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Milwaukee, West Shore and Western Railroad Company

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MILWAUKEE, WEST SHORE AND WESTERN RAILWAY
COMPANY.

MAY 15, 1888.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. HUDD, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany bill H. R. 9958.]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 9958) to authorize the construction of the Milwaukee, Lake Shore and Western Railroad through the Lac de Flambeau Indian Reservation in Wisconsin, having had the same under consideration, respectfully report:

The reservation was created and now exists under authority of the treaty of September 30, 1854, with the Chippewa Indians. Thereby said Indians ceded their lands in Wisconsin to the United States, and certain reservations were therein agreed to be established for the use and occupancy of the various bands of said tribe.

The eleventh article thereof provided that—

All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

Thereunder both Secretaries Teller and Lamar ruled that, subject to the approval of the Secretary of the Interior, and proper compensation paid to the Indians therefor under departmental supervision, railroads could be constructed through the various reservations created and existing under this treaty.

Thus on June 26, 1884, Mr. Secretary Teller granted the application of this company to make preliminary survey of its subsequently constructed line through the La Pointe or Bad River Reservation, near Ashland. (See Appendix, Exhibit A.)

April 23, 1885, Mr. Secretary Lamar approved the location of such line therein, and the bond given by the company to secure the Indians proper compensation therefor. (See Appendix, Exhibit B.)

November 3, 1885, Mr. Secretary Lamar approved the compensation agreed upon with the Indians, which was accordingly thereafter paid by the company and distributed under the direction of the Secretary. (See Appendix, Exhibit C.)

Similarly, the Duluth, Superior and Michigan Railway Company asked and was accorded the privilege of surveying, locating, and thereafter constructing its road through said reservation, the proceeding thereunder being the same as in the former case, the approval of its route and bond being shown by departmental letter of April 12, 1887. (See Appendix, Exhibit D.)

In constructing its new line of road from Milwaukee, via Rhinelandor, direct to Ashland, the Milwaukee, Lake Shore and Western Railroad Company found it necessary to traverse for a few miles the Lac de Flambeau Reservation in Wisconsin. Upon the faith of previous departmental action the company applied for, and on November 29, 1887, Mr. Secretary Lamar accorded it, the requisite permission to make survey for its line therein. (See Appendix, Exhibit E.)

Thereunder its maps of definite location were submitted to the Department for approval, but on April 26, 1888, Mr. Secretary Vilas reversed the rulings of his predecessor and held that Congress alone could lawfully determine what railroads were "necessary" to pass through this reservation under the aforesaid provision of the treaty of 1854. Declining to approve such maps he held that "this company should apply to Congress for the authority." (See Appendix, Exhibit F.)

Hence the pending bill is presented. The road named will traverse a portion of Wisconsin now without railroad facilities. It gives a direct air-line connection between Milwaukee, on Lake Michigan, and the ports of Lake Superior at Ashland, Bayfield, and Washburn, large and important shipping points. The company has proceeded with the active work of construction up to the line of this reservation, not anticipating any reversal of executive practice nor denial of its right to proceed here as had been done by it and others elsewhere, as above recited. The enterprise is now suspended in mid-air until requisite legislation is provided authorizing construction across this reservation. The undertaking involves large expenditure, and the work should be permitted to proceed without delay, to prevent large loss which will otherwise occur, from no fault of the company, but solely from change in executive construction of the law, which the company could not anticipate.

The bill is modeled upon the most recent enactments of the last Congress applicable to similar reservations in the Northwest. The extent of the right of way asked (100 feet) is moderate and plainly needed. The compensation therefor is left to be amicably adjusted with the Indians through the Secretary of the Interior, precisely as was done in the acts on which this bill is modeled. The consent of the Indians has been given by the treaty provision above quoted, and their renewed consent is not now requisite. They are directly under the management and control of the Interior Department, are few in number, and only partially civilized. Hence it is believed that the mode of fixing the compensation to be paid through the authority of the Secretary of the Interior is both expeditious and proper, and will afford the largest measure of protection to the Indians.

The committee deem this road a "necessary" one within the full meaning of the treaty provision, and accordingly recommend the passage of the bill.

EXHIBIT A.

DEPARTMENT OF THE INTERIOR,
Washington, June 26, 1884.

SIR: I return herewith the papers which accompanied your report of the 26th instant, in relation to the application of the Milwaukee, Lake Shore and Western Railway Company for permission to make a preliminary survey upon the lands of the Bad River (Chippewa) Indian Reservation in the State of Wisconsin, to definitely establish or locate its line of road which is to proceed from a point on the Montreal River, between the States of Michigan and Wisconsin, to Washburn, on the shore of Chagamegon Bay, in the county of Bayfield, State of Wisconsin.

The necessary proofs and papers being filed you will instruct the United States Indian agent of the La Pointe Agency to convene his Indians in council and ascertain their wishes in the matter, fully explaining the desire of the railway company in the premises, and the measure of the privileges granted under the treaty.

