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SERVICE DATE - LATE RELEASE DECEMBER 11, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41068

VALLEY FEED COMPANY

v.

GREATER SHENANDOAH VALLEY DEVELOPMENT COMPANY D/B/A SHENANDOAH
VALLEY RAILROAD COMPANY

Decided: November 30, 1998

Alleging material error and new evidence, Valley Feed Company (Valley Feed), the owner and operator of a poultry and dairy feed mill, petitioned under 49 CFR 1115.3 for reopening and reconsideration of the ICC decision served December 21, 1995, dismissing this complaint. Shenandoah filed a reply.² Valley Feed had requested an order directing Greater Shenandoah Valley Development Company d/b/a/ Shenandoah Valley Railroad Company (Shenandoah) to restore rail service to its mill, which is located on private industrial track, and pay it in excess of \$100,000 in damages. The ICC determined that the 1,700-foot segment of track (Valley Feed Track) necessary to reach Valley Feed's private track and mill is an exempt spur under 49 U.S.C. 10907(b)(1) (now 49 U.S.C. 10906) and, as a consequence, not subject to its jurisdiction with respect to the relief sought.³ Valley Feed's petition to reopen will be denied.

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted on December 29, 1995, and effective on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10904 and 11101. Therefore, this decision applies the law in effect prior to ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² On March 5, 1996, Valley Feed filed a motion for leave to file a reply to Shenandoah's reply and tendered a reply. Shenandoah replied to the motion for leave. Under 49 CFR 1104.13(c), a reply to a reply is not permitted. Valley Feed's motion will be denied, and its reply will be rejected.

³ In 49 U.S.C. 10907(b), the Interstate Commerce Act (IC Act) provided that:

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BACKGROUND

The Valley Feed Track is composed of four segments;⁴ it connects to a 20.2-mile rail line, between Pleasant Valley (milepost HS-5.0) and Staunton, VA (milepost HS-25.2), that Shenandoah acquired from CWR⁵ under the OFA procedures of 49 U.S.C. 10905 (now 49 U.S.C. 10904).⁶ Valley Feed's private industrial track extends 440 feet beyond the end of the Valley Feed Track, on land owned by Commonwealth Gas Corp (Commonwealth), and is used primarily to unload feed ingredients.⁷

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The [ICC] does not have authority under sections 10901-10906 of this title over—

(1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located in one State

As a result of the ICCTA, 49 U.S.C. 10906 now provides, in pertinent part, that:

The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

⁴ The first segment extends 280 feet from the Pleasant Valley-Staunton line turnoff; it was owned by Chesapeake Western Railway Company (CWR) and conveyed to Shenandoah at the closing on the offer of financial assistance (OFA) purchase discussed below. The second and third segments extend approximately 1,210 feet across property respectively owned by Augusta Block, Inc. (Augusta), and Moffett Paving & Excavating Corp. (Moffett). Shenandoah acquired the easements over these segments on February 9, 1993, just a few days after closing on the OFA purchase. The fourth segment extends 210 feet across the Bells Lane Warehouse property and connects with Valley Feed's 440-foot industrial track. CWR deeded the Bells Lane Warehouse property to Mr. Robert H. Nutt, President, Chief Executive Officer, and General Manager of Valley Feed, on November 10, 1992, and he, in turn, deeded an easement over the segment to Shenandoah and rented the warehouse to Valley Feed.

⁵ CWR is controlled by Norfolk Southern Railway Company (NS), which, in turn, is controlled by Norfolk Southern Corporation (NSC).

⁶ See Chesapeake Western Railway Company—Abandonment—Between Pleasant Valley and Staunton in Rockingham and Augusta Counties, VA, Docket No. AB-290 (Sub-No. 120) (ICC served Oct. 8, 1992, and Jan. 15, 1993) (CWR Ab.) (adopting OFA terms and conditions).

⁷ In the December 1995 decision, the ICC observed that Commonwealth had also been
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The ICC's spur determination was based on the balancing of the traditional factors that are used to determine whether track is an exempt spur or a railroad line. See CNW—Aban. Exemp.—In McHenry County, IL, 3 I.C.C.2d 366, 367-8 (1987) (McHenry), rev'd on other grounds sub nom. Illinois Commerce Com'n v. ICC, 879 F.2d 917 (D.C. Cir. 1989) (Illinois). In making its spur determination, the ICC found that the Valley Feed Track: (1) is relatively small (only 1,700 feet long), stub-ended, and without stations; (2) is used only by Valley Feed, whose mill is located beyond the stub end; (3) needs rehabilitation; (4) has a track maintenance record that is too ambiguous to shed light on any residual common carrier obligation; (5) experienced increased traffic volume since 1990, when Valley Feed began using its track mobile to move cars to its private track, but annual traffic volume has never exceeded 50 cars a year; and (6) has no record of regularly scheduled rail service, common carrier service, or having extended into the territory of another carrier. The ICC also found that, although at least two other shippers had used the Valley Feed Track at different times, the record did not show significant use or uses extending beyond loading and/or unloading on side track.

Additionally, the ICC noted that the Valley Feed Track had not been included on any System Diagram Maps (SDM), 49 CFR 1152, and that the Virginia State Corporation Commission, Division of Railroad Regulation (VSCC), the agency responsible for administering the Federal Railway Administration (FRA) Track Safety Program in Virginia, regarded the Valley Feed Track as a spur and declined to inspect it on an official basis because it was not part of the national rail system or the rail system for which the FRA was responsible.⁸ The ICC also observed that the Valley Feed Track, unlike other spur and side track, had not been specifically referred to in either the notice to the public or the abandonment decision in CWR Ab. (ICC served June 4, 1992) or in any of the subsequent OFA decisions (see decisions served Sept. 17 and Oct. 18, 1992, and Jan. 15, 1993). Based on the finding that the Valley Feed Track is an exempt spur and, as a consequence,

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referred to as Commonwealth Gas Service, and, before that, Columbia Gas (Columbia) and Virginia Gas Distribution. The ICC stated that Valley Feed owns and maintains the 440 feet of track and Commonwealth owns the land under and beside it. On further review, it appears that Valley Feed only maintains the track (notwithstanding that in 1989 it apparently built a 150-foot extension to bring the track to its current 440-foot length); Commonwealth owns the track as well as most of the property (part of the track extends on to the adjoining Whitmore estate) (Valley Feed Opening Statement, Verified Statement of Mr. Nutt, Exhibit 10; and Shenandoah Verified Response, Exhibit 22).

