

SERVICE DATE – MAY 10, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1107X

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

Digest:¹ This decision waives a regulatory provision that would result in the expiration of the authority of West Michigan Railroad Co. to abandon approximately 8.92 miles of rail line and grants a request to extend the time to negotiate interim trail use/rail banking.

Decided: May 9, 2019

On November 8, 2018, the Michigan Department of Natural Resources (MDNR) filed a request for an extension of the interim trail use/rail banking negotiating period. That request is opposed by the National Association of Reversionary Property Owners (NARPO). This decision waives the provision of 49 C.F.R. § 1152.29 that would result in the expiration of the authority of West Michigan Railroad Co. (WMI) to abandon approximately 8.92 miles of rail line, and grants the request to extend the time to negotiate interim trail use/rail banking.

BACKGROUND

On January 8, 2013, WMI filed a verified notice of exemption under 49 C.F.R. part 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) and milepost 30.55 (east of Kalamazoo Street in Paw Paw), in Van Buren County, Mich. (the Line). Notice of the exemption was served and published in the Federal Register on January 28, 2013 (78 Fed. Reg. 5867).

On June 7, 2013, the Board issued a notice of interim trail use or abandonment (NITU) to provide time for Friends of the Kal-Haven Trail and Van Buren County Board of Park Trustees to negotiate with WMI for interim trail use/rail banking under the National Trails System Act

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

(Trails Act), 16 U.S.C. § 1247(d).² The abandonment exemption became effective on June 8, 2013.

By letters filed on January 31, 2014, and February 4, 2014, WMI notified the Board that it had consummated the abandonment of two portions of the Line: (1) between mileposts 30.2 and 30.55, and (2) between mileposts 25.1 and 26.5. On February 21, 2014, in response to a request to extend the NITU negotiating period, WMI notified the Board that it was willing to extend the negotiating period with the interim trail sponsors for the remaining unconsummated portions of the Line: (1) between mileposts 19.88 and 25.1, and (2) between mileposts 26.5 and 30.2. WMI further indicated that, “[i]n recognition of the rail restoration provision in trails use agreements,” a sale agreement for the consummated portion of the Line between milepost 25.1 and milepost 26.5 “did include a provision for the re-acquisition of the property by WMI, which would allow for restored rail service” in the future for the portion of the Line east of milepost 25.1. (WMI Letter 1, Feb. 21, 2014.) By decision served on April 15, 2014, the Board, through the Director of the Office of Proceedings, noted WMI’s discussion of the aforementioned re-acquisition provision, and granted the request to extend the NITU negotiating period over portions of the Line between mileposts 19.88 and 25.1, and between 26.5 and 30.2.³ Thereafter, by a series of decisions, the NITU negotiating period was further extended, ultimately to November 12, 2018.

On November 8, 2018, MDNR timely filed a request for an additional extension of 180 days to negotiate trail use over the Line between mileposts 19.88 and 25.1, and between 26.5 and 30.2.⁴ That same day, NARPO filed a letter opposing MDNR’s request, arguing that the segment between mileposts 26.5 and 30.2 has been disconnected from the national rail system since the consummation of the abandonment of the segments between mileposts 25.1 and 26.5 in 2014.

On November 28, 2018, MDNR responded, stating that it had made an offer to purchase to WMI and that an extension of the NITU is justified to allow time “to resolve several issues important to [WMI] prior to accepting the terms of [MDNR’s] offer,” and “to go through [MDNR’s] approval process[,] which involves public notification and placing the transaction on the agenda of the Natural Resources Commission.” (MDNR Letter 1.) MDNR acknowledged

² In the same decision, the Board also imposed a public use condition under 49 U.S.C. § 10905. That condition expired on December 5, 2013.

³ By decision served on June 6, 2014, the Board, through the Director of the Office of Proceedings, further extended the NITU negotiating period and substituted MDNR for Friends of the Kal-Haven Trail and Van Buren County Board of Park Trustees as interim trail sponsor. The decision again noted WMI’s explanation that the sale agreement transferring that portion of the Line between mileposts 25.1 and 26.5 included a re-acquisition provision to allow for restored rail service.

⁴ On November 20, 2018, WMI filed a letter stating that it does not oppose MDNR’s request.

that WMI had sold the corridor between mileposts 25.1 and 26.5 but pointed to the Board’s decision of June 6, 2014, which noted the contract provision permitting WMI to reacquire that sold segment in the event rail service were to be restored. (*Id.* at 2 (quoting W. Mich. R.R.—Aban. Exemption—in Van Buren Cty., Mich., AB 1107X, slip op. at 2 (STB served June 6, 2014)).) NARPO responded on November 28, 2018, arguing that the part of the Line east of milepost 25.1 is no longer available for a NITU because it is separated from the national rail system as a result of the abandonment of the section of the Line between mileposts 25.1 and 26.5.

On December 10, 2018, WMI requested leave to supplement its November 20, 2018 response, and to respond to NARPO’s filings.⁵ WMI disagrees with NARPO’s contention that the section of the Line between mileposts 26.5 and 30.2 is not appropriate for trails use negotiations and argues that NARPO offers no precedent to support its assertion that the Board cannot sanction trails use arrangements for the segment between mileposts 26.5 and 30.2 under the circumstances present here. (WMI Letter 1, Dec. 10, 2018.) WMI states that it “transferred the underlying right-of-way for the segment between mileposts 25.1 and 26.5, post-abandonment consummation, to adjacent land owners, subject to a WMI-bargained-for right to acquire a sufficient property interest to reconnect the un-abandoned segments if WMI should choose in the future to restore common [carrier] service to the line segment beyond milepost 26.5.” (*Id.* at 1-2.)

