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SERVICE DATE – MARCH 8, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1107X

WEST MICHIGAN RAILROAD CO.—ABANDONMENT
EXEMPTION—IN VAN BUREN COUNTY, MICH.

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: March 7, 2013

West Michigan Railroad Co. (WMI) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon approximately 10.67 miles of rail line between milepost 19.88 (west of the line's crossing of 56th Street near Lawrence, Mich.) and milepost 30.55 (east of Kalamazoo Street in Paw Paw, Mich.), in Van Buren County, Mich. Notice of the exemption was served and published in the Federal Register on January 28, 2013 (78 Fed. Reg. 5,867).

The exemption was scheduled to become effective on February 27, 2013, but a formal expression of intent to file an offer of financial assistance (OFA) was timely filed by Great Lakes Locomotive, LLC (Great Lakes), to purchase the entire line, which has the effect of automatically staying the effective date of the exemption until March 9, 2013.¹ In the filing, Great Lakes requests that WMI provide the following information: (1) the minimum purchase price; (2) WMI's most recent reports on the physical condition of the line; (3) a description of any rail, crossings or crossing structures that have been removed and any estimates of the cost of rebuilding or re-installing such rail or structure(s); (4) traffic, revenue and other data, including WMI's estimate of the net liquidation value of the line together with supporting data reflecting available real estate appraisals, assessments of the quality and quantity of track materials in the line, and the removal cost estimates used to obtain the net liquidation value (such data should include a description of the nature of the title to the real estate involved, including disclosure of all reversionary interests); (5) copies of any environmental audits of the real estate involved and a description of (a) all sites under investigation by, or being remediated under the supervision of, the U.S. Environmental Protection Agency or the Michigan Department of Environmental Quality (MDEQ), (b) all known potential environmental liabilities arising out of conditions on the property, (c) all releases of hazardous materials on or about the property, and (d) the history of all customers and industrial users along the line; and (6) contact information in order for Great Lakes and its advisors to make arrangements to inspect the property, if so desired.

¹ See 49 C.F.R. § 1152.27(c)(2)(i).

Great Lakes also requests that the time period for filing its OFA² be tolled for an additional 30 days in order to allow Great Lakes an adequate opportunity to review and analyze WMI's information, and to submit its OFA. WMI does not oppose Great Lakes' request. Accordingly, the request for an extension of the OFA filing deadline will be granted.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on February 1, 2013. In the EA, OEA states that two offices of the U.S. Army Corps of Engineers, Detroit District (Corps), replied to WMI's environmental report. According to OEA, by letter dated January 23, 2013, the Corps' Compliance and Enforcement Branch noted that the State of Michigan has assumed the Corps' regulatory responsibilities under Section 404 of the Clean Water Act (33 U.S.C. § 1344) and, therefore, a separate authorization from the Corps is not required. OEA notes further that MDEQ, which assumed the Section 404 permitting authority, has not responded to WMI's environmental report. OEA states that, although WMI does not intend to perform any salvage activities in wetlands or other waters of the United States, the line is located near some water resources. Therefore, OEA recommends that a condition be imposed requiring WMI to consult with MDEQ prior to beginning salvage activities regarding permitting requirements under Section 404 of the Clean Water Act and, if applicable, comply with the reasonable permitting requirements of MDEQ.³

OEA also states that the U.S. Fish and Wildlife Service, Midwest Regional Office in Bloomington, Ind. (USFWS) has not responded to the proposed abandonment or WMI's statement that it does not believe that the proposed abandonment would have any impact on endangered or threatened species, or on any area designated as a critical habitat. OEA states that, based on its information, it is unable to determine whether any federally listed threatened or endangered species exist in the area of the proposed abandonment. However, due to the temporary nature and very limited scope of the proposed salvage activities, OEA believes that potential impacts to any such species could be appropriately mitigated through consultation with USFWS pursuant to Section 7 of the Endangered Species Act. Accordingly, OEA recommends that a condition be imposed requiring WMI to (1) contact USFWS's East Lansing Field Office at 2651 Coolidge Rd., in East Lansing, Mich., 48823, prior to beginning salvage activities to discuss potential impacts to any federally listed endangered or threatened species, (2) report the results of the consultation to OEA in writing, and (3) consult with OEA and USFWS to develop appropriate mitigation measures, should any potential impacts be identified.

