost 69.52) west approximately 4.1 miles to Landing Jct. (milepost 73.6). Segment Two runs west from Landing Jct. approximately 12 miles to Humboldt Jct. (milepost 85.6). Segment Three continues from Humboldt Jct. south approximately 8.9 miles to the end of track at Republic Mine (milepost 94.5). Initially, this petition for exemption involved all three segments. In the petition, LS&I stated that Canadian National Railway Company (CN) owned a two-thirds interest in the first segment, that CN held trackage rights authority over the second segment, and that LS&I wholly owned the third segment.

Because CN was not a party to the proceeding, the petition could not be processed as filed and was rejected in its entirety by decision served May 26, 2004. Subsequently, LS&I filed a petition for reconsideration, requesting reinstatement of the petition as to Segment Three only. By decision served October 22, 2004, the petition for reconsideration was granted. The May 26 decision was vacated and the petition for exemption was reinstated and accepted for filing. LS&I's request for leave to withdraw its request for exemption authority as to Segments One and Two was granted.

LS&I states that Segment Three of the Republic Subdivision has carried no rail traffic for more than 5 years and that maintenance has been deferred for want of traffic. This segment was constructed to serve the Humboldt and Republic Mines, both of which ceased operation in 1981. LS&I states that substantial track maintenance and rehabilitation would be required before operations could be conducted on this segment of rail line. Petitioner states that it estimates the cost of replacing worn rail and ties, together with repairing washouts, to be approximately \$280,000. Petitioner indicates that such an investment would not be economically justified and that abandonment would enable LS&I to deploy its assets more productively on the remainder of its system.

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 LS&I of the expense of maintaining a line that is no longer used and allowing it to use its assets more productively elsewhere on its system. [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Because the purpose of Segment Three of the Republic Subdivision was to serve the Humboldt and Republic Mines, both of which ceased operation in 1981, and there has been no traffic on the line for more than 5 years, we find that regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. 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).

LS&I 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 action. See 49 CFR 1105.11. The Board's 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 November 22, 2004.

In the EA, SEA states that the National Geodetic Survey (NGS) has identified two geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends a condition requiring that LS&I notify NGS 90 days prior to salvage activities to plan for the markers' potential removal.

SEA states that the U.S. Fish and Wildlife Service-Marquette Office (USFWS) and the MI-DNR have completed their preliminary review of the proposed abandonment and have concerns regarding the threatened Gray Wolf (*Canis Lupus*) and the Canada Lynx (*Lynx Canadensis*). Therefore, SEA recommends that LS&I be prohibited from salvaging or disposing of the right-of-way until consultation with USFWS and MI-DNR has been completed.

SEA states that the U.S. Environmental Protection Agency, Region 5 (EPA) has completed its review. SEA states that: (1) EPA requests that any portion of the right-of-way that LS&I owns or intends to sell for alternative public use or recreational trail use first be revegetated with native flora following the removal of ballast; (2) EPA states that the removal and disposal of ballast and rails, if not recycled, should be handled in a manner consistent with applicable environmental regulations; and (3) EPA states that wood treated with creosote should be buried in a non-hazardous waste landfill unless otherwise required by the State of Michigan. Therefore, SEA recommends that LS&I be prohibited from salvaging or disposing of the right-of-way until consultation with EPA has been completed.

SEA further states that EPA and the Michigan Department of Environmental Quality, Water Division (MDEQ-WD) have completed their review. SEA states that, due to the potential for the stream crossings to contribute sediment, other non-point source pollutants, and to create barriers to fish migration, EPA and MDEQ-WD request that LS&I complete a stream crossing survey. Therefore, SEA recommends that LS&I be prohibited from salvaging or disposing of the right-of-way until consultation with EPA and MDEQ-WD has been completed.

Finally, SEA states that the Republic Township Planning Commission (the Township) has not completed its review of the proposed abandonment. Therefore, SEA recommends a condition requiring that LS&I consult with the Township prior to initiation of any salvage activities.