⁸ In a letter dated September 7, 1993, VSCC wrote Shenandoah "to clarify [its] inspection responsibilities regarding the spur line (Bells Lane Spur) and the private siding serving Valley Feed Company at Staunton, Virginia." The letter states that the "Bells Lane Spur has not had an inspection" by that agency under the FRA program but that an "unofficial inspection" was made on April 30, 1993, at the request of the Virginia Department of Rail and Public Transportation (Shenandoah Verified Response at 4 and Exhibit 7).

that it could have been abandoned or service over it could have been discontinued at any time without ICC approval, the ICC dismissed complainant's request for the restoration of rail service and damages.

DISCUSSION AND CONCLUSIONS

Petitions to reopen and reconsider must establish that new evidence or changed circumstances of a material nature exist or that material error was committed. 49 CFR 1115.3. Valley Feed contends that the ICC's December 1995 decision dismissing its complaint should be reopened to correct material errors of law and fact. It argues that the ICC's spur finding was incorrect, and, in the alternative, contends that, even if the Valley Feed Track is a spur, the ICC retained sufficient jurisdiction under 49 U.S.C. 11101(a) and 49 U.S.C. 10905(b)(4) to allow it to order the restoration of rail service on the Valley Feed Track, at least for the 2-year period after the OFA was consummated. We address each argument in turn.⁹

1. SPUR DETERMINATION

Valley Feed basically challenges the ICC's spur determination by contending that: (1) a station is physically located midway along the Valley Feed Track; (2) the Valley Feed Track once was connected to another rail line; and (3) multiple shippers used the Valley Feed Track at the same time. It also argues that the spur determination is inconsistent with precedent.¹⁰ Based on a review of the material supplied by Valley Feed and Shenandoah and our own independent historical research to verify the parties' claims as to the nature of the Valley Feed Track,¹¹ we find the ICC's

⁹ At the outset, we note that Valley Feed's entire case on reopening is based on evidence that was available and should have been filed in the evidentiary stage and not on appeal. Even though Valley Feed has presented no justification for its failure to file timely, in the interest of developing a full record, we nevertheless are considering the new evidence.

¹⁰ Valley Feed further argues that the ICC failed to accord due regard to the fact that the light-weight, 85-lb. rail that, for the most part, characterizes the Valley Feed Track also is found on the Pleasant Valley-Staunton line. Track weight can be relevant, and the use of lighter weight rail ordinarily is viewed as a factor indicating spur track, McHenry, supra at 368, but there is no need to give this factor significant weight when, as here, it is ambiguous and the other track characteristics support the ICC's spur track determination.

¹¹ In addition to the information submitted by the parties, we reviewed ICC decisions related to rail lines in the vicinity of the Valley Feed Track and consulted standard historical reference materials, such as Manual of the Railroads of the United States, Henry V. Poor (1876-1913) (Poor's Manual), to see if available historic research would answer some of the inconsistencies in the hand-drawn maps and other information that were submitted. As discussed below, most of Valley Feed's claims could not be verified based on our records and historical research. The history of the track
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spur determination reasonable, supported by the evidence of record, and consistent with precedent. See, e.g., McHenry, *supra*.

a. The existence of a station. In its December 1995 decision, slip op. at 1-2 and n.5, the ICC observed that the Valley Feed Track historically had been referred to as the “‘Bells Landing’ Station” and “‘Bells Lane Crossing,” and stated that “‘Bells Lane is physically located about 1 mile north of the Valley Feed Spur, and the ‘Bells Lane Station’ was the last one reached” from the north.¹² Based on this description, Valley Feed contends that the ICC erroneously believed that Bells Lane Station is located on the Pleasant Valley-Staunton line at the intersection with Bells Lane, about 1 mile north of the Valley Feed Track. Additionally, it notes that the turnoff for the Valley Feed Track on the Pleasant Valley-Staunton line is at milepost HS-24.7, and not milepost HS-24.8 as stated in the ICC decision.

Valley Feed asserts that Bells Lane Station actually refers to an area “located midway along the 1,700 foot branch, near the present boundary between the Augusta and Moffett Paving properties.” Valley Feed Petition to Reopen at 3-5. It claims that this strongly suggests that the Valley Feed Track historically was a branch line.¹³ According to Valley Feed, the Bells Lane Station was the site of a tipple¹⁴ operated by Moffett’s predecessor, Farrier Paving Co. (Farrier), and

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(i.e., why it was built, the shippers it served, or the exact location of stations) is not well documented anywhere (including in the information Valley Feed Track submitted on administrative appeal). We found nothing in our historical research to suggest that this is the kind of track we should be, or the ICC should have been, regulating. Thus, we will not disturb the ICC’s spur track determination.

¹² This description apparently emanated from Shenandoah’s Verified Response at 4, which states:

Norfolk Southern’s Category III designation of the Pleasant Valley-Staunton Line shows Bells Lane as a non-agency station located at [milepost HS-24.7] (see Exhibit 3). Bells lane is physically located about one mile north of the Valley Feed Spur, and since CWR delivered shipments through Harrisonburg from the north, the last station referenced prior to reaching the Valley Feed Spur was the Bells Lane Station.

¹³ We note that Valley Feed has not previously argued that Bells Lane Station physically is located midway along the Valley Feed Track, notwithstanding that Shenandoah referred to the Valley Feed Track as a spur and stated that it had no stations (Shenandoah Verified Response at 12). Valley Feed does not explain why it did not make the station argument until now.

