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SERVICE DATE - FEBRUARY 19, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-167 (Sub-No. 1176X)¹

CONSOLIDATED RAIL CORPORATION--ABANDONMENT EXEMPTION--
IN WICOMICO COUNTY, MD

Decided: February 10, 1997

By petition filed October 25, 1996, Consolidated Rail Corporation (Conrail) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon: (1) the portion of its Mardella Industrial Track extending from milepost 40.80± to the junction with Conrail's Delmarva Secondary at milepost 42.00±, near Salisbury, MD; and (2) its Mill Street Industrial Track extending from the connection with the Mardella Industrial Track at milepost 0.00± to milepost 0.60±, near Salisbury. The total distance of the two tracks is 1.80 miles. The United Transportation Union seeks the imposition of labor protective conditions.

Several parties filed comments opposing the proposed abandonment. These included the two shippers that use the line, Salisbury Brick Company, Inc. (Salisbury Brick) and The Farmers & Planters Company (Farmers & Planters), and two other shippers located on the line, Delmarva Chemical Manufacturing Corp. (Delmarva Chemical) and the Salisbury Building Supply Co., Inc. A number of public agencies protested, including the City of Salisbury, the Maryland Office of Planning (MOP), the Maryland Department of Business and Economic Development, Wicomico County, and the Maryland Department of Agriculture. Salisbury-Wicomico Economic Development, Inc. (SWED), a non-profit organization created to retain and create jobs in Wicomico County, MD, also opposed the abandonment. Finally, we received letters from public officials, including letters from U.S. Senator Barbara A. Mikulski, U.S. Senator Paul S. Sarbanes, and State Delegate Norman H. Conway.²

Some of the protests were filed in response to the notice of intent to abandon that Conrail published pursuant to our

¹ Conrail previously filed a notice of intent to abandon this line pursuant to a formal application in STB Docket No. AB-167 (Sub-No. 1169). Because Conrail then filed the present petition for exemption in lieu of a formal application, an entirely new docket subnumber was assigned, (Sub-No. 1176X). See prior decision in this proceeding (STB served Nov. 8, 1996) denying requests for oral hearing, setting a procedural schedule for the filing of comments and replies, requiring service of the petition on all shippers on the line segment, and stating that all comments filed in STB Docket No. AB-167 (Sub-No. 1169) would be considered in this proceeding.

² We will treat the ones served upon Conrail (so that the railroad was given notice of the filing of the comment and an opportunity to reply to it) as formal pleadings; we have placed the rest in the correspondence section of the docket in this proceeding.

regulations governing formal applications. Because those protests sought an opportunity to file comments in the type of proceeding that we usually conduct in response to the filing of a notice of intent to file a formal abandonment application, and because Conrail had actually filed such a notice in this case, we issued a decision on November 5, 1996, giving interested members of the public an opportunity to comment on the proposed abandonment. We also required Conrail to serve a copy of the decision on all the shippers on the line and on all persons on whom the railroad served its notice of intent to abandon the line. We gave Conrail an opportunity to reply to the comments filed in response to our decision.

BACKGROUND

The line proposed for abandonment is located in the City of Salisbury, situated in the generally agricultural section of Maryland's Eastern Shore. The two shippers who patronize Conrail's service on the line ship brick and fertilizer. The line is located adjacent to US Route 13, a major north-south artery, and US Route 50, a major east-west artery. Both are high-capacity, 4-lane highways. The portion of the line from milepost 41.45 to milepost 40.8, which includes a 120-foot timber trestle over the Wicomico River, has been out of service for more than 2 years. A few sections of rail are missing from this segment.

Conrail says it wants to abandon the line because revenue generated by the traffic is not adequate to cover the cost of maintaining and operating the line. The railroad therefore loses money on the service. According to Conrail, only two customers, Salisbury Brick and Farmers & Planters, have used the line. Service to the industries on the line is scheduled twice weekly, but is actually offered only when needed because of the small traffic volume. An additional company, Delmarva Chemical, has expressed an interest in using rail service. Delmarva says it anticipates receiving about 4 carloads per month.