Comments to the EA were due by December 22, 2004. On December 24, 2000, SEA contacted Mr. Cecil Pavlat, director of the Michigan Anishinaabek Cultural Preservation and Repatriation Alliance and member of the Sault Ste. Marie Tribe of Chippewa Indians. SEA states that it was concerned because it had only received comments from three of the original 27 Native American

tribes receiving a copy of the EA for review and comment.¹ Based on Mr. Pavlat's comments, SEA states that the Bay Mills Indian Community, the Keeweenaw Bay Indian Community, and the Sault Ste. Marie Tribe of Chippewa Indians have not completed their preliminary review of the proposed abandonment. Therefore, SEA recommends adding a new condition that LS&I consult with the three above-listed Federally recognized tribes regarding concerns for the presence of any traditional cultural properties, sacred sites, or other national register eligible properties prior to the institution of any salvage activities. Furthermore, if during the course of salvage activities any traditional cultural properties, sacred sites, or other national register eligible properties are inadvertently discovered, SEA recommends that LS&I shall abide by the regulations as outlined at 36 CFR 800.13(b) of the National Historic Preservation Act.

Accordingly, we will impose the conditions recommended by SEA. 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.

As previously noted, MI-DNR filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for imposition of a public use condition under 49 U.S.C. 10905. MI-DNR 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 December 2, 2004, LS&I states that it is willing to negotiate with MI-DNR for interim trail use and supports MI-DNR's request to negotiate. Because MI-DNR's request complies with the requirements of 49 CFR 1152.29, and LS&I is willing to enter into trail use negotiations, we will issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, LS&I 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.

SEA has indicated in its EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. MI-DNR requests imposition of a 180-day public use condition prohibiting LS&I from: (1) disposing of the corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail

¹ The three Native American tribes submitting comments are the following: Leech Lake Band of Ojibwe; Prairie Band Potawatomi Nation; and the Little Traverse Bay Band of Odawa Indians.

related structures such as bridges, trestles, culverts and tunnels.² MI-DNR states that the rail corridor would make an excellent recreational trail and provides an extension of a rail corridor already developed for trail use. MI-DNR states that the 180-day period is needed to conduct appraisal and title review and begin negotiations with LS&I.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. MI-DNR has 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 on the rail line to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, LS&I must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, 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 the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, LS&I is not required to deal exclusively with DNR, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public 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, 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 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 trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

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

² In its December 2 letter, LS&I states that it has no intention of removing or destroying any trail related structures, but requests that it be allowed to dispose of the tracks, ties and other rail related structures, because they are valuable commodities.

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), and the conditions that LS&I shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts, and tunnels (except track, ties, and signal equipment) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below; (3) notify the National Geodetic Survey 90 days prior to salvage activities to plan for the two identified geodetic station markers' potential removal; (4) be prohibited from salvaging or disposing of the right-of-way until consultations have been completed with the U.S. Fish and Wildlife Service-Marquette Office, the Michigan Department of Natural Resources, the U.S. Environmental Protection Agency, Region 5, and the Michigan Department of Environmental Quality, Water Division; (5) consult with the Republic Township Planning Commission prior to initiation of any salvage activities; and (6) consult with the Bay Mills Indian Community, the Keeweenaw Bay Indian Community, and the Sault Ste. Marie Tribe of Chippewa Indians regarding concerns of the presence of any traditional cultural properties, sacred sites, or other national register eligible properties prior to the institution of any salvage activities and if during the course of salvage activities any traditional cultural properties, sacred sites, or other national register eligible properties are inadvertently discovered, LS&I shall abide by the regulations as outlined at 36 CFR 800.13(b) of the National Historic Preservation Act.

2. 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, 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.

3. 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.

4. 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.

5. 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, LS&I may fully abandon the line, provided the conditions imposed above are met.

6. 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 28, 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 increased to \$1,200, effective October 31, 2004. See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services–2004 Update, STB Ex Parte No. 542 (Sub-No. 11) (STB served Oct. 1, 2004).

7. 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.”**

8. Provided no OFA has been received, this exemption will be effective on February 18, 2005. Petitions to stay must be filed by February 3, 2005; petitions to reopen must be filed by February 14, 2005.

9. Pursuant to the provisions of 49 CFR 1152.29(e)(2), LS&I 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 LS&I’s filing of a notice of consummation by January 19, 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