¹⁴ A tipple essentially is a funnel used to load bulk product into rail cars.

an unloading dock,¹⁵ and they were used by their owners and the public before being removed in 1984 and 1994, respectively (Valley Feed Petition to Reopen at 4). Valley Feed contends that the SDM for the Pleasant Valley-Staunton line lists Bells Lane at milepost HS-24.7 but that it must have been referring to the former tipple and unloading dock because there is no track facility for public access at milepost HS-24.7. Further, it observes that, on the detailed but undated map of the Valley Feed Track (Map) that was submitted by Shenandoah, the “Bells Lane” name appears on the Farrier (Moffett) parcel above a reference to a stone birm trestle.¹⁶ Based on these considerations, it contends that Bells Lane Station was physically located on the Valley Feed Track near the former tipple and unloading dock.

Valley Feed also contends that CWR’s abandonment application, and particularly its notice of intent to abandon, when clarified by the ICC compliance report prepared in response to Valley Feed’s service complaints, show that “Bells Lane is the Valley Feed Track; the Bells Lane Station is located at the Bells Lane/Valley Feed Track turnoff at [milepost HS-24.7]; and the Bells Lane/Valley Feed Track was designated a ‘branch station’ by [NS]” (Valley Feed Petition to Reopen at 5). Further, the references to Bells Lane Station in Docket No. AB-290 (Sub-No. 120) allegedly refer to the Valley Feed Track as branch line, and demonstrate, according to Valley Feed, that the Valley Feed Track was included within Shenandoah’s OFA acquisition and, as a result, was subject to the minimum 2-year service obligation under 49 U.S.C. 10905(f)(4).

Valley Feed has not shown that the ICC’s December 1995 decision contained material error. The ICC may have incorrectly stated that the Valley Feed Track was located at milepost HS-24.8 of Shenandoah’s main line (rather than milepost HS-24.7), but the error was not material to its analysis of the nature of the track, and, in any event, may be attributed to Valley Feed, which referred to the track as being at milepost HR-24.8 in numerous pleadings beginning with its formal complaint.

¹⁵ Valley Feed states that the record included references to a public unloading dock and a tipple, but it gives no source for those references (Valley Feed Petition to Reopen at 3-5). The ICC referred to the tipple, when discussing track maintenance, but made no reference to an unloading dock. Then, in its March 5 reply at 3-4, Valley Feed claims that there is “uncontradicted evidence and verified statement proffered by Valley Feed . . . showing that there existed on the Valley Feed Track two station facilities, including a public unloading dock and a tipple.” However, the March 5 reply refers back only to Valley Feed’s petition to reopen, where the unsupported statement was made, and not to any preexisting evidence of record.

¹⁶ The Map (Shenandoah Verified Response, Exhibit 1) shows the Valley Feed Track along with the last 0.6 miles of the 20.2-mile Pleasant Valley-Staunton line. Although not dated, the Map must have been prepared between June 28, 1979, the last referenced date, and November 10, 1992, the date Bells Lane Warehouse was conveyed to Mr. Nutt, since it refers to Bells Lane Warehouse as parcel No. 6.

Valley Feed's evidence designed to show that a station was located midway on the Valley Feed Track is inconclusive at best. The CWR Ab. proceeding contains numerous references to Bells Lane and even refers to Bells Lane as a branch station, but the record in that case does not show that these references were to a station located midway along the 1,700-foot Valley Feed Track as Valley Feed now claims. Similarly, while both the notice of intent and the SDM listed Bells Lane as one of seven stations on the Pleasant Valley-Staunton line, neither suggested that it was located elsewhere than at milepost HS-24.7 of the line. The subsequently prepared ICC compliance report referred to the Valley Feed Track as a spur, even though it was included in the notice of intent to abandon; it does not discredit the VSCC report or otherwise add credible support for Valley Feed's argument.¹⁷

The appearance of the name "Bells Lane" on Shenandoah's Map also fails to establish that a station existed midway along the Valley Feed Track. The Map is not dated, and there is no evidence of record as to when it might have been prepared. Nor is the Map sufficiently detailed to offer credible support for the existence of a station midway on the Valley Feed Track. For example, the Map makes no reference to a tipple or unloading dock, much less a "Bells Lane Station." Moreover, the placement of the name, "Bells Lane," on the Map appears to refer to the entire Valley Feed Track from the turnoff at milepost HS-24.7 of the Pleasant Valley-Staunton line. The same is suggested by the original hand-drawn map submitted by Valley Feed (Valley Feed Opening Statement, Exhibit 1); it shows an otherwise unexplained arrow pointing to Bells Lane at the first 280 feet of the turnout to the Valley Feed Track. Additionally, Shenandoah's Map and Valley Feed's hand-drawn map differ substantively; while they both delineate the Augusta, Moffett (Farrier), and Bells Lane Warehouse (parcel No. 6 on Shenandoah's Map) parcels,¹⁸ they give different property owners and land configurations.¹⁹

Finally, it is difficult to reconcile Valley Feed's station argument with at least one former statement made by Mr. Nutt:

¹⁷ The fact that the compliance report and other evidentiary material refer to the Valley Feed Track as a spur is not dispositive. See Nicholson v. ICC, 711 F.2d 364, 367 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984) (Nicholson) (whether a particular track segment is a spur "turns on the intended use of the track segment, not the label or cost of the segment").

¹⁸ Shenandoah, in Exhibit 2 of its Verified Response, submitted a less detailed, overview map of the Staunton area, which raises additional reliability issues because it suggests, contrary to other evidence of record, that the Transit Mix Concrete Corp. unloading facility, allegedly used for unloading by at least three other shippers including Valley Feed (Valley Feed Opening Statement, Verified Statement of Mr. Nutt at 4; and Valley Feed Rebuttal, Verified Statement of Mr. Nutt at 3), is not located on a rail line.

¹⁹ Where Valley Feed's map delineates parcels labeled "Valley Feed," and "Columbia Gas," Shenandoah's Map delineates parcels labeled "Staunton Union Stock Yards" and "Staunton Shale & Brick Co."

Shenandoah has also told you that the track in question is a spur used only for loading and unloading. In years past, that was true, but all structures for loading and unloading on that track have long since been removed and that track is no longer a spur. [Letter from Mr. Nutt to the ICC dated October 11, 1995.]

Mr. Nutt's understanding certainly appears to contradict Valley Feed's station argument.²⁰ Valley Feed argues that the existence of the tipple and unloading dock demonstrate that the Valley Feed Track was a branch line with a station, whereas Mr. Nutt states that Valley Feed Track did not become a branch line until after the tipple and unloading dock were removed.

