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SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-1020X

EAST PENN RAILROAD, LLC–ABANDONMENT EXEMPTION–IN BERKS AND MONTGOMERY COUNTIES, PA

Decided: November 18, 2008

By petition filed on July 31, 2008, East Penn Railroad, LLC (ESPN) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon an 8.6-mile line of railroad extending from milepost 0.0 at Pottstown to milepost 8.6 at Boyertown, in Berks and Montgomery Counties, PA. Notice of the filing was served and published in the Federal Register on August 20, 2008 (73 FR 49240). On August 28, 2008, Montgomery County, PA (Montgomery County) filed a request for the issuance of a notice of interim trail use (NITU) for a portion of the right-of-way and for imposition of a public use condition. Berks County, PA (Berks) filed a protest on September 9, 2008.

We will grant the petition for exemption, subject to public use, trail use, environmental, and standard employee protective conditions.

PRELIMINARY MATTERS

Berks' protest to ESPN's petition prompted ESPN to file a response to the protest on September 26, 2008. On October 6, Berks asked the Board not to accept ESPN's response and on October 16 moved to strike portions of it.

We will accept ESPN's response to the protest. Although the Board's rules do not provide a right of response, acceptance of the response is within our discretion and will provide a more complete record. ESPN's response is limited to addressing the issues raised by Berks and was filed in time for us to adequately consider it without jeopardizing our ability to meet our statutory deadline.

We also will deny the motion to strike. Berks contends that certain parts of ESPN's response are irrelevant, immaterial, impertinent, and scandalous, and that ESPN mischaracterizes or distorts certain statements or testimony given by Berks' witnesses. We do find several of ESPN's challenged statements unprofessional and inappropriate in tone, and we consider them in that light. Similarly, Berks' claims of mischaracterization go to the weight we will afford that evidence in reaching our decision. And contrary to Berks' argument that ESPN's response

included information that should have been submitted in its case-in-chief, the cost evidence submitted by ESPN merely addresses questions raised regarding certain aspects of ESPN's overall cost presentation, and, as pointed out by ESPN, much of this information is set forth in ESPN's discovery responses, which Berks placed in the record in its protest.

On November 10, 2008, Berks filed a petition for leave to supplement the record and its supplement, to which ESPN replied on November 12. In its petition, Berks argues that the price of scrap steel has dropped from its peak of $540 per net ton in August 2008 to $277 per net ton as of September 26, 2008. In its supplement, Berks' expert witness revises his estimate for rail, track materials, and ties downward to a net salvage value of $831,000, to reflect the drop in steel prices. Using that figure, Berks expert calculates an opportunity cost of $172,099.37, as opposed to ESPN's estimated opportunity cost of $311,660.

We will deny Berks' petition for leave to supplement the record, and we will dismiss ESPN's reply as moot. Berks acknowledges that the price of steel had dropped by September 26, 2008, but Berks has failed to explain why it waited until November 10, 2008, to attempt to supplement the record. Under our statute and our rules, we must issue a decision on the merits of ESPN's abandonment petition by November 18, 2008. Berks' late filing simply does not give us adequate time to properly consider this new evidence and ESPN's reply and meet our deadline.

Even were we to accept this restatement, we note that it would still result in a substantial opportunity cost. Should Berks wish to pursue subsidy or purchase of the line under our offer of financial assistance procedures, Berks would have sufficient opportunity to present current cost evidence for the value of the line, ESPN would have sufficient opportunity to reply, and the Board would have sufficient opportunity to make a reasoned decision within the statutory timeframes.

The situation here differs from that in Oregon International Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific Railroad, Inc., STB Finance Docket No. 35160 (STB served Oct. 31, 2008) (Coos Bay Feeder Line), cited by Berks. There, we were obligated pursuant to 49 U.S.C. 10907 to set the precise value of the line to be transferred. Here, we need not establish the net liquidation value of the line with precision at this time. See Grand Trunk Western Railroad Incorporated—Abandonment—In Macomb and Oakland Counties, MI, STB Docket No. AB-31 (Sub-No. 33) (STB served Dec. 24, 1998). As noted previously in this decision, that could be addressed in an offer of financial assistance were one to be filed. It is sufficient here to note that, notwithstanding the decline in the price of scrap steel, this 8.6-mile line contains a significant amount of steel and that ESPN incurs an opportunity cost because it is unable to sell that metal. In the companion abandonment case that we issued on the same day as Coos Bay Feeder Line, Central Oregon & Pacific Railroad, Inc.—Abandonment and Discontinuance of Service—In Coos, Douglas, and Lane Counties, OR, STB Docket No. AB-515 (Sub-No. 2) (STB served Oct. 31, 2008), we did not attempt to factor in the latest steel prices to our net liquidation value analysis. Rather, we noted that the line incurred a substantial opportunity cost in support of our decision to grant the abandonment.

