

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-364 (Sub-No. 12X)

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

Decided: April 3, 2008

By petition filed on December 18, 2007, 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 15.83-mile rail line (the Line) between milepost 137.83, southeast of Lowell, and milepost 122.00, east of Prairie Center, the end of the Line, in Kent and Ionia 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 at 73 FR 1263 on January 7, 2008. On January 22, 2008, West Michigan Trails and Greenways Coalition (WMTGC) filed a request for the issuance of a notice of interim trail use (NITU) for the Line. On February 4, 2008, the Board provided notice that, on January 24, 2008, MMRR had revised its Combined Environmental and Historic Report to correct its description of the bridges and culverts on the Line. 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

The Line was constructed in 1857 by the Detroit & Milwaukee Railroad, which later became the Detroit Grand Haven & Milwaukee Railroad (DGHM). DGHM was acquired by the Grand Trunk and Western Railroad Company (GTW) in 1882. The Line became part of the Central Michigan Railroad Company (CMR) in 1986 when it was sold by GTW to Straits Corporation. In 1993, the Line was acquired by the Grand Rapids Eastern Railroad Company (GRE), which was controlled by RailTex, Inc. (RailTex). In 1999, RailTex merged GRE into MMRR.¹ Subsequently, RailTex merged into RailAmerica, Inc. in 2000.

¹ RailTex, Inc., Mid-Michigan Railroad, Inc., Michigan Shore Railroad, Inc., and Grand Rapids Eastern Railroad, Inc.—Corporate Family Transaction Exemption, STB Finance Docket No. 33693 (STB served Jan. 20, 1999).

There are two shippers located on the Line: Gallagher Farm Service (Gallagher) and Standard Lumber, both located near Ionia. According to MMRR, the demand for service is very light: Gallagher shipped eight cars in 2004, 11 cars in 2005, 15 cars in 2006, and nine cars through June 2007. Standard Lumber shipped one car in 2004, two cars in 2005, two cars in 2006, and one car through June 2007. MMRR argues that this volume of traffic does not justify continued operations, especially in light of the value of the assets on the Line. MMRR explains that abandoning the Line will permit it to save: (1) rehabilitation costs of \$331,000; (2) annual operating losses of \$21,159; (3) annual maintenance costs of \$79,150; and (4) opportunity costs of \$489,854. According to MMRR, upon receipt of abandonment authority, it plans to salvage the track and materials on the Line, but leave in place the bridges and culverts necessary for interim trail use/rail banking. MMRR states that it has entered into a Memorandum of Understanding (MOU) to sell the Line to WMTGC for interim trail use/rail banking. MMRR asserts that there are readily available highway alternatives to rail transportation.

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. The limited traffic on the Line has readily available highway alternatives to rail transportation. Michigan Route 21 runs between Lowell and Ionia, and Interstate 96 runs south of the Line and is connected to Lowell by Michigan Route 50 and to Ionia by Michigan Route 66. Neither of the shippers on the Line, Gallagher and Standard Lumber, has participated in this proceeding to oppose the abandonment exemption. Nevertheless, to ensure that these shippers are informed of our action, MMRR will be required to serve a copy of this decision on them within 5 days of the service date of the decision and 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 there is insufficient traffic on the Line to provide a realistic opportunity for successful operation if the Line is acquired through the OFA process.

MMRR maintains that the Line is no longer needed for common carrier service and that the interim trail use proposed by WMTGC offers another public use for the Line, a public purpose that would be frustrated by the OFA process.

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.²

Here, however, petitioner has not justified an exemption from the OFA procedures at 49 U.S.C. 10904. 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.³ 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 justifying 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 the Line 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. In its petition, MMRR states that it has entered into a MOU with WMTGC and that, 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 the Line. The

² 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).

³ See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails).

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 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 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 appropriate Federal, state, and local agencies with a copy of that report as required by the Board's environmental rules. See 49 CFR 1105.11. 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 February 15, 2008.

MMRR has also submitted an historic report and has served the report on the Michigan Historic Center (the State Historic Preservation Offices or SHPO) pursuant to 49 CFR 1105.8(c). However, as noted, that initial historic report contained descriptions and photographs of the wrong bridges and culverts on the Line and, on January 24, 2008, MMRR submitted corrected historic reports to the SHPO and SEA for review and comment. SEA states that it has not yet heard from the SHPO and, therefore, has not been able to consider the SHPO's opinion before determining if the Line may be potentially eligible for listing on the National Register of Historic Places (National Register). Therefore, SEA recommends in its EA that a condition be imposed 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 within the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the Nation Register until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

No comments to the EA were filed by the March 17, 2008 due date. Accordingly, we will impose the condition recommended by SEA in 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. Finally, although SEA has indicated on 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.⁴

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 rail 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 on the two shippers on this Line, Gallagher and Standard Lumber, by April 9, 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.

⁴ Public use requests were due by no later than 20 days after publication of the notice in the Federal Register, or by January 28, 2008.

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 October 1, 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 April 14, 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 May 5, 2008. Petitions to stay must be filed by April 21, 2008, and petitions to reopen must be filed by April 29, 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 April 4, 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