The evidence of record simply does not establish that a station existed midway on the Valley Feed Track, as is now alleged. Nor is it apparent, regardless of Mr. Nutt's statement, that the Valley Feed Track became a branch line following the removal of the tipple and the alleged unloading dock in 1984 and 1994, particularly if Valley Feed made relatively little use of rail service. On the basis of the evidence presented, it appears to be far more likely, as Shenandoah argues, that milepost HS-24.7, with 280 feet of carrier-owned track and right-of-way, was the Bells Lane Station.

b. A former rail connection. Valley Feed asks that we consider new evidence consisting of a certified metes and bounds deed and an annexed plat marked as having been dated and recorded in Augusta County, VA, on April 8, 1913 (Valley Feed Petition to Reopen, Exhibit 1). Valley Feed claims that these documents, when viewed together, offer historical support for its contention that the Valley Feed Track is a branch line, and not spur track, because they show that the Valley Feed Track once was connected to another rail line making through rail service possible. Valley Feed does not explain why documents of public record for 83 years were not timely submitted into evidence or brought to our attention during the development of the record.

Nevertheless, we have considered the deed and plat in the interest of compiling a complete record, but we find them inconclusive. The deed and plat pertain to a 9.68-acre parcel of land in the city of Staunton on which a segment of track, referred to as "the Baltimore and Ohio R.R. [B&O] Spur track" is located. Ignoring the anomaly, Valley Feed asserts that the B&O "Spur track" is, in fact, the Valley Feed Track and that the plat itself suggests a connection between the B&O "Spur track" and another track referred to as, and labeled, "the Chesapeake and Ohio Railway Company [C&O] Spur track."²¹ Valley Feed argues that the existence of the alleged connection is supported

²⁰ Aside from Valley Feed's statement, supra, that the last structure was removed in 1994, we note that Mr. Nutt referred to the Valley Feed Track as a spur in a number of letters (Valley Feed Opening Statement, Verified Statement of Mr. Nutt, Exhibit 4; and Valley Feed Rebuttal, Exhibits B, C, and L).

²¹ The deed and plat attest to a conveyance made by J. E. Whitmore and his wife. To the east of the C&O "Spur track" appears a reference to "J. E. Whitmore's other land."

by Mr. Nutt, who purportedly observed remnants of two tracks coming within 10 feet of each other on the property where Valley Feed's mill is located.

We have not been able to locate any historical evidence to corroborate Valley Feed's argument. Our research indicates that the Pleasant Valley-Staunton line, in 1913, was owned by the Valley Railroad Company of Virginia (Valley), a B&O subsidiary. It was part of the 62.12-mile Valley Line (72.37 miles of total trackage) between Harrisonburg, Lexington, and East Lexington, VA, and formed part of the larger B&O line between Harper's Ferry, WV, and Lexington.²² In 1942, CWR obtained authority to acquire the Harrisonburg-Staunton line and the bulk of Valley's other properties. See Chesapeake Western Railway Purchase, 254 I.C.C. 840 (1942); and Moody's Manual of Investments (1943) at 593. Then, in 1954, the Norfolk and Western Railway Company obtained authority to acquire control of CWR. See Chesapeake Western Railway Control, 290 I.C.C. 815 (1954).

Throughout this period, there was no record of either a Valley branch line or a line of railroad at Bells Lane.²³ C&O's main line between Richmond, VA, and Clifton Forge, WV, crossed Valley's line at Staunton in 1913, but, contrary to the deed and plat, there is no record of a C&O "Spur track" or of a B&O-C&O "Spur track" connection just to the north of Staunton. Rather, it appears that Staunton and Lexington (where the Valley Line connected with the Lexington Branch of C&O's Richmond and Allegheny Division) were the only B&O-C&O connections in the area.

Aside from the absence of corroborating historical evidence, the deed does not state, and the plat is not sufficiently detailed to establish, that a B&O-C&O branch line or spur connection actually existed. Moreover, from an operational standpoint, we find it unlikely that a branch line connection could have existed in such close proximity to the two main line B&O (Valley)-C&O connections that existed at Staunton and Lexington. For these reasons, we reject the argument that the Valley Feed Track is not spur track because it was once connected to another rail line.

²² Valley apparently was chartered in 1868 and opened a 25.78-mile line (with an additional 2 miles of siding and other track) between Harrisonburg and Staunton on April 1, 1874. See Poor's Manual (1880 edition) at 452. An extension to Lexington was completed in 1883, id. (1884 edition) at 452, at which time the Valley Line appears to have reached its full length (along with an additional 5.25 miles of siding and other track). Valley appears to have been associated with B&O from its very beginning. B&O operated the Valley line under lease as early as 1876, id. (1876 edition) at 347-48, helped finance the extension to Lexington in 1883, id. (1884 edition) at 408 and (1885 edition) at 401, and somewhat later appeared as operating and controlling Valley, id. (1904 edition) at 61.

²³ For example, Poor's Manual (1885 edition) contains no reference to any branch lines belonging to Valley but describes and depicts both B&O and C&O with main and branch lines.

c. Shipper use. Valley Feed claims that the ICC erred in failing to find an established history of common carrier service. Specifically, it disputes the ICC's statement that "at least two other shippers, Farrier in the 1970's and Augusta in the 1980's, may have used the track, but at different times." While the evidence of record is limited, somewhat conflicting, and inconclusive, we nevertheless find that it supports the ICC's finding. The evidence extends back to 1970, at which time, according to Mr. Nutt, the Valley Feed mill was built by Ralston Purina Company (Ralston Purina), and the Valley Feed Track was partially rebuilt at Ralston Purina's request. Valley Feed purchased the mill in 1978,²⁴ and it initially earned most of its revenue from redistributing Ralston Purina products trucked in from Richmond. Mr. Nutt states that rail service was not really important to Valley Feed until 1988 (Valley Feed Opening Statement, Verified Statement of Mr. Nutt at 1.)²⁵ Valley Feed's mill received 15 carloads in 1989, when the private industrial track was extended to its full 440 feet, 37 carloads in 1990, and about 50 carloads in 1991 and 1992.