On December 17, 2018, NARPO filed in response to WMI’s letter, relying on RLTD Railway v. STB, 166 F.3d 808 (6th Cir. 1999), to argue that any portion of the Line from milepost 25.1 to the end (milepost 30.2) is now separated from the national rail system, and that for a NITU to be valid, the Line has to be connected to the national rail system.

PRELIMINARY MATTER

Under 49 C.F.R. § 1152.29(e)(2), if a notice of consummation of abandonment is not filed within (i) one year after the date of service of a decision permitting abandonment (provided there are no legal or regulatory barriers to consummation), or (ii) 60 days of the satisfaction, expiration, or removal of the last legal or regulatory barrier to consummation, whichever is later, the abandonment authority expires. Here, that means WMI’s abandonment authority would have expired on January 11, 2019, 60 days after the NITU expired. However, MDNR filed a timely request to extend the NITU, and additional filings, including WMI’s response, NARPO’s objection, and several subsequent replies, were filed up until shortly before the partial shutdown

⁵ Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will grant WMI’s request and accept its supplement into the record. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record . . .”) For the same reason, all other filings relating to the request to extend the NITU negotiating period will be accepted into the record as well.

of the Federal government from December 22, 2018, through January 25, 2019, during which time the Board's operations were suspended. In these circumstances, the Board will waive the 60-day provision at 49 C.F.R. § 1152.29(e)(2) to the extent it would have resulted in the expiration of WMI's abandonment authority on January 11, 2019.⁶

DISCUSSION AND CONCLUSIONS

The Board's role under the Trails Act is limited. See Citizens Against Rails to Trails v. STB, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001); Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990). The Board's responsibility when a request for a NITU is filed is to confirm that the trail sponsor agrees to assume, during the interim trail use, full responsibility for the management of the rights-of-way and for any associated legal liability and taxes and acknowledges that the rights-of-way are subject to possible future restoration or reconstruction for railroad purposes. 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(a)(3). Where, at the end of the previously imposed negotiating period, a carrier has not consummated the abandonment for portions of the line and is willing to continue trail use negotiations for those portions of the line, the Board retains jurisdiction, and the NITU negotiating period may be extended. See Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987); see also Birt v. STB, 90 F.3d 580, 588-90 (D.C. Cir. 1996); Grantwood Vill. v. Mo. Pac. R.R., 95 F.3d 654, 659 (8th Cir. 1996).

Here, the Board will grant MDNR's request to extend the NITU negotiating period. WMI has not consummated the abandonment of the portions of the Line that are the subject of the NITU, and WMI has expressed its willingness to continue trail use negotiations for those portions. Although NARPO relies on RLTD Railway in opposing the request, the facts of this case differ significantly from RLTD Railway. While NARPO argues that the segment has been disconnected from the national rail network as in RLTD Railway, the Board finds that NARPO has not made such a showing in this case. Here, the record shows that when WMI consummated abandonment over two small portions of the Line and sold the property between mileposts 25.1 and 26.5, WMI specifically retained the right to reacquire a sufficient property interest over that segment to allow for restored rail service for the portion of the Line east of milepost 25.1 should it be needed. WMI and MDNR have demonstrated an intent to reach a trails use agreement for the segments of the Line between mileposts 19.88 and 25.1 and between mileposts 26.5 and 30.2. WMI has provided for the connection of the portion of the Line east of milepost 26.5 to the national rail network; therefore, the Board is not persuaded by NARPO's argument that the part of the Line east of milepost 26.5 is not available for a NITU.⁷ See Burlington N. R.R.—Aban.

⁶ The 60-day provision will again apply with respect to any future satisfaction, expiration, or removal of all legal or regulatory barriers to consummation.

⁷ The Board's findings here are based on the particular circumstances of this case. The Board need not, and does not, decide here whether any other connection between a line authorized for abandonment and the rest of the national rail system would suffice, or whether any connection is needed at all, to permit rail banking under the Trails Act.

Exemption—Between Klickitat & Goldendale, Wash., AB-6 (Sub-No. 335X), slip op. at 3-5 (STB served June 8, 2005) (finding that, despite the railroad selling certain property within the right of way for a portion of line authorized for abandonment, both the railroad and trail sponsor retained sufficient property interests to “serve as a link to the interstate rail network if active rail service on [the] rail banked line were to be restored”); cf. Norfolk & W. Ry.—Aban.

Exemption—Between Kokomo & Rochester in Howard, Miami, & Fulton Ctys., Ind., AB 290 (Sub-No. 168X), slip op. at 12 (STB served May 4, 2005) (noting the possibility that rail service could be restored over an abandoned segment should the property owner agree to “provide a connection . . . to the interstate rail network in the event rail service is restored”).

Under the circumstances, the Board will grant the request for extension of the negotiating period. See Birt, 90 F.3d at 588-90; Grantwood Vill., 95 F.3d at 659. An extension of the NITU negotiating period will promote the establishment of trail use and rail banking consistent with the Trails Act. Accordingly, the NITU extension request will be granted for a period of 180 days from November 12, 2018, to May 11, 2019, for the portions of the Line (1) between mileposts 19.88 and 25.1, and (2) between mileposts 26.5 and 30.2.

It is ordered:

1. The provision at 49 C.F.R. § 1152.29(e)(2) setting a 60-day time limit for filing a notice of consummation upon the expiration of any legal or regulatory barriers is waived in this instance.
2. WMI’s request for leave to supplement is granted, and all additional filings submitted relating to the request to extend the NITU negotiating period are accepted into the record.
3. The request to extend the NITU negotiating period is granted to the extent discussed above, and the NITU negotiating period is extended to May 11, 2019, for the following portions of the Line: (1) between mileposts 19.88 and 25.1, and (2) between mileposts 26.5 and 30.2.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.