As soon as the decision of the Indians shall be communicated by the agent you will notify the railway company accordingly.

Very respectfully,

H. M. TELLER,
Secretary.

The COMMISSIONER OF INDIAN AFFAIRS.

EXHIBIT B.

APRIL 23, 1885.

SIR: I return herewith the bond and duly authenticated map of definite location filed in your office by Mr. Alfred Cory, general solicitor and secretary of the Milwaukee, Lake Shore and Western Railway Company, of its line of road to be constructed across a portion of the La Pointe or Bad River Indian Reservation in Wisconsin, with two letters of Mr. Cory which accompanied your letter of 21st instant, requesting that steps be taken to ascertain the compensation to be paid to the band of Chippewas, and individual members of the band residing upon said reservation, for lands taken and damages to improvements on account of the right of way and construction of said road thereon.

Agreeable to your recommendation an authority is hereby granted for Agent Durfee to take necessary measures to adjust and determine the compensation to be paid to the Indians, collectively and individually, and to secure the right of way to the railway company, subject to the approval of this Department, and such further action as may be found necessary in the premises.

The usual instructions in such cases should be furnished by your office for the information and guidance of the agent in this matter.

A representative of the railway company will be allowed to be present at the negotiations to be held with the Indians for the right of way, as recommended by you.

Very respectfully,

L. Q. C. LAMAR,
Secretary.

The COMMISSIONER OF INDIAN AFFAIRS.

EXHIBIT C.

DEPARTMENT OF THE INTERIOR,
Washington, November 3, 1885.

SIR: I return herewith the papers which accompanied your communication of the 2d instant in relation to the action taken by Agent Gregory, of the La Pointe Agency, Wisconsin, under the authority of this Department in its two several letters addressed to you upon the subject under the respective dates April 23 and June 19, 1885, to adjust and determine the compensation to be paid individually and collectively to the Indians upon the La Pointe or Bad River Reservation, in said State, for the right of way to the Milwaukee, Lake Shore and Western Railway Company for construction of their road across said reservation, as contemplated under the provisions contained in the third article of their treaty of September 30, 1854 (10 Stat., 1110).

The right of way secured, as appears from the papers presented, is 100 feet in width, and the quantity of land taken thereby from the area held in common by the band is 171.15 acres, which, at the rate of compensation agreed upon per acre between the agent and the Indians, \$5 per acre, amounts to \$855.75.

The individual claims for damages to lands held in severalty by members of said band are stated as \$647, to be distributed in various amounts among eight claimants whose relinquishments of right of way are filed with the papers above noted.

In accordance with your recommendation, the preliminary negotiations had by Agent Gregory and the terms of compensation agreed upon are hereby approved, and your office is authorized to take the requisite measures to perfect the said negotiations, preparing for the signature of the Indians in their collective and individual capacities the usual final papers confirming to the said railway company the right of way, etc., as may be necessary in the premises, including therein such stipulations as may be necessary to protect the interests of the Indians and the faithful observance of the intercourse laws, with good and sufficient bond to secure the obli-

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gations on the part of the said company. The company should be called upon at the proper time to pay over the compensation money in the manner suggested by you, and the Department will decide as to its disposal when it is so paid.

Very respectfully,

L. Q. C. LAMAR,
Secretary.

The COMMISSIONER OF INDIAN AFFAIRS.

EXHIBIT D.

DEPARTMENT OF THE INTERIOR,
Washington, April 12, 1887.

SIR: I return herewith the bond dated April 6, 1887, in the sum of \$10,000, filed by Mr. R. R. Kinkade, general attorney, on behalf of the Duluth, Superior and Michigan Railway Company, in the matter of securing the right of way for the construction of its road across the La Pointe or Bad River Indian Reservation in Wisconsin, which has been made in compliance with Department directions of March 29, 1887, and which accompanied your letter of 11th instant recommending its approval, and that the company be authorized to proceed with the construction of its road.

As recommended by you, the bond is approved, and authority is granted to the said railway company to proceed with the work of constructing its road upon the said reservation, and in accordance with your further recommendation, your office is authorized to issue the necessary instructions to the local Indian agent in regard to the ascertainment of compensation provided for in the treaty with the Indians upon the said reservation, as was done in the similar case of the Milwaukee, Lake Shore and Western Railway on the same reservation, under treaty provisions with Chippewa (10 Stat. p. 1110). The letter of Mr. Kinkade is also herewith returned.

Very respectfully,

H. L. MULDROW,
Acting Secretary.

The COMMISSIONER OF INDIAN AFFAIRS.

EXHIBIT E.

DEPARTMENT OF THE INTERIOR,
Washington, November 29, 1887.

SIR: I return herewith the letter of Messrs. Brittan & Gray, of this city, presenting as attorneys the application of the Milwaukee, Lake Shore and Western Railway Company for permission to make a preliminary survey through the Lac du Flambeau Indian Reservation, in the State of Wisconsin, in order to fix the line of definite location of their contemplated branch road from the village of Rhinelander in the county of Oneida, through said county of Oneida, and through the county of Ashland to a point of junction with its main line of road, in or near the village of Hurley in said last-mentioned county, transversing in its course the said Lac du Flambeau Reservation, which accompanied your letter of 29th instant.

I concur in your views that the express provisions of the treaty, namely, that "all necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases," can not be defeated by any factious opposition on the part of the Indians or those connected with them, and therefore the authority of the Department is hereby granted under the provisions of said treaty, for said railroad company to proceed with its preliminary survey on the Lac du Flambeau Reservation, in order to fix the line of definite location of the proposed road, with the distinct understanding, however, that no work in the construction of such road shall be begun or attempted upon said reservation until further orders from the Department.

You will instruct the agent to take such judicious and precautionary measures, if any may be necessary, as will prevent interference by the Indians with the work of the railroad company in making this preliminary survey.

Very respectfully,

L. Q. C. LAMAR,
Secretary.

The COMMISSIONER OF INDIAN AFFAIRS.

EXHIBIT F.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 26, 1888.

SIR: Herewith are returned the maps of definite location of the Rhinelander Branch of the Milwaukee, Lake Shore and Western Railroad Company, on the Lac de Flambeau Reservation, within the jurisdiction of the La Pointe Agency, Wisconsin, which your letters of the 3d of February and 15th of March recommend approval of, together with authority thereupon to said company to proceed in the construction of its road upon certain prescribed conditions.

I am unable to find the necessary authority in the law to warrant this Department in giving permission to the railroad company to locate and construct its road as proposed upon this reservation, and the precedents you refer to I cannot accept as controlling even if I am mistaken in supposing that they may, perhaps, have been governed by some other considerations. I find no other act of Congress besides the one approved March 3, 1875, and understand no other is assumed to grant this right of way. That act is a general granting act of the right of way to any railroad company out of, and upon the public lands, with material for construction and a generous measure of land for station purposes. But it is expressly provided that it shall not apply to any lands within the limits of an Indian reservation, "unless such right of way shall be provided for by treaty stipulation, or by act of Congress heretofore passed." This language seems obviously to mean the particular right of way, intending to reserve from the operation of a prohibitory clause only such cases as Congress had specially legislated upon, or as had been specially legislated upon by the treaty-making power which gives to instruments of its creation the same force as an act of Congress. This is in pursuance of the policy of Congress in respect to Indian reservations, not departed from, so far as I am able to find, in any instance, unless this be such a departure; a policy which wisely reserves to Congress the determination of the particular instances, the extent and the terms when and upon which an Indian reservation shall be put to the use of railroads. Many such acts have been recently passed and bills are now under consideration of this character.

The only provision by law or treaty claimed to be within the qualifications quoted from the act of 1875, is found in the last sentence of the third article of the treaty with the Chippewa Indians, made September 30, 1854, by which, among other things, this reservation was established. The third article provided that the United States should define the boundaries of the reservation tracts; that the President might cause them to be surveyed and allot tracts to heads of families or single persons; might make rules for the disposition of other lands; might make changes in the boundaries of reserved tracts necessary to prevent interference with any vested rights; and then added the following sentence:

"All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

It does not seem to me that this provision in the treaty with the Chippewas, made twenty-one years before the passage of the act of 1875, can be taken as a provision by treaty stipulation for such a right of way as is intended by the quoted language of the latter act. That stipulation was not a grant to any railroad company; it was simply an authorization to the United States to permit railroad companies to build across the reservation. In some cases it has been agreed that there shall be no intrusion upon the reservation whatever, as in the case of the great Sioux Reservation. This treaty authorizes the other party to it, the United States, to permit such intrusion when necessary. I think it to be presumed that the determination of the necessity was to be made according to the custom with all other reservations, when Congress saw fit to provide therefor, and I do not feel myself justified in giving approval to this map and assuming to grant the authority to enter upon this reservation upon no other foundation than the provision mentioned in the treaty. This company should apply to Congress for the authority.

In my judgment it strengthens this interpretation that no provision has been made by law for fixing the amount of compensation to be paid for the right of way through reservations. The treaty provides, as it ought, that compensation shall be made for any taking of the reservation lands for a right of way "as in other cases." This reference was to the established usage of the Government, pursuant to which special acts have been passed fixing the mode of the adjustment of compensation. The act of 1875 requires no compensation to be paid for the taking of the public lands thereby granted. The difficulty which, for the want of legislation, is entailed by permitting railroads to pass through these reservations without special provision of Congress therefor, has been already experienced in the cases referred to by you as precedents, which necessitated a submission to Congress of the project of a law to

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cover the rights of the Indians in those cases, a thing which Congress has not yet provided.

I am also advised upon consultation that this view is taken by a committee on Indian Affairs of one of the houses of Congress, and probably both.

I am unable, therefore, to approve of the proposition submitted, but think the right to cross the reservation must be obtained from Congress.

Very respectfully,

WM. F. VILAS,
Secretary.

The COMMISSIONER OF INDIAN AFFAIRS.

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