Otherwise, the record shows that the Valley Feed mill is located at the end of a mini-industrial park that was owned and served by CWR. It is not clear when the industrial park was formed or to what extent the Valley Feed Track had been used to serve preexisting shippers. The record does show, however, that in 1973 and 1976, respectively, CWR sold land in the industrial park to Block Associates (subsequently renamed Augusta Block, Inc.) and Farrier.²⁶ According to Valley Feed, Farrier owned the tipple, used it to receive carloads of deicing salt, and allowed other shippers to use it as well. Moffett acquired the Farrier property in 1980 but apparently never requested rail service and did not join in the effort to remove the tipple when, according to Mr. Nutt, CWR announced in 1984 that the tipple had rotted and was no longer serviceable and that the track beyond would have to be embargoed. Apparently Columbia had used the Valley Feed Track and joined in the effort to remove the tipple.²⁷

²⁴ Mr. Nutt states that Ralston Purina, the initial shipper, was successively replaced by Farmers Service of Augusta County, Check-R-Board Store, Virginia Farm Services, Inc., and Valley Feed (Valley Feed Rebuttal Statement, Verified Statement of Mr. Nutt, Exhibit S).

²⁵ In the same Verified Statement at 2, Mr. Nutt suggests otherwise when he states that necessary work was performed in 1984, prior to the 150-foot track extension, to enable the mill to receive "'3 car unit' shipments of corn."

²⁶ Although Valley Feed states that these sales occurred in 1975 and 1979 (Valley Feed Rebuttal Statement, Verified Statement of Mr. Nutt, Exhibit O at 2), the 1993 deeds which conveyed the Augusta and Moffett rail easements to Shenandoah (Shenandoah Verified Response, Exhibit 4) and Shenandoah's Map show that the deeds for the sales to Augusta and Farrier were dated August 2, 1973, and December 21, 1976, respectively.

²⁷ Other than its participation in the joint effort, the record basically is silent as to Columbia. In a letter dated June 16, 1993, Valley Feed stated that Commonwealth, Columbia's successor, had not used the Valley Feed Track since 1988 (Shenandoah Verified Response, Exhibit 24), but in an
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The record does not indicate when, or to what extent, Augusta used the Valley Feed Track. The only evidence of record is a letter dated November 19, 1993, in which Augusta states that it has not used rail service “in a number of years” but that rail service could become attractive once more. Valley Feed asserts that Augusta constructed a short unloading track off the Valley Feed Track to avoid blocking rail service to the other shippers, that it is visible on Shenandoah’s Map, and, as a consequence, that Shenandoah’s Map supports the contention that multiple shippers must have used the Valley Feed Track at some time.

Because the existence of the alleged unloading track on Augusta’s property was neither apparent nor previously mentioned, it must be considered late-filed new evidence submitted without leave or explanation. We have considered all of Valley Feed’s evidence on the matter but have found nothing in the record or in our independent historical research to corroborate that an unloading dock existed on Augusta’s property or that Augusta was responsible for its construction. Moreover, even if Augusta were responsible for the construction of the unloading dock, Valley Feed appears to be speculating on the reason for the construction, the extent of its use, and the notion that multiple shippers used the Valley Feed Track at the same time.

At best, the record suggests, that Farrier may have been a relatively significant user of the Valley Feed Track between 1976 and 1980 and that 3 other shippers (Augusta, Commonwealth, and Valley Feed), or their predecessors, may have made some use of the Valley Feed Track at varying points in time. This is not enough to show that the ICC erred in finding no record of regularly scheduled service or common carrier service to multiple shippers along the Valley Feed Track.

d. Consistency with precedent. To determine whether particular track is spur under 49 U.S.C. 10907(b), it is necessary to consider all of the track’s characteristics, including the use to which it has been put, the amount of traffic moved, whether there was regularly scheduled service, the number of shippers, whether it has stations, and whether it was constructed of light rail. McHenry, 3 I.C.C.2d at 367. These traditional factors, the factors considered by the ICC (and now by us) here, indicate that the Valley Feed Track is not a line of railroad, but incidental spur track. See Illinois Commerce Comm’n v. I.C.C., 779 F.2d 1270 (7th Cir. 1985).

Nevertheless, Valley Feed argues that the ICC’s spur determination is inconsistent with two ICC cases: Seminole Gulf Railway, Inc.—Abandonment Exemption in Lee County, FL, Docket No. AB-400 (Sub-No. 2X) (ICC served Dec. 22, 1994) (Seminole) (jurisdiction found over the abandonment of 3.55 miles of 85-lb., stub-ended track with no stations, platforms, or buildings, no record of regularly scheduled service, and only a limited record of shipper use); and Huron & Eastern Ry. Co.—Abandonment Exemption—Sanilac County, MI, Docket No. AB-380X (ICC

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earlier letter, dated May 26, 1993, it stated that Commonwealth had used rail service in the previous year (Shenandoah Verified Response, Exhibit 18).

served Dec. 22, 1992) (Huron) (jurisdiction found over the abandonment of 4.6 miles of 85-lb. track with a station at its stub end, the carrier responsible for maintenance, and as many as five shippers). We disagree.

In finding jurisdiction over the proposed abandonment in Seminole, the ICC noted that its jurisdiction had been invoked when the track had been specifically included among the lines being acquired under an earlier notice of exemption²⁸ and that its exclusive authority over rail line abandonments had been successfully relied on to defend the track from a subsequent adverse state court action.²⁹ Nothing comparable is at issue here. Similarly, in Huron, the ICC noted that its jurisdiction had been invoked initially when the track was acquired and that it had expressly observed, at that time, that the acquisition was part of a transaction subject to its jurisdiction. Thus, Seminole and Huron are distinguishable and not inconsistent with the ICC's finding that the Valley Feed Track is a spur.