BACKGROUND

According to ESPN, the line was previously owned and operated by the Reading Company (Reading) for decades, until Reading declared bankruptcy in 1971 and merged into Consolidated Rail Corporation (Conrail) in April 1976. Conrail continued to operate the line for several years until it designated the line for abandonment. In 1982, the Pennsylvania Department of Transportation (PennDot) acquired the line from Conrail and leased the line to Anthracite Railway. In 1990, PennDot transferred the lease to the Blue Mountain and Reading Railroad. In 1995, PennDot transferred the lease to East Penn Railway.

Penn Eastern Rail Lines, Inc. (PERL), one of ESPN's predecessors, was assigned the lease of the line in 1997.[1] In 2001, Berks County acquired the line from PennDOT. In 2003, PERL acquired the line from Berks County but failed to obtain acquisition authority from the Board. In July 2007, PERL and an affiliate railroad, East Penn Railways, Inc., were merged into ESPN.[2] Shortly thereafter, the membership units in ESPN were sold to Regional Rail, LLC, a noncarrier. Upon discovering that PERL had consummated the acquisition of the line in July 2003 but had inadvertently failed to obtain prior Board approval for that acquisition, ESPN immediately filed for and obtained such authority.[3]

ESPN states that, in September 2004, the line was damaged and taken out of service for nearly 6 months due to a truck's having destroyed a low clearance bridge, preventing access to Drug Plastic & Glass Company, Inc. (Drug Plastic) and Cabot Corporation (Cabot), the two active users of the line. ESPN's predecessor, PERL, completed the repair of the bridge by April 2005, at a cost of about $120,000, and resumed service on the line.

ESPN further states that neither Drug Plastic nor Cabot has made any commitment for continued use of the line, nor have they opposed the abandonment. ESPN notes that the line is stub-ended and, therefore, not capable of handling overhead traffic.

TRAFFIC AND REVENUES

ESPN states that traffic on the line has consisted of inbound shipments of plastic pellets transloaded for delivery to Drug Plastic and occasional outbound shipments of containerized hazardous waste transloaded from truck to rail for Cabot. Both Drug Plastic and Cabot are located off line in the Boyertown area, and their shipments are transloaded between rail cars and

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[1] See Penn Eastern Rail Lines, Inc.–Acquisition and Operation Exemption–Lines of Lancaster Northern Railway, Inc., Chester Valley Railway, Inc., East Penn Railways, Inc., and Bristol Industrial Terminal Railway, Inc., STB Finance Docket No. 33512 (STB served Dec. 1, 1997).

[2] See John C. Nolan, Penn Eastern Rail Lines, Inc., and East Penn Railways, Inc.–Corporate Family Transaction Exemption, STB Finance Docket 35056 (STB served July 13, 2007.

[3] See East Penn Railroad, LLC–Acquisition Exemption–Berks County, PA, STB Finance Docket No. 35089 (STB served Nov. 1, 2007).

trucks on ESPN property in Boyertown. During the time the line was out of service, ESPN states that all of the traffic destined to Drug Plastic was transloaded on ESPN at a location 8 miles away in Pottstown, or handled via truck from one of the many rail to truck transload facilities located in Philadelphia, Reading, or Allentown, PA. ESPN states that it has offered Drug Plastic the use of its transload facility located in Pennsburg, which is only 10 miles away from Boyerstown. This facility has been offered at a reduced rate to help offset any increase in trucking costs that Drug Plastic may experience. If the Board grants its abandonment petition, ESPN expects that most of the traffic it currently handles will shift to another ESPN line located 10 miles away in Pennsburg, PA, or to one of the many existing rail to truck transload facilities in the area.

ESPN states that the total freight revenues received since April 2005 do not even cover the cost of repairing the bridge and the ensuing litigation. According to ESPN, it has been unable to develop any new rail traffic moving to and from the line, and the revenues generated by Drug Plastic and Cabot have been inadequate to cover the cost of operations.

According to ESPN, Drug Plastic received 84 carloads in 2005, 93 carloads in 2006, and 82 carloads in 2007, and Cabot shipped 11 carloads in 2005, 0 carloads in 2006, and 7 carloads in 2007. This traffic generated gross revenues of $51,511, $51,834, and $53,526 in 2005, 2006, and 2007, respectively. ESPN explains that, in addition to the $53,526 in gross revenues from traffic for Drug Plastic and Cabot during its 2007 base year, it generated $29,400 in other income, mainly from switching and car storage services provided to Drug Plastic, along with leases along the line, for total revenues of $82,926.

ESPN states that, from January 1 through May 31, 2008, it handled 29 inbound carloads of plastic pellets, generating $17,893 in gross revenues. ESPN also states that no outbound traffic was tendered to it during that time period. Based on the number of carloads and the commodities handled on the line during that period in 2008, ESPN estimates 70 total carloads and total gross revenues of $43,190 for its forecast year (the 12-month period beginning August 1, 2008). ESPN also estimates $21,000 in other income, again mainly from switching and car storage services provided to Drug Plastic, along with leases along the line, resulting in total gross revenues for the forecast year of $64,190.

The traffic and revenue figures submitted by ESPN appear reasonable, and no one has attempted to restate these figures.[4] We, therefore, accept them.