Conrail states that, although overall total traffic levels for the past 5 years have remained fairly constant, inbound shipments of brick have steadily declined over the period. There is no overhead traffic on the line. The table below summarizing Conrail's data shows the cars handled over this line for the shippers during 1994, 1995 the first 3 months of 1996, for a "base year" (a 12-month period from April 1, 1995 to March 31, 1996) and for a "forecast year" (the 12-month period from September 1, 1996, through August 31, 1997). Conrail has increased the estimated number of carloads for the forecast year to reflect the testimony of Delmarva Chemical.

CARLOADS TERMINATING ON THE LINE (NO CARS ORIGINATING)

COMMODITY	CARS				
	1994	1995	1-3/96	Base Yr 4/95-3/96	F'cst Yr 9/96-8/97
Chemicals (Fertilizer)	47	36	11	35	97
Clay Products (Brick)	66	41	11	43	50
Hazardous Materials	9	5	4	7	7
TOTAL	122	82	26	85	154

Conrail states that the general condition of the track is poor. It is classified as FRA class 1 but the track is designated as "Excepted Track." This means that train speeds may not exceed 10 MPH and that freight trains may operate with no more than 5 cars of hazardous material. The rail on the line is predominantly 85-lb. jointed rail. Conrail classifies the rail as "scrap quality," meaning that it is in such poor condition that, if salvaged, it could not be relaid and used as rail on another line. It is valuable only as scrap metal.

Conrail states that it will continue to serve Salisbury. Shippers may obtain access to its lines via "team track" facilities that will continue to be maintained in Salisbury. Conrail also maintains a team track in Delmar, DE, about 6 highway miles from the line. Conrail adds that it and CSXT operate multi-modal facilities in Baltimore, MD (about 107 highway miles from the line) and in Philadelphia, PA (about 133 highway miles from the line). Conrail also states that Norfolk Southern Railway Company maintains similar facilities in Norfolk, VA, about 135 highway miles from Salisbury. Commodities may be transferred between truck and rail, or intermodal containers may be handled at these facilities. Conrail states that barge service is also available in Salisbury via the Wicomico River.

Salisbury Brick states that it has averaged about 75 inbound cars per year on the line and that, between January 1991 and September 1996, it paid Conrail \$646,000 for rail service. The shipper avers that it largely depends on rail service and that, during its 30 years on the line, it has not seen any significant maintenance or improvement to the line. Delmarva Chemical, a new area business, says that it is experiencing strong growth and that it plans to use the railroad to enhance that growth. Farmers & Planters states that it is an agricultural fertilizer and full-line crop production business serving the farm community. Farmers & Planters notes that it is the last on-sight blending facility in Wicomico County and asserts that it cannot provide the area agricultural community with cost-competitive crop production products without rail service. Salisbury Building Supply states that it has used the line in the past and that it may have a need for rail service in the future. Other responses, including those from state and local governments and related agencies, assert opposition to the abandonment on the bases of various adverse effects to the local economy and communities, including lost jobs and revenues, increased

congestion, and safety and noise problems on the local road system.³

FINANCIAL DATA

Conrail presented revenue and cost data for the line, both in its petition for exemption and in its reply statement. As earlier indicated, a portion of the Mardella Track, from the end of the track at milepost 40.8 to milepost 41.45, (0.7 miles) is out of service and, according to Conrail, is not needed to serve existing customers or the proposed new customer. Conrail believes that, although SWED and others have stated that they would not oppose abandonment of the Mardella Track, these arguments run only to the 0.7-mile out-of-service portion.

Accordingly, in Conrail's reply statement, the railroad recalculated its costs of operating the active portions of the line to exclude costs, rehabilitation, and net liquidation values associated with the Mardella Track. Conrail argues that, even with the new traffic, the costs of providing service on the Mill Street Industrial Track will exceed the revenues that Conrail can expect to earn from the line. In its reply, Conrail calculates that it will incur an avoidable loss from operations in the base year of \$38,014 and will incur an avoidable loss in the forecast year of \$42,158. In addition to these losses from operations, Conrail states that it will have to spend \$200,927 to rehabilitate the line. Finally, Conrail states that the net liquidation value (NLV) of the line is \$25,078. NLV is used in determining a railroad's annual "opportunity costs"--the cost of forgoing the income from the real estate, track and ties that Conrail could expect to earn if these assets were put to a productive use.

We have analyzed Conrail's revenue and cost data and conclude that, except for the specific cost items discussed below, the revenue and cost data appear to be reasonable. None of the comments filed contain material challenges to the specific revenue and cost data presented by Conrail.

More specifically, Conrail projects an increase in traffic of 69 carloads, from the base year 85 cars, to the forecast year 154 carloads. The railroad also projects a concurrent increase in revenues of \$91,672 from the base year, \$74,803, to the forecast year, \$166,475. These projections appear to be reasonable and are not challenged by protestants. Accordingly, we will accept them.

Conrail calculates its annual maintenance for the Mill Street Track to be \$14,165. The carrier supports this with a list showing the quantity and cost for each item of maintenance. Although Conrail does not support the unit costs it used or discuss how the replacement rates for materials were determined, experience from other abandonment cases and replacement rates derived from the FRA track standards suggest that the railroad's normalized track estimate is reasonable. Conrail's tie replacement rate of 32 ties per mile annually (based on its 10-

³ In particular, MOP claims that abandonment of this line will create an economic hardship for the area, and that it is likely that 50 jobs and over \$9.5 million in revenues will be lost.

year plan of 315 ties) falls within the replacement rate based on FRA's class 1 safety standards. Its replacement rate is roughly equivalent to a 35-year tie life using the FRA class 1 tie spacing minimums and allowing for good ties under all joints. A life expectancy in this range is reasonable. Conrail's unit cost for tie labor and materials also falls within the range we see in other cases. Track surfacing and highway crossing maintenance intervals fall into typical ranges as well. There do not appear to be any unusual or unexpected costs. For these reasons, we will accept Conrail's maintenance estimate.

Conrail's witness has not provided supporting documentation or an explanation for his estimate of rehabilitation costs. A review shows some fundamental flaws in Conrail's figures. For instance, the railroad intends to replace 3,317 ties over the line's 1.8-mile length, or 1,843 ties per mile. This is a greater number of ties than required to meet the FRA track safety standards.⁴ Although the rehabilitation estimate is reduced to \$200,927 in Conrail's reply statement for the revised 1.2-mile section, there is no breakdown of costs by category included in its reply comments. For these reasons, we will place little weight on Conrail's cost rehabilitation estimate.⁵

We earlier noted that Conrail submitted a net liquidation value of \$25,078. We cannot, however, determine the validity of the railroad's real estate value of \$11,293, because Conrail failed to include supporting documentation, and we have no other reliable means for establishing a value for the real estate involved here. Conrail states that most rail would be scrapped and that the remaining rail would be used in sidings and yards. Its unit costs for scrap, salvage and removal were not supported, but fall within the range seen in other cases. Because of the overall lack of support for Conrail's NLV estimate, however, we will not accept it.

In summary, we accept Conrail's operating revenue and cost data, showing an avoidable loss for the forecast year of \$42,158 even when the out-of-service portion of the line (Mardella Track) is excluded. We do not accept Conrail's estimated rehabilitation costs or opportunity costs.

CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10502, however, we must

⁴ The FRA standards do not specify the number of non-defective ties required per mile of track. The standards provide for a minimum number of non-defective ties per 39-foot length of track and under rail joints. An average number of non-defective ties per mile of line can be deduced by multiplying the minimum numbers and adding in ties for rail joints. Our average number of ties is not intended to replace the FRA standards, but is an initial test of reasonableness. The possibility exists that unique circumstances on the line could result in a significantly greater number of ties in a specific area, such as one caused by a washout.

⁵ Because the line is excepted track and therefore, below FRA class 1, Conrail is entitled to some rehabilitation. We cannot, however, on the basis of its presentation, determine that amount.