Another way of looking at whether a railroad can be directed to continue service over a line is by considering whether the construction of and operation over a particular track would be subject to Board approval. Judicial precedent adds further support for the conclusion that operations over the Valley Feed Track are not the sort of operations that would have warranted regulation by the ICC (and now the Board) under 49 U.S.C. 10901-10906. The test that generally has developed under the case law for determining whether an activity is subject to prior ICC/STB approval and authorization looks to whether the track is designed to "improve the facilities required by shippers already served by the carrier" (not a new line or extension, and hence not subject to ICC/STB approval) or whether the track "extends into territory not theretofore served by the carrier" (new line or extension subject to ICC/STB approval). Texas & Pacific Ry. Co. v. Gulf C. & S.F. Ry. Co., 270 U.S. 266, 278 (1926) (T&P). In T&P, the Court found that the construction of a new spur was subject to prior ICC approval because it was so costly and allowed the constructing carrier to enter

²⁸ Seminole Gulf Railway L.P.—Exemption to Acquire and Operate—CSX Transportation, Finance Docket No. 31155 (ICC served Nov. 30, 1987).

²⁹ Paul H. Freeman v. Seminole Gulf Railway, L.P., Case No. 90-3076 CA RWP (Fla. Cir. Ct. Feb. 12, 1993).

into head-to-head competition for line haul movements.³⁰ If the Valley Feed Track were built today, it would be non-jurisdictional.

e. Summary. Valley Feed has not shown that the ICC committed material error in determining under the traditional criteria, McHenry, 3 I.C.C.2d at 367, that the Valley Feed Track is a spur. Specifically, it has failed to establish, based on the evidence of record and its late-filed new evidence, submitted without leave or explanation, that: (1) a station existed midway along the Valley Feed Track; (2) the Valley Feed Track was connected to another rail line, making through rail service possible; or (3) the Valley Feed Track has an established history of common carrier service. Additionally, it has failed to show that the ICC's decision is inconsistent with judicial precedent or the agency's own case law.

2. DUTY TO OPERATE

Valley Feed contends that the ICC committed material error when it rejected the argument that the spur track exemption, 49 U.S.C. 10907(b)(1), does not extinguish its authority to enforce the common carrier obligation, 49 U.S.C. 11101(a). Alternatively, Valley Feed asserts that the OFA provisions of 49 U.S.C. 10905(f)(4) supply an independent, mandatory basis for ICC/STB jurisdiction over the Valley Feed Track. We disagree with both arguments.

a. Jurisdiction under 49 U.S.C. 11101(a). Valley Feed argues that the ICC retained jurisdiction to enforce the common carrier obligation provisions of section 11101(a) and to order Shenandoah to serve the Valley Feed Track, even if it is a spur. However, as the ICC found (December 1995 decision, slip op. at 7), spur track can be abandoned at any time under 49 U.S.C. 10907(b)(1) without need for regulatory approval.³¹ It follows that there is no ICC/STB authority

³⁰ See also Nicholson, in which the court held that the construction of a railroad classification yard did not require ICC approval, notwithstanding that it was expected to make the handling of freight traffic more efficient, where the yard would be incidental to the operation of main line track and would be used solely for storage, switching, and rail car classification. In Detroit/Wayne County Port Authority v. I.C.C., 59 F.3d 1314, 1315-16 (D.C. Cir. 1995), aff'g City of Detroit v. Canadian National Ry. Co., et al., 9 I.C.C.2d 1208 (1993), the court held that ICC approval was not required for the construction of a replacement tunnel built 90 feet from, and parallel to, an outmoded 100-year old tunnel. In City of Stafford, Texas v. Southern Pac. Transp. Co., Finance Docket No. 32395 (ICC served Nov. 8, 1994), aff'd mem., 69 F.3d 535 (5th Cir. 1995), the court upheld the ICC determination that its approval is not required for improvements such as "double-tracking" (the construction of a second track to perform activities that can already be performed over existing track).

³¹ Before the ICC, Valley Feed had also argued that the abandonment of a spur within Virginia would require approval by the VSCC and that such approval had not been obtained (Valley
(continued...))

to order the resumption of rail service where there is no ICC/STB jurisdiction over its termination. Accordingly, a cause of action does not lie under section 11101(a) for a failure to provide service over spur track. See Illinois, 879 F. 2d at 923 (“Section 10907(b) specifies in no uncertain terms that the [ICC] ‘does not have authority under’ [former sections 10901-06, governing the construction, acquisition, operation, abandonment, and discontinuance of spur track.] We simply cannot find jurisdiction where there is a total lack of authority to act [footnote omitted]”). See also H.R. Rep. No. 1479, 94th Cong., 2d Sess. 22 (1976) (spur tracks “are not operated as a part of a general system of rail transportation and thus are purely local”).³²

The pertinent case law is not to the contrary. Valley Feed relies on Durham & S. C. R. Co. Control, 295 I.C.C. 585, 590 (1957) (Durham), where the ICC found that section 1(22) of the IC Act, the predecessor of 49 U.S.C. 10907(b)(1), did not exclude from the agency’s jurisdiction the acquisition and operation of spur track. But there is no reason to find this 40-year old ICC case controlling here. Section 10907(b)(1), the applicable statute throughout the period at issue here, on its face excepts from ICC regulation the “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, switching, or side track.” That was not the case under former section 1(22),³³ the statute under which Durham was decided.³⁴

³¹(...continued)

Feed Opening Statement at 5). To the extent Valley Feed may have had a cause of action for unlawful abandonment or discontinuance under Virginia law, such relief is no longer available. All state authority over such matters has been preempted in new 49 U.S.C. 10501(b)(2) and 10906. See H.R. Conf. Rept. No. 422, 104th Cong., 1st Sess. 182 (1995); and Battaglia Distributing Co., Inc. v. Burlington Northern Railroad Company, Finance Docket No. 32058 (STB served June 18, 1997) (Battaglia), slip op. at 4, aff’d, (STB served December 11, 1998).

³² Additionally, the ICC properly noted (December 1995 decision, slip op. at 8) that Shenandoah appeared to have made a reasonable effort to serve Valley Feed over the Pleasant-Valley Staunton line and, as a result, had met any common carrier obligation it might have had. The common carrier obligation is not absolute. Rather, the carrier is under a duty simply to act reasonably under the prevailing circumstances. Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325 (1981).