AVOIDABLE COSTS

ESPN submits a breakdown of on-branch avoidable costs for 2007 totaling $163,256. For the forecast year, ESPN projects on-branch avoidable costs of $145,774, based on

[4] As discussed later in our decision, Berks does speculate about potential future traffic from shippers that are not located on the line and apparently are not now using rail service for their transportation needs. Such speculation, however, does not cause us to question ESPN's projections. And, in its response, ESPN states that its last remaining transload customer, Drug Plastic, has given notice that it will no longer use the line.

70 carloads handled and a 3% inflation adjustment factor. Berks submits a verified statement from its expert challenging and restating estimates for three of the avoidable cost figures: Maintenance of Equipment (MOE), Transportation, and General & Administrative.

MOE. ESPN derives its 2007 estimate using its system-wide average annual costs for maintaining each unit of its locomotive fleet ($11,433 per locomotive) multiplied by the number of locomotives used to perform service on the line (1 locomotive). ESPN adds the depreciation expense ($3,139) incurred by that locomotive in 2007 for a total cost of $14,572.

Berks asserts three types of error in ESPN's MOE analysis. First, Berks points out that ESPN also has used a normalized maintenance cost of $6,500 per mile in estimating a Maintenance-of-Way (MOW) cost of $55,900 for 2007. Berks contends that ESPN is improperly claiming as separate expenses under Transportation the cost of its two-man train crew for performing maintenance on tracks and locomotives. In doing so, Berks accuses ESPN of triple counting the cost of non-transportation activities performed by the two-man crew.

ESPN explains that the track maintenance functions performed by the crew are not the sort of activities a short line railroad would include under the MOW account. They include spot weed control to manage sight lines at crossings, removal of downed trees, and the insertion of a gauge rod until proper repairs can be made: activities associated with the safe operation of the train and not the proper maintenance of the track. Similarly, ESPN explains that the locomotive maintenance performed by the two-man crew consists of activities such as changing a brake shoe and adding water, sand, or oil and that the operating crew is not qualified to perform the functions included under the MOE account. We agree that including the expenses associated with these activities in an account in addition to the normalized costs used for MOW and the system-wide average costs used for MOE did not result in double or triple counting the costs of those activities.

Second, Berks claims that it is improper to use ESPN's system average costs to determine the locomotive maintenance expenses, because the locomotive on this line is used only for a few hours a day, whereas, Berks contends, most locomotives on short lines are used every day for at least 8 hours per day. Thus, Berks estimates that the locomotive servicing this line is used only approximately 15% of the system average, and it has restated the locomotive maintenance expense from $11,433 to $1,715 to reflect this lesser amount of usage.

ESPN responds that it is not a typical short line. ESPN explains that, on any given day, it has three to four crews operating on its various rail lines and that no single locomotive on the ESPN system is used every day, and very few are used a full 8 hours per day. Because it does not use its locomotives on average 8 hours per day, ESPN argues that Berks' restatement based on an 8-hour system average is improper. ESPN also points out that it uses a single, dedicated locomotive to service this line. Because this locomotive at 71 years old has required specially ordered parts for basic maintenance, ESPN contends that using its system average costs for this locomotive, if anything, understates this expense. Given ESPN's reasonable explanation, we find that ESPN's use of its system average costs for this expense is acceptable and provides a better estimate of this cost item than Berks' restatement.

Finally, Berks claims that ESPN has failed to provide any proof of the $3,139 depreciation expense used. Berks states that ESPN has not provided any appraisal for the engine or the basis for the depreciation. But an appraisal is unnecessary here because ESPN has provided in the workpapers the actual depreciation expense taken in 2007. While Berks claims the depreciation expense is wrong, it has not provided a depreciation expense that it believes is right. Given this record, we accept ESPN's depreciation expense as a reasonable value, and we accept ESPN's overall MOE estimates.

Transportation. ESPN calculates its Transportation cost as the sum of wages and fringe benefits associated with the freight operations on the line, locomotive fuel costs, and lube oil costs. ESPN uses its average system-wide wage cost per hour ($15) and the average hourly cost of benefits per employee ($4.13) to estimate the cost of a two-man crew, working 8 hours per day, for the 104 days that the crew operated over the line in 2007 to handle the traffic moving over the line. Applying those data, ESPN calculates the cost of wages and fringe benefits to be $31,832 for 2007.

In addition to the triple counting previously discussed, Berks offers several criticisms of ESPN's estimate of Transportation costs. First, although ESPN has used system-wide average costs, Berks claims that ESPN has failed to disclose its total number of employees or the total wages and benefits paid to its workforce, and Berks accuses ESPN of engaging in a pattern of providing highly evasive and non-responsive answers to Berks' legitimate discovery request regarding that information. But ESPN has provided the actual, rather than system-wide data, in its discovery response. As ESPN states in its response, the actual hourly wage cost per hour for each of the two individuals working on the line is $15.10, or almost identical to the system-wide average. The evidence disclosed through discovery thus tends to validate ESPN's use of system-wide data.

Second, Berks also specifically challenges ESPN's use of an 8-hour workday for crews on the line, claiming that a crew should need no more than 3 hours per day to service the line. Using this lesser number of hours, Berks' expert restates Transportation costs for 2007 as $15,254.

ESPN points out, however, that the crew spends between 2 and 3 hours a day in traveling between their duty station and the line.[5] ESPN also provides evidence of specific duties, which Berks has failed to consider, that when added to the travel time amounts to a minimum of 6½ hours per day plus unspecified time required for minor and routine maintenance and for securing the cars and locomotive at the end of the day. Based on the evidence of record, we find that ESPN has provided a more reasonable estimate for the amount of hours required to service the line. Thus, we accept ESPN's estimate for Transportation costs for 2007 and for the forecast year.

General & Administrative. ESPN estimates General & Administrative (G&A) costs attributable to the line of $44,881 in 2007. That amount includes the actual electric expense

[5] ESPN states that the crew is located on another ESPN line that, unlike the subject line, requires 3-day-per-week service and has a duty station.

($1,102) and actual signal maintenance contractor expense ($1,680) incurred on the line in 2007. The remaining balance of $42,099, which includes other expenses such as telephone service, insurance, and office and general expenses, is attributed to the line by prorating ESPN's system-wide costs on a mileage basis.

Berks does not challenge the actual electric and signal maintenance contractor expenses. It does argue, however, that certain of the remaining G&A costs, specifically citing insurance (which Berks asserts is "factored by total payroll and/or revenue calculations"), should be prorated based on carloads, not mileage. Using a traffic estimate of 8,100 carloads of freight system-wide annually and a mileage figure of 251.1 total system miles, Berks calculates that doing so would reduce those prorated G&A expenses from $42,099 to $13,620, resulting in total G&A expenses attributable to the line (when the actual electric and signal maintenance contractor expenses are added back in) of $16,402.

We find that ESPN's estimates for G&A costs are reasonable and Berks' assertion that the prorated costs should be calculated differently without merit. Berks has failed to show that a carload-based proration would more closely reflect actual incurred costs than would ESPN's mileage-based proration. As to insurance costs, ESPN notes that the number of miles operated and the number of rail/highway grade crossings are equally important factors in determining insurance rates as the "total payroll and revenue calculations" Berks mentions. Berks fails to discuss any other specific prorated costs, much less show that mileage-based proration is inappropriate for them. Finally, ESPN demonstrates that both the mileage figure and the annual carload estimate upon which Berks bases its carload proration are incorrect in any event: Berks relies on a mileage of 251.1, rather than the 120.1 miles provided by ESPN in discovery, and an estimate of 8,100 system-wide carloads per year instead of the actual 2007 figure of 4,809 carloads as set forth in ESPN's workpapers.

Other Costs and Summary. Berks has not specifically challenged the remaining avoidable costs estimated by ESPN. We have reviewed them and find them to be reasonable. We therefore accept ESPN's estimates of avoidable costs for 2007 and the forecast year.

SUMMARY OF OPERATING COSTS AND REVENUES

As discussed above, the evidence of record shows that ESPN has incurred $163,256 in avoidable operating costs in 2007 compared to $82,926 in revenue generated from the line. ESPN, therefore, has incurred an avoidable loss of $80,330 in 2007.[6] As ESPN points out, even if we were to accept the adjustments to avoidable costs proposed by Berks' expert witness, the line would still show an avoidable loss of $19,099 in 2007. For the forecast year, the record shows avoidable costs of $145,774 and revenues of $64,190, resulting in an avoidable loss of $81,584.

[6] See Exihibit-1 attached to this decision.

OPPORTUNITY COSTS

Opportunity costs (or total return on value of road property) reflect the economic loss experienced by a carrier from forgoing a more profitable alternative use of its assets. Under Abandonment Regulations–Costing, 3 I.C.C.2d 340 (1987), the opportunity cost of road property is computed on an investment base equal to the sum of: (1) allowable working capital; (2) the net liquidation value (NLV) of the line; and (3) current income tax benefits (if any) resulting from abandonment. The investment base (or valuation of the road properties) is multiplied by the current nominal rate of return, to yield the nominal return on value. Under 49 CFR 1152.34(d), the rate of return used to calculate return on value represents the individual railroad's current pre-tax nominal cost of capital. Our most recent after-tax cost of capital finding for the railroad industry is used as a basis for developing the appropriate nominal rate of return. The nominal return is then adjusted by applying a holding gain (or loss) to reflect the increase (or decrease) in value a carrier will expect to realize by holding assets for one additional year. Applying this methodology, ESPN submits that it would incur opportunity costs of $311,660 if it were to continue operating the line.

In estimating the NLV of the line, ESPN first calculates the net salvage value of the rail, track materials, and ties at $1,082,000. Berks challenges this figure, arguing that ESPN fails to provide a net value because ESPN has not accounted for costs for removing track and ties, transporting scrap materials, restoring grade crossings, and dismantling bridges. But ESPN explains that it has based its estimate on a bid from a rail salvage company that includes all removal costs other than for bridge removal.[7] ESPN states that it does not plan on removing any bridges; that it has already agreed to negotiate rail banking for a portion of the line; and that, even if it does remove the bridges, the salvage value would cover any removal costs. Berks has failed to offer sufficiently detailed evidence on bridge removals to show otherwise. Thus, we accept ESPN's estimate for the net salvage value of track and materials as reasonable.

ESPN calculates the net real estate value of the right-of-way to be $995,556. Pointing out that it has recently sold a parcel of land adjacent to the line for $162,679 per acre, ESPN states that it has conservatively used an average per acre gross value of the real estate of $18,821 for the 60.8 of the 64 acres held in fee, resulting in a gross value for the real estate of $1,144,317. ESPN has adjusted the gross value downward 13% to account for selling costs, holding costs/gains and a discount factor in arriving at its net real estate value estimate.

Berks challenges this valuation as well. Given the rough topography of the corridor, Berks' expert estimates a gross value of $6,000 per acre for a total gross value of $364,800, to which he applies the 13% discount factor used by ESPN, resulting in a net value of $317,376 for the line's real estate. In support, Berks points out that it sold the track and real estate to ESPN's predecessor in 2003 for $177,000. Berks also cites the lack of an appraisal by ESPN and the recent downturn nationally in the real estate market.

The burden of proving the value of the real estate falls on ESPN, as part of its burden of providing adequate support for all the findings required to justify the abandonment of the line.

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[7] See Berks' Protest, Exhibit D, Response by ESPN to Document Request No. 5.

In support of its real estate valuation, ESPN has offered only the "recent" sale of a single parcel of real estate along the right-of-way, date and size of parcel unspecified. The parcel chosen is obviously unrepresentative of the value of the right-of-way, because it sold for $162,679 per acre, while ESPN asks us to value the right-of-way at $18,821 per acre. It chose a single sale at a high price and sought to justify the value of the right-of-way at a much lower price on the ground that the lower price, by comparison, was conservative. It could have, but did not, employ an expert to conduct an appraisal of the value of the right-of-way.

The Board customarily relies on the "across-the-fence" (ATF) method to value real estate, in which appraisers examine recent sales of real estate along the right-of-way and analyze the value of the right-of-way in the light of these arguably comparable sales. ESPN made no effort to do that here. Indeed, it said nothing about the characteristics of the real property that was the subject of the one sale it cites. As a result, we have no basis upon which we can assess the accuracy or the reasonableness of the $18,821 per acre value ESPN claims.

Berks puts the value of the right-of-way at $6,000 per acre. In its response to the protest ESPN characterizes that figure as arbitrary, but it is not any more arbitrary than the one it offered. In its response, ESPN sought to buttress the one-parcel valuation it offered in evidence by offering another six-figure per acre appraisal—in this case, an appraisal of the parcel occupied by the local Wal-Mart.

ESPN did not thereby rehabilitate its real estate valuation. We cannot find that its valuation is adequately supported by the record, and we therefore will not accept it. That leaves us with the choice of either according the real estate no value or else accepting Berks' valuation as the minimum that even the protestant concedes.

We will use Berks' valuation of $6,000 per acre not because it is better supported than that offered by ESPN, but because Berks' evidence amounts to a concession that the real estate must be worth at least $6,000 an acre, and because that valuation does not prejudice ESPN—the only alternative valuation supported by the record being zero.

ESPN mistakenly has calculated working capital using the estimated avoidable loss for the line instead of on-branch avoidable costs. Using the correct figure yields an amount for working capital of $5,591. ESPN's estimate for income tax consequences is unchallenged and appears reasonable.

Accepting ESPN's estimate of $1,082,000 for the net salvage value for track and materials and Berks' adjusted estimate of $317,376 for the net value of the line's real estate results in an NLV of $1,399,376. ESPN has applied a nominal rate of return of 14.98%, but we must adjust the nominal rate of return to reflect our most recent cost of capital determination in Railroad Cost of Capital–2007, STB Ex Parte No. 558 (Sub-No. 11) (STB served Sept. 26, 2008). Applying the properly adjusted nominal rate of return of 17.24% to the adjusted investment base yields an opportunity cost of $242,216.

LOCAL COMMUNITY AND SHIPPER INTEREST

Berks opposes the petition for exemption on the grounds that the petition lacks sufficient information for the Board to make a decision. Berks contends that enough potential future rail traffic exists to allow ESPN to operate the line profitably and, as discussed above, Berks has challenged parts of ESPN's cost evidence. Berks details its efforts over the years to preserve rail service on the line and contends that the proposed abandonment would adversely impact potential industrial growth, as well as existing industries and the local road system. Berks states that the petition should be rejected and ESPN be required to file a formal application.[8]

Berks is located in the eastern portion of Pennsylvania and is served by a network of rail lines. Among them, the line proposed for abandonment connects Boyertown Borough, Colebrookdale Township, and Douglass Township with the Philadelphia-Harrisburg main line of the Norfolk Southern Railway Company at Pottstown. Berks has identified eight potential customers near the line proposed for abandonment: Cabot; Boyertown Foundry; Martin Stone Quarries, Inc. (Martin); Rahn's Concrete; Berks Products; Trap Rock Quarries; Bechtelsville Asphalt; and Haines & Kibblehouse. Berks adds that Wal-Mart recently has located a large store adjacent to the former railroad right-of-way in Bechtelsville. While Berks does not dispute ESPN's carload and revenue statistics, it asserts that ESPN either deliberately ignored or else negligently overlooked significant potential freight movements that would have generated sufficient revenues to have made the line profitable. Berks questions whether ESPN's new owner had made a predetermined decision to abandon the line given that less than a year passed from the time of acquisition of ESPN by Regional Rail, LLC in July 2007 to the time ESPN instituted the abandonment process in 2008.

ESPN questions whether the potential future traffic, which currently moves by truck, is rail competitive. According to ESPN, most of the traffic shipped or received by the entities identified by Berks would involve movements of about 70 miles by rail and involve three rail carriers and a transload to truck at either off-line origin or destination. And ESPN adds that, on September 4, 2008, Drug Plastic, the last transload customer using the line, gave notice that it would no longer be using the line.

Of the potential customers identified by Berks, only Martin has filed a statement supporting Berks' protest and expressing an interest in rail service. Martin states that it is prepared to commit to shipping 50%, or about 2,500 carloads annually, of its outbound stone traffic to customers in southern New Jersey, provided it can obtain "suitable financial incentives." Martin states that it does not recall ESPN ever approaching it with a proposal to provide it with rail service. Martin also notes that Rahn's Concrete, a tenant of Martin, and Berks Products annually import 80 to 100 thousand tons of sand from New Jersey that could be transported by rail on the line.

[8] Berks also raises concerns that the line possesses considerable historic significance and should be preserved. These concerns are addressed in the Board's environmental review process.

ESPN states that it has pursued stone and sand traffic moving between southeastern Pennsylvania and southern New Jersey from its other nearby rail line that has quarry and cement facilities located directly on the line. ESPN notes that it has been unsuccessful because the traffic has proven to be extremely truck competitive. ESPN points out that service to Martin would involve a truck transload onto ESPN, a relatively short haul into southern New Jersey by rail, and probably a truck transload for delivery to destination. ESPN notes that it purchases all of its ballast from Martin and leases property to Martin at another location. Given these business relations, ESPN questions why Martin has not contacted the railroad directly if it really is serious about desiring rail service.

ESPN defends it managers, pointing out that they have spent over 13 years working on growing railroad short line operations. In particular, they worked with RailAmerica, Inc. from 1995 to 2003, after which they joined OmniTRAX, Inc. They left OmniTRAX in 2007 to form Regional Rail, LLC, the parent of ESPN. According to ESPN, its managers view abandonment as the last resort. ESPN also notes that Berks was unable to generate new traffic when it owned the line, as was ESPN's predecessor owner of the line.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. ESPN has shown that continued operation of the line will impose a substantial economic burden on it and on interstate commerce that outweighs any potential harm to shippers and the local communities and that its proposal meets the criteria for granting an exemption.

Based on the revenue and cost evidence submitted, ESPN will incur an avoidable loss from operations of $81,584 in the forecast year. ESPN also will incur opportunity costs of $242,216, if required to continue operating the line. Neither of the two shippers that have used the line in the past 3 years has opposed the abandonment proposal. Indeed, the record shows that both shippers have ceased using the line altogether. And there is no credible evidence in the record showing that shippers have made a commitment to switch to using rail service over the line to the extent necessary to warrant requiring ESPN to continue to provide rail service over this line. Martin, the only shipper to submit a statement in support of Berks' protest, has qualified any commitment to shifting to using rail service over the line on first obtaining "suitable financial incentives." Not only has Martin failed to elaborate on the necessary incentives, Martin has not even inquired with ESPN about providing rail service even though the two already do business together involving other matters.

Contrary to Berks' position, the record contains ample information to assess the future financial viability of the line as set forth above. Berks' arguments regarding the potential for future traffic and revenues for the line are unpersuasive. Berks also has failed to show that ESPN, its owner, or its managers have acted improperly in seeking abandonment authority at this time. And, while we understand Berks' concerns regarding the potential impact of the loss of

this rail line on future economic development, this potential, speculative harm to Berks does not outweigh the concrete, demonstrated harm to ESPN resulting from requiring continued rail service over the line.

As for the specific exemption criteria, we find that detailed scrutiny of this transaction under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. An exemption also will foster sound economic conditions and encourage efficient management by permitting the rationalization of an unnecessary rail line from ESPN's system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

And we find that regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. As noted, no shipper currently uses the line. The line's two former shippers have accessed the line via a truck transload and have not opposed the abandonment. These shippers and other potential shippers may access numerous nearby transload facilities to meet their transportation needs. Nevertheless, to ensure that the shippers that have used the line in the recent past are aware of our action, we will require ESPN to serve a copy of this decision on Drug Plastic and Cabot within 5 days of the service date of this decision and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

LABOR ISSUES

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

ENVIRONMENTAL ISSUES

ESPN has submitted an environmental and historic report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

SEA served an environmental assessment (EA) on September 30, 2008, requesting comments by October 29, 2008. In the EA, SEA stated that, in a letter dated July 10, 2008, Ms. Denise Pyers, Bureau of Rail Freight, Ports & Waterways, Pennsylvania Department of Transportation (PA-DOT), advised that the environmental report was forwarded to PA-DOT's Engineering Districts 5 and 6 for review. PA-DOT also requested that the Board consult with the Pennsylvania Historical Commission. PA-DOT further states that it does have concerns regarding the public highway rail crossings (at-grade and grade separated) and requested that the crossings be abolished in an appropriate manner and with the approval of the Pennsylvania

Public Utility Commission (PPUC). SEA therefore recommended that ESPN be required to consult with PPUC regarding PPUC's requirement for closing crossings prior to commencing any salvage activities.

SEA also stated that, in a letter dated May 6, 2008, Ms. Kathleen McGinty, Pennsylvania Department of Environmental Protection (DEP), advised that a National Pollutant Discharge Elimination System (NPDES) permit would be required if the proposed project involves greater than five acres of earthmoving or greater than one acre with a point of discharge. According to Ms. McGinty, DEP generally does not consider removal of rail tracks an earthmoving activity as long as the rail bed remains undisturbed, but removal of existing railroad bridges and/or culverts is considered an earthmoving activity. And, even if the proposed project were determined to be exempt from the NPDES permit requirement, DEP would require ESPN to implement proper erosion and sedimentation controls. DEP thus has requested that ESPN contact the Montgomery County Conservation District (610-489-4506) and the Berks County Conservation District (610-372-4657) to determine if an NPDES permit or an erosion and sedimentation control plan approval is required. Accordingly, SEA recommended that ESPN be required to consult with Berks and Montgomery County Conservation Districts prior to commencing any salvage activities and comply with reasonable NPDES requirements.

SEA further stated that, in an e-mail dated June 18, 2008, the U.S. Department of Commerce, National Geodetic Survey (NGS) indicated that one geodetic station marker may be located in the area of the proposed abandonment. Therefore, SEA recommended that ESPN be required to notify NGS at least 90 days prior to beginning salvage activities in order to plan for the possible relocation of the geodetic station marker by NGS.

In the EA, SEA noted Berks' arguments concerning the line's eligibility for listing in the National Register of Historic Places (National Register), the impact of the proposed abandonment on adjacent historic structures, and the failure to initiate the required review of the 11 railroad structures on the line. SEA pointed out that the Pennsylvania Historical and Museum Commission, Bureau of Historic Preservation (SHPO) had filed comments that the line was not eligible for listing in the National Register and that no historic properties listed in or eligible for listing in the National Register would be affected within the right-of-way of the proposed abandonment. SEA also noted the letter from the Historical Society of Berks County regarding the historical significance of two wooden trestle bridges on the line. Because SEA typically relies on the SHPO regarding historical matters, SEA did not recommend an historic preservation condition but did specifically request comments addressing the historic potential of the line and the two wooden trestle bridges during the comment period.

Five comments to the EA were filed. These comments all involve the historic significance of the line and structures on the line and include further comments from the SHPO. Having re-evaluated the National Register eligibility of the line based on additional information provided by local historical societies and concerned citizens, the SHPO has reaffirmed its prior evaluation regarding the line's lack of eligibility for listing in the National Register. The SHPO has stated, however, that local groups may submit Historic Resource Forms for evaluation of the bridges.

Given these comments, SEA continues to recommend the three conditions set forth in the EA. We therefore will impose the conditions recommended by SEA in the EA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

TRAIL USE

As previously noted, Montgomery County has filed a request for issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for a portion of the right-of-way located in Montgomery County between milepost 0.0 and milepost 2.26 and for imposition of a public use condition under 49 U.S.C. 10905 for that portion of the line. Montgomery County has submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service, as required under 49 CFR 1152.29. By letter filed on September 9, 2008, ESPN states that it is willing to negotiate with Montgomery County for interim trail use. Because Montgomery County's request complies with the requirements of 49 CFR 1152.29 and ESPN is willing to enter into negotiations, we will issue a NITU authorizing the parties to negotiate an agreement for interim trail use/rail banking during the 180-day period prescribed below. If an agreement is executed with regard to the above-described portion of the line, no further Board action is necessary. If no agreement is reached within 180 days, ESPN may fully abandon that portion of the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

PUBLIC USE

SEA has indicated in its EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. Montgomery County also requests imposition of a 180-day public use condition prohibiting ESPN from: (1) disposing of the portion of the corridor between milepost 0.0 and milepost 2.26, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels. Montgomery County states that the rail corridor has considerable value for recreational trail use. According to Montgomery County, the 180-day period is needed to assemble and review title information and to commence negotiations with ESPN.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments–Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, as in the case with regard to the above-described portion of the line, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. Montgomery County has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition also will be imposed on the above-described portion of the line,

commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way subject to public use condition, ESPN must keep the remaining portion of the right-of-way subject to the public use condition intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to negotiate to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, ESPN is not required to deal exclusively with Montgomery County but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. We accept ESPN's September 26, 2008 response, we deny Berks' motion to strike, we deny Berks' petition to supplement the record, and we dismiss ESPN's response to that petition as moot.

2. Under 49 U.S.C. 10502, we exempt ESPN from the prior approval requirements of 49 U.S.C. 10903 for 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), and subject to the conditions that ESPN shall: (1) leave intact the right-of-way between milepost 0.0 and milepost 2.26, including bridges, trestles, culverts, and tunnels (except tracks, ties and signal equipment) for a period of 180 days from the effective date of this decision and notice, to enable any State or local government agency, or other interested person, to negotiate the acquisition of the line for public use; (2) with regard to the portion of the line between milepost 0.0 and milepost 2.26, comply with the interim trail use/rail banking procedures set forth below; (3) consult with PPUC regarding PPUC's requirement for closing crossings prior to commencing any salvage activities; (4) consult with the Berks and Montgomery County Conservation Districts prior to commencement of any salvage activities and comply with the reasonable NPDES requirements; and (5) notify NGS at least 90 days prior to beginning salvage activities in order to plan for the possible relocation by NGS of the geodetic station marker it has identified.

3. ESPN must serve a copy of this decision and notice on Drug Plastic and Cabot within 5 days after the service date of this decision and certify to the Board that it has done so.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

6. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached for the above described portion of the line by the 180th day after the effective date of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, ESPN may fully abandon the above-described portion of the line, provided the conditions imposed above are met.

8. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by November 28, 2008, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee of $1,500. See 49 CFR 1002.2(f)(25).

9. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

10. Provided no OFA has been received, this exemption will be effective on November 28, 2008. Petitions to stay must be filed by December 3, 2008, and petitions to reopen must be filed by December 15, 2008.

11. Pursuant to the provisions of 49 CFR 1152.29(e)(2), ESPN shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by ESPN's filing of a notice of consummation by November 18, 2009**,** and there are no legal or regulatory barriers to

consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

EXHIBIT 1

	ESPN Base Year operations (1/1/07-12/31/07)	Berks County operations (1/1/07-12/31/07)	ESPN Forecast year operations (8/1/08-7/31/09)	STB Forecast year operations (8/1/08-7/31/09)
Revenues attributable for:				
1. Freight originated and/or terminated on branch	53,526	53,526	43,190	43,190
2. Bridge Traffic				
3. All other revenue and income	29,400	29,400	21,000	21,000
4. Total revenues attributable (lines 1 through 3)	82,926	82,926	64,190	64,190
Avoidable costs for:				
5. On-branch costs (lines 5a through 5k)	163,256	102,025	145,774	145,774
a. Maintenance of way and structures	55,900	55,900	55,900	55,900
b. Maintenance of equipment	14,572	1,715	14,915	14,915
c. Transportation	35,149	15,254	36,347	36,347
d. General administrative	44,881	16,402	25,559	25,559
e. Deadheading, taxi, and hotel	3,733	3,733	4,502	4,502
f. Overhead Movement				
g. Freight car costs (other than return on freight cars)				
h. Return on value-locomotives	7,052	7,052	6,582	6,582
i. Return on value-freight cars				
j. Revenue taxes				
k. Property taxes	1,969	1,969	1,969	1,969
6. Off-branch costs	0	0	0	0
a. Off-branch costs (other than return on freight cars				
b. Return on value-freight cars				
7. Total avoidable costs(line 5 plus line 6)	163,256	102,025	145,774	145,774
Subsidization costs for:				
8. Rehabilitation *				
9. Administration costs (subsidy year only) **				
10. Casualty reserve account				
11. Total subsidization costs (lines 8 through 10)	0	0	0	0
Return on value:				
12. Valuation of property (lines 12a through 12c)		919,761	2,080,509	1,404,967
a. Working capital		385	2,953	5,591
b. Income tax consequences				
c. Net liquidation value		919,376	2,077,556	1,399,376
13. Nominal rate of return	0.1498	0.1498	0.1498	0.1724
14. Nominal return on value (line 12 time line 13) ***	0	137,723	311,660	242,216
15. Holding gain (loss)				
16. Total return on value (line 14 minus line 15)	0	137,723	311,660	242,216
17. Avoidable loss from operations (line 4 minus line 7)	(80,330)	(19,099)	(81,584)	(81,584)
18. Estimated forecast year loss from operations (line 4 minus lines 7 and 16)		(156,822)	(393,244)	(323,800)
19. Estimated subsidy (line 4 minus 7,11, and 16)		(156,822)	(393,244)	(323,800)

* This projection shall be computed in accordance with § 1152.32(m).

** Omit in applications pursuant to §§ 1152.22 and 1152.23.

*** If a negative for the "forecast year operations" insert "0" in this line