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 of this abandonment under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of abandonment, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also promote a safe and efficient rail transportation system, foster sound economic conditions, and encourage efficient management because Conrail will be able to reallocate elsewhere on its rail system the funds and materials needed to maintain and operate the line [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the transaction is not necessary to protect shippers from an abuse of market power. Although two shippers are currently using the line, the record indicates that alternative rail, motor, and barge service is available. Conrail in particular has indicated that it will continue to serve the Salisbury area. Moreover, the record does not indicate that either shipper will suffer as a result of the abandonment. Neither one alleges that it will lose business to a competitor that retains rail service, and neither has expressed great concern on its own behalf. Farmers & Planters expresses concern about the added costs that will be borne by the local agricultural community, i.e., the farmers who buy the fertilizer. Salisbury Brick notes that rail service allows it to be more cost efficient and supply local customers with the best possible price and service. Unfortunately, the record shows that the savings to the customers of these shippers is being met by added costs, which shippers (and their customers) on other lines must pay in order to cover the losses that Conrail is incurring from its service on the Mill Street Industrial Track.

The record before us leads to the conclusion that Conrail is operating uneconomic facilities here. Even with our adjustments to Conrail's financial data, the evidence demonstrates that this line is losing money. Although we are not accepting Conrail's rehabilitation and NLV calculations, we are accepting the railroad's other cost figures, resulting in a forecast year avoidable loss from operations of \$42,158. Given our finding regarding the probable effect of the transaction on market power, we need not also determine whether the transaction is limited in scope.

Opponents of the abandonment have stated that, in addition to the two businesses currently using the line, a new business will use it as well and others may have a need for rail service in the future. Speculation that additional traffic might materialize in the future does not justify forcing the railroad to continue to incur losses by operating this rail line. Nor does it justify tying up assets that could be used more productively elsewhere.⁶ Furthermore, certain state and local

⁶ See, e.g., Michigan Shore Railroad, Inc.--Abandonment
(continued...)

government representatives are concerned about the adverse effect of the proposed abandonment on the local economy and community. However, the evidence of record clearly indicates that affected shippers will have viable transportation alternatives. We note that, should the City of Salisbury or any area businesses wish to retain the line, they may acquire the line or subsidize its continued operation under the offer of financial assistance (OFA) procedures contained in 49 U.S.C. 10904 of the ICCTA.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the labor protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

Conrail has submitted an environmental report with its petition and has notified the appropriate agencies of the opportunity to submit information concerning the energy and environmental impact of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effect of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on December 27, 1996,⁷ and no one filed comments on the EA. SEA recommends that no environmental conditions be placed on any decision granting abandonment authority. We adopt SEA's recommendation and will not impose any environmental conditions on the abandonment of this line. Finally, we conclude that, based on SEA's recommendation, the proposed abandonment, if implemented, will not have a significant effect on the quality of the human environment or the conservation of energy resources.

Although SEA states that the right-of-way may be suitable for other public use under 49 U.S.C. 10905, no one has sought a public use condition, and none will be imposed. Nevertheless, we will provide a 20-day period after Federal Register publication for interested persons to request a public use condition.

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 in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

2. Notice will be published in the Federal Register on February 19, 1997.

3. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, the exemption will be effective on March 21, 1997.

⁶(...continued)

Exemption--In Muskegon, Muskegon County, MI, STB Docket No. AB-361 (Sub-No. 2X) (STB served Oct. 8, 1996), CSX Transp., Inc. v. Surface Transp. Bd., 96 F.3d 1528 (D.C. Cir. 1996).

⁷ The assessment has an incorrect service date of December 27, 1997. However, the comment due date of January 24, 1997, is correct.

4. Formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2)⁸ must be filed by March 3, 1997; petitions to stay must be filed by March 6, 1997; requests for a public use condition under 49 CFR 1152.28 and requests for a notice of interim trail use/rail banking under 49 CFR 1152.29 must be filed by March 11, 1997; petitions to reopen must be filed by March 17, 1997.

5. If a formal expression of intent to file an OFA has been timely submitted, an OFA to allow rail service to continue must be received by the railroad and the Board within 10 days after publication, subject to time extensions authorized under 49 CFR 1152.27(c)(2)(ii)(C) and (D). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2).

6. 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."

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁸ See Exempt. of Rail Abandonment--Offers of Finan. Assist., 4 I.C.C.2d 164 (1987) for regulations in effect at the time of filing of the exemption petition. We note that the ICC Termination Act of 1995 has made changes and additions to the previous law regarding the processing of abandonments and OFAs. To implement these changes, we have issued final rules in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996), effective January 23, 1997. Because we have processed the exemption petition under the former regulations, we will continue to use the former regulations in this proceeding to process an OFA, if one is filed.