³³ Section 1(22) of the IC Act excepted from ICC regulation only the construction and abandonment, not the acquisition and operation, of spur track.

³⁴ Section 1(22) of the IC Act was repealed by section 801(b) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127 (4R Act). Section 801(a) of the 4R Act transferred the jurisdictional exceptions from section 1(22) [“the construction, acquisition, or operation of spur, industrial, switching, or side tracks . . . ”] to section 1(18)(d) of the IC Act, but inadvertently failed to include the exceptions for the abandonment or discontinuance of spur track. The mistake was subsequently corrected; the exceptions for the abandonment or

(continued...)

Valley Feed's reliance on Trojan Scrap Iron Corp. v. Boston & M. R., 270 I.C.C. 727 (1948) (Trojan), is similarly misplaced. Trojan also was based on section 1(22) of the IC Act, not 49 U.S.C. 10907(b), and, like Durham, it is distinguishable. In Trojan, the ICC determined that the defendant carrier had violated former section 1(9) of the IC Act by refusing to construct and operate a switch connection to serve a municipally owned lateral branch line and private side track that accessed three shippers where such a connection was reasonably practical, could be installed safely, and would furnish sufficient business to justify its construction and maintenance. The common carrier obligation holding under former section 1(4) of the IC Act was ancillary,³⁵ and, as a consequence, does not support Valley Feed's position here. Section 1(9) was recodified as 49 U.S.C. 11104 and subsequently carried forward by ICCTA as 49 U.S.C. 11103. It suggests an approach very different from the one Valley Feed pursued here, and presumably it was not pursued because the shipper, under former section 11104, is obligated to restore the track to operable condition before a carrier may be ordered to install and operate a switch connection. See Battaglia (STB served June 18, 1997), slip op. at 4.

Valley Feed argues that, by its plain language, 49 U.S.C. 10907(b)(1) applies only to transactions under 49 U.S.C. 10901-06 involving "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side track." Because spur track is included within the statutory definition of "railroad,"³⁶ it claims that the ICC's jurisdiction

³⁴(...continued)

discontinuance of spur track were added back to the statutory language, and the entire section was recodified at 49 U.S.C. 10907(b)(1) by Pub. L. No. 95-473, 92 Stat. 1337, 1407 (1978). See Illinois, 879 F.2d at 923-24.

³⁵ We note that Trojan was reversed by the ICC on the issue of whether the agency's jurisdiction under section 1(4) of the IC Act allowed it to enforce the common carrier obligation provisions. See Adequacies—Passenger Service—Southern Pac. Co., 355 I.C.C. 415, 430 (1969) (Adequacies). Adequacies and a number of other ICC decisions that concluded that jurisdiction to resolve disputes over the duty to provide adequate service lay with the courts and not the ICC were subsequently reversed in Winnebago Farmers Elevator Co. v. Chicago & N.W. Tr. Co., 354 I.C.C. 859, 862-870 (1978) (Winnebago). There, the ICC, after reviewing the applicable case law, concluded that its enforcement powers extended to the common carrier obligation provisions of section 1(4) and ordered the upgrading of a rail line subject to its abandonment authority. Winnebago, however, does not suggest that ICC/STB jurisdiction to enforce the common carrier obligation extends to cases involving spur track.

³⁶ A "railroad" is defined under 49 U.S.C. 10102(21)(C) (and 49 U.S.C. 10102(6)(C) of ICCTA) to include "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation."

to enforce the common carrier obligation also extends to spur track.³⁷ However, the court in Illinois, 879 F.2d at 923, rejected a similar argument made by the ICC in McHenry, *supra* (since spur track is included within the statutory definition of “railroad,” spurs fall within the ICC’s exclusive jurisdiction), explaining:

“The spur line provision of section 10907(b),” the [ICC] stated, “does not mean that spurs are outside the [ICC]’s jurisdiction, but that they are exempt from its abandonment oversight (footnote omitted).” This argument loads the definition [of railroad] with far more weight than it can bear. To be sure, an intrastate spur is part of a railroad but, as Section 10907(b)(1) makes evident, [ICC] jurisdiction does not extend to that part.

In short, we affirm the ICC’s finding that the common carrier obligation provisions do not apply to spur track.

b. Jurisdiction under 49 U.S.C. 10905(f)(4). Finally, Valley Feed contends that the ICC erred “when it stated that only the first 280 feet of the Bells Lane Branch was conveyed under the OFA [Valley Feed Motion to Supplement the Record].” It seeks leave to tender a verified statement made by Mr. J. L. Causey, NSC’s Real Estate Counsel and the person responsible for the deeds and documents transferring the Pleasant Valley-Staunton line to Shenandoah. According to Mr. Causey, CWR intended to convey the entire 1,700-foot Valley Feed Track to Shenandoah under the OFA, notwithstanding that the conveyance was not separately negotiated and the only consideration received was in connection with the OFA. He states that the deeds for the Augusta, Moffett, and Bells Lane Warehouse easements were inadvertently omitted from the group of deeds transferred at the closing but were subsequently delivered to Shenandoah. Valley Feed relies on Mr. Causey’s statement to demonstrate that the entire 1,700-foot Valley Feed Track was part of the OFA and, therefore, subject to the 2-year service obligation of section 10905(f)(4). Shenandoah filed a reply.

We have considered Mr. Causey’s verified statement, even though it contains evidence that should have been submitted in the evidentiary phase of the proceeding when Valley Feed first argued the 2-year service obligation under 49 U.S.C. 10905(f)(4). While Mr. Causey’s statement helps clarify the OFA, we find no merit in Valley Feed’s contention that the section 10905(f)(4) obligation applies to spur track.³⁸

³⁷ Specifically, Valley Feed reasons that: (1) spur track is regulated rail track and, as such, is subject to 49 U.S.C. 11101(a); (2) 49 U.S.C. 10907(b)(1) does not entirely eliminate the ICC’s jurisdiction over spur track; and (3) by setting out the limits of the spur exemption so plainly, Congress clearly did not intend to disturb the ICC’s jurisdiction outside the bounds delineated by the express language of section 10907(b)(1).