Further, OEA states that WMI submitted a historic report and provided the Michigan State Housing Development Authority, State Historic Preservation Office (SHPO) with a copy. OEA also states that, in a January 4, 2013 letter, the SHPO directed WMI to resubmit its request for review of potential historic properties using the SHPO's mandatory application form available on the SHPO's website. OEA adds that, on January 17, 2013, WMI complied. OEA notes, however, that the SHPO has not submitted comments on the proposed abandonment and

² Under 49 C.F.R. § 1152.27(c)(2)(ii)(B), OFAs are due 30 days after publication of the notice of exemption in the Federal Register.

³ OEA states that it provided a copy of the EA to MDEQ for review and comment.

that OEA has not been able to consider the SHPO's opinion before determining whether the proposed project could affect historic properties. Therefore, OEA recommends that a condition be imposed requiring WMI to 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 that are eligible for listing or listed in the National Register of Historic Places (National Register) until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f, has been completed.

Comments on the EA were due February 15, 2013, and OEA received one comment. According to OEA, in an email dated February 6, 2013, USFWS requested additional information from WMI regarding the proposed abandonment and, in an email reply on the same date, WMI provided USFWS with that information. OEA states, however, that USFWS has not submitted final comments concerning the proposed abandonment. OEA continues to recommend that the three conditions in the EA, including the USFWS condition, be imposed upon any decision granting abandonment authority. Accordingly, the conditions recommended by OEA will be imposed. Based on OEA's recommendation, the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

In the EA, OEA states that the right-of-way may be suitable for other public use following abandonment and salvage of the line. On February 11, 2013, Friends of the Kal-Haven Trail and Van Buren County Board of Park Trustees (proponent) filed a request for the issuance of a notice of interim trail use (NITU) and rail banking under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29, and for a public use condition under 49 U.S.C. § 10905, in order to negotiate with WMI for acquisition of the right-of-way for use as a trail. By response filed on February 26, 2013, WMI has indicated its willingness to negotiate with proponent. Pursuant to 49 C.F.R. § 1152.29, proponent has submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment. To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2).

Proponent has satisfied the requirements for both a public use condition and a NITU and, therefore, imposition of both would be appropriate commencing with the effective date of the exemption. However, an OFA takes priority over any requests for a NITU or for a public use condition. Therefore, the issuance and effectiveness of a NITU and a public use condition will be delayed until the OFA process has been completed. If agreement is reached on the sale or

subsidy of the line, public use and trail use conditions would be unnecessary and unavailable. If no agreement is reached on the OFA, an appropriate decision and notice of interim trail use will be issued addressing these requests.

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

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the exemption of the abandonment of the rail line described above is subject to the conditions that: (1) WMI consult with MDEQ prior to beginning salvage activities regarding permitting requirements under Section 404 of the Clean Water Act and, if applicable, comply with the reasonable permitting requirements of MDEQ; (2) WMI (a) contact USFWS's East Lansing Field Office prior to beginning salvage activities to discuss potential impacts to any federally listed endangered or threatened species, (b) report the results of the consultation to OEA in writing, and (c) consult with OEA and USFWS to develop appropriate mitigation measures, should any potential impacts be identified; and (3) WMI (a) shall 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 that are eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f, has been completed, (b) report to OEA regarding any consultations with the SHPO and the public, and (c) not file its consummation notice until the Section 106 process has been completed and the Board has removed this condition.
3. The requests for issuance of a notice of interim trail use and for issuance of a public use condition are held in abeyance pending completion of the OFA process.
4. If the OFA process terminates, a decision and notice effective on its service date will be issued to impose the notice of interim trail use and the public use condition.
5. WMI is directed to provide Great Lakes with the requested information to enable Great Lakes to file an OFA. The deadline for Great Lakes to file its OFA is extended to March 29, 2013.
6. The effective date of the exemption is postponed until April 8, 2013.
7. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.