³⁸ Under 49 U.S.C. 10905(f)(4)(A) [unchanged in new 49 U.S.C. 10904(f)(4)(A)], “[n]o
(continued...)

We also disagree with Valley Feed's characterization of the ICC's December 1995 decision. Nothing in that decision supports Valley Feed's contention that the ICC found that "only" the first 280 feet of track had been conveyed under the OFA.³⁹ Rather, the ICC found no evidence to show that the 1,700-foot Valley Feed Track was specifically included in either the abandonment or subsequent OFA transfer. In reviewing the record in the OFA proceeding and in particular the ICC's January 1993 decision clarifying the content of the OFA, we find that the OFA sale was intended to embrace and convey all track and side track not specifically excluded, regardless of what the parties or the ICC specifically mentioned and valued.⁴⁰ Because the Valley Feed Track was not specifically excluded, we may infer that CWR intended to transfer it to Shenandoah under the OFA.

³⁸(...continued)

purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to end of the second year after consummation of the sale" Nothing in the statutory language suggests that this requirement applies to incidental spur or side track that is not necessary for continued rail freight operations.

³⁹ In the December 1995 decision, slip op. at 1 n.4, the ICC initially stated that "the first 280-foot segment at the beginning of the turnout was acquired by Shenandoah in connection with the OFA." Then, in response to Valley Feed's argument "that the Valley Feed Track was included in the Pleasant Valley-Staunton OFA line acquisition," the ICC went on to state (id. at 5 n.16):

It does not appear that the first 280-feet of the Valley Feed Track was included in the 2.65 miles of adjacent track included within the OFA acquisition. (Shenandoah Verified Response at 3.) The parties, however, do not question that it was acquired by Shenandoah regardless of whether the sale was required by the OFA decision.

Observing that the Valley Feed Track, unlike other spur and side track, had not been specifically referred to in the SDM, abandonment notice, or abandonment and OFA decisions, the ICC then concluded (id. at 7) that: "The record in the abandonment proceeding indicates, and the parties agree, that the Valley Feed Track was not specifically included in either the abandonment or the subsequent OFA transfer."

⁴⁰ In the decision served June 22, 1992, finding Shenandoah's OFA bona fide, the Director of the Office of Proceedings noted that it was not clear whether the OFA includes the 2.65 miles (17,997 feet) of other adjacent track mentioned in the abandonment. As subsequently discussed in the September 1992 decision establishing terms and conditions, Shenandoah responded that the OFA did not include the 6,750-foot American Razor Company (ARC) spur; all other track was included. Then, in the January 1993 decision, slip op. at 3, clarifying that the OFA included the disputed "Lowe's Parcel," the ICC relied on CWR's prior statement that "all sidetracks should be included in the transaction," and the fact that CWR did not dispute the transfer of "any adjacent track, whether included in cost calculations or not," in connection with an engineering report that identified 14 specific segments of side track (the 2.65 miles of track) used for the OFA valuation."

Mr. Causey's verified statement corroborates that this was CWR's intention, and, indeed, it is not unusual for an OFA to omit specific reference to segments of incidental track or parcels of property that nonetheless are intended to be transferred along with a railroad line.

The implicit inclusion and transfer of the Valley Feed Track under the OFA, however, does not mean that the 2-year service obligation of 49 U.S.C. 10905(f)(4) applies to the Valley Feed Track. Track exempt from abandonment regulation under 49 U.S.C. 10907(b)(1) does not become regulated track simply because it is transferred, along with regulated track, under an OFA. Nor does the status of track change upon being valued in an OFA proceeding. While the parties or the ICC/STB, where appropriate, may value spur track that is to be transferred under an OFA proceeding, the inclusion of the spur track in the OFA, and the use of that track in subsequent rail freight operations under section 10905, are entirely consensual and not subject to ICC/STB regulation. As a result, spur track transferred as part of an OFA is not subject to the service obligation of section 10905(f)(4).

We also disagree with Valley Feed's contention that the ICC implicitly recognized that the 2-year service obligation of 49 U.S.C. 10905(f)(4) applies to spur track. Valley Feed correctly notes that the ICC, in its September 1992 decision establishing terms and conditions, found the ARC spur not necessary for continued rail service and granted Shenandoah's request to exclude it from the OFA, stating that to require otherwise would be inconsistent with the 2-year service obligation of section 10905(f)(4). However, the ICC previously had asserted jurisdiction over the ARC spur in approving CWR's abandonment of the Pleasant Valley-Staunton line, and in the certificate and decision served October 8, 1992, it stated:

The abandonment of this spur line may be exempt from [ICC] jurisdiction under 49 U.S.C. 10907, and ordinarily would have been had CWR abandoned it separately. Since CWR included it in its application to abandon the entire line and since the Commission considered the spur along with the rest of the line in granting abandonment authority, we will assert jurisdiction over this segment of the line. Accordingly, this certificate and decision applies to this spur. [Slip op. at 1 n.1.]

It is by no means certain that the ICC should have asserted jurisdiction over the ARC spur simply because it was included in the abandonment application. But in any event, the ICC never considered the Valley Feed Track to be subject to its abandonment authority. The June 1992 decision approving the abandonment of the Pleasant Valley-Staunton line states only that Valley Feed was a shipper at Bells Lane, near the end of the 20.2-mile line; it makes no mention of any track turning off at Bells Lane. The Valley Feed Track was not referred to in either the abandonment or OFA record or in any of the related decisions, whereas the ARC spur was the subject of the October 1992 decision and was mentioned a number of times by itself and with at least 14 other segments of adjacent side track in the ICC's January 1993 decision. Thus, we conclude that the transfer of the Valley Feed Track was ancillary and incidental to the OFA transfer of regulated track and was not subject to the 2-year service obligation of 49 U.S.C. 10905(f)(4).

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

It is ordered:

1. Valley Feed's March 5, 1996 motion for leave to file a reply to Shenandoah's reply is denied, and the tendered reply is rejected. Valley Feed's April 16, 1996 motion for leave to supplement the record is granted; the submission and Shenandoah's reply are accepted into the record.
2. Valley Feed's petition to reopen and reconsider the ICC's December 21, 1995 decision is denied.
3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary