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SERVICE DATE - DECEMBER 31, 1996

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-32 (Sub-No. 75X)

BOSTON AND MAINE CORPORATION--ABANDONMENT EXEMPTION--  
IN HARTFORD AND NEW HAVEN COUNTIES, CT

STB Docket No. AB-355 (Sub-No. 20X)

SPRINGFIELD TERMINAL RAILWAY COMPANY--DISCONTINUANCE  
OF SERVICE EXEMPTION--IN HARTFORD AND NEW HAVEN COUNTIES, CT

Decided: December 20, 1996

On September 12, 1996, Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (ST) (jointly petitioners) supplemented the filing dated August 28, 1996, entitled "summary application and request for exemption" to include ST's discontinuance of service and to seek exemptions under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903. B&M seeks to abandon, and ST seeks to discontinue service over, a 9.50-mile portion of rail line, known as the Canal Branch, located between milepost 14.50 at Cheshire and milepost 24.00 at Southington, in Hartford and New Haven Counties, CT.

Comments and protests were filed by the Cheshire Economic Development Commission, Southington Town Council, State Senator Brian McDermott, F.L. Ariola, Rex Forge Division of J.J. Ryan Corporation (Rex Forge), Dalton Enterprises, Inc. (Dalton), and Country Lumber, Inc. (Country Lumber). The town manager, on behalf of the town of Cheshire, also requests issuance of a notice of interim trail use or abandonment (NITU) under the National Trails System Act (Trails Act), 16 U.S.C. 1247(d), as well as a public use condition under 49 U.S.C. 10905. Rex Forge filed a notice of intent to file an offer of financial assistance. The Railway Labor Executives' Association seeks imposition of labor protective conditions. We will deny the petitions for exemption.

BACKGROUND

The line proposed for abandonment is part of a railroad system under the control of Guilford Transportation Industries, a noncarrier. This system is comprised of the B&M, ST, Maine Central Railroad Company, and Portland Terminal, and operates from northern and eastern Maine through New Hampshire, Vermont, Massachusetts, Connecticut and New York.

Operations on the line are conducted by ST, pursuant to a lease agreement dated October 9, 1986. On November 23, 1994, the line was embargoed due to track conditions.<sup>1</sup> B&M seeks to abandon the line and discontinue service by ST stating that substantial rehabilitation and maintenance are not justified by

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<sup>1</sup> Association of American Railroads' Consecutive Sheet 165, issued November 23, 1994.

the low volume of traffic and poor revenue generated by the line.

B&M projects costs and revenues for the "forecast year" (the 12-month period from July 1, 1996, through June 30, 1997), by assuming flat 1994 revenues and expenses, and increases in labor costs of between 25% and 51% based on collective bargaining agreements, as follows:

Revenue Attributable:	\$ 53,000
Avoidable Costs	\$ 98,000
Return on Value <sup>2</sup>	\$ 222,300

Traffic data submitted by B&M reflected that it transported 24 cars for Country Lumber and 58 cars for Copeland Company (now Dalton) in 1994, and that no traffic moved in 1995 or the first 6 months of 1996.

B&M states that there has been no rail service over the line, due to hazardous operating conditions, since it was embargoed on November 23, 1994. B&M claims that the impact, if any, of the proposed abandonment, on two former shippers would be minimal, and that no disruption to customers would result. B&M further asserts that several sources of alternative transportation service are available and that Country Lumber is currently using a reload service and receives freight at B&M's Waterbury Yard and that Dalton Enterprises has publicly announced the construction of a 20,000-square foot addition to its existing location to better accommodate truck traffic. Three shippers, however, have filed comments or protests in opposition to the proposed abandonment and discontinuance of service.

#### SHIPPER AND COMMUNITY INTERESTS

Dalton Enterprises, Inc., a manufacturer of asphalt and sport surface materials, uses the line to bring in raw materials for processing at its plant. Dalton says that it built and later expanded its plant in 1989 in reliance upon rail service.

Dalton disputes B&M's appraised value of the line at \$1.9 million. Dalton asserts that possible environmental contamination of the line from an adjacent property owned by Ball and Socket Manufacturing Corp. would diminish its value. Dalton submitted an appraisal it obtained, which values the portion Dalton wishes to purchase at \$55,000, compared to \$150,000 as appraised by B&M. This, according to Dalton, leaves B&M's valuation of the entire line in question.

Dalton also disputes petitioners' projection that revenues over the line during the forecast year would not exceed those earned in 1994. Dalton says that its business has increased and that it is currently capable of receiving its raw materials in approximately 135 rail cars per year, as opposed to 58 rail cars

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<sup>2</sup> B&M's appraised value of the line as of July 5, 1995, was \$1,900,000.  $\$1,900,000 \times 11.7\% = \$222,300$ . The return on value is computed by multiplying the value of the line by the railroad's cost of capital, which the Board has determined to be 11.7%. See Railroad Cost of Capital - 1995, Ex Parte No. 523 (Sub-No. 1) (STB served June 5, 1996).

per year it was receiving in 1994. Dalton also says that it may ship more traffic by rail, if it opens a new product line.

Dalton contends that the proposed abandonment could result in its inability to remain in business. Because Cheshire's zoning for industrial use is confined to a narrow strip of land adjacent to the rail line, Dalton states that, when the line was embargoed, Dalton was forced to use trucks. The trucks cannot make the turn onto Dalton's loading docks without going onto B&M's property. Dalton contends that, if rail service is not restored and B&M's property is acquired for trail use, Dalton will be forced out of business.

Dalton also disputes B&M's statement that Dalton has publicly announced a construction of a 20,000-square foot addition to its existing building to better accommodate truck traffic. Dalton states that issues need to be resolved with an owner of an easement before that addition can be constructed.

Dalton supplemented its protest on December 3, 1996, advising that negotiations for the potential sale of a portion of B&M's right-of-way to Dalton have broken down. Negotiations were conditioned upon the willingness of the town of Cheshire to locate its proposed linear park on the westerly side of the line so Dalton could use the easterly side to access Route 70. Dalton also advises that on November 21, 1996, it filed a complaint under 49 U.S.C. 11903 and 11704 with the United States District Court for the District of Connecticut, Civil Action No. 396CV02355, seeking an award of damages for an illegal embargo and a court order that service over this line be resumed.

Country Lumber, Inc., a company that has been in business 21 years and employs 25 people, anticipates increasing its traffic to 50-70 cars, and estimates a business loss of \$40,000 a year because of the embargo.

Rex Forge produces steel and stainless forgings and conducts galvanizing operations at its Plantsville facility. Rex Forge says that the rail line is critical to its business, as it offers the only means of transporting heavy metal presses weighing approximately 300,000-600,000 pounds to and from its plant. Contrary to B&M's statement of no traffic in 1995, Rex Forge submitted evidence that B&M delivered a 300,000-pound metal press for Rex Forge on January 20, 1995, after the line was embargoed. Rex Forge admits that those shipments are rare, but states that it is critical to Rex Forge's business that rail access to its plant be retained. To ensure continued rail service to its business, Rex Forge has filed a notice of intent to submit an offer of financial assistance.

The Southington Town Council (Council) supports the abandonment, stating that even though it desired to see the line rejuvenated, the town has no shippers. The Council filed a second comment favoring cooperation between B&M and Rex Forge in ensuring delivery of equipment to Rex Forge's manufacturing plant.

The Cheshire Economic Development Commission (CEDC) has expressed concern that loss of the rail line would affect the efforts of state and town officials to attract business investment to a vacant 500,000 square-foot facility and

industrial strip abutting the line. CEDC says that abandonment would harm the growth potential of Dalton and County Lumber and retard needed investment and employment opportunities for Connecticut residents recovering from a severe recession.

State Senator Brian McDermott opposes the abandonment, stating that the rail line is vital to the area's economic future, that current prospects of companies seeking to locate in the area would be hampered if the line were abandoned, and that the current nonuse of the line is already affecting existing businesses.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned, or service discontinued, without 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.

B&M originally filed a formal application for abandonment. B&M, however, amended its filing and requested that it be exempted from our regulatory review and approval of the proposed abandonment under 49 U.S.C. 10903. B&M's reason for filing the exemption rather than an abandonment application is that it needed to expedite the abandonment because the town of Cheshire allegedly wants to buy the line and use it for a trail using fiscal 1996 funds on the project. B&M argues that an exemption is justified because the transaction is limited in scope because the line has not been in service for almost 2 years,<sup>3</sup> and that there are only two shippers, and that they have alternative transportation services.

Contrary to B&M's statement, the town of Cheshire has provided no evidence that it wants the line to be abandoned so that it can purchase it as a trail. Rather, it opposes the abandonment and argues that the city needs an active rail line. While the town of Cheshire has filed a request for trail use, this does not conflict with its general opposition to the abandonment.

Petitioner's primary justification for seeking an exemption rather than filing a formal application to abandon the line is that the two identified shippers, Dalton and Country Lumber, will not be harmed by the abandonment because they will have alternative transportation services. The three shippers, on the line, however, have presented evidence that they will be harmed by the transaction. Two of the shippers have raised doubts as to whether they will have access to alternative transportation service.

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<sup>3</sup> B&M's belief that it would soon qualify for a 2-year out of service class exemption under 49 CFR 1152.50 based on when the line was embargoed is in error. Dalton filed its District Court complaint arguing that there has been an illegal embargo on November 21, 1996, which would prohibit the use of the class exemption.

It appears that Dalton's business will be seriously disrupted because no access for truck deliveries will be available if B&M's property is acquired for trail use. Likewise, Rex Forge's oversized shipments appear to require rail movement because of highway and bridge limitations, and without any agreement with B&M for a future movement of oversized equipment, Rex Forge will be without alternative transportation service.

Also doubts have been raised about the alleged unprofitability of the line. Protestants Dalton and Country Lumber contend that their traffic has increased. They dispute B&M's portrayal of the forecast year projections at the 1994 level. Rex Forge also submits that B&M did move a shipment after the line was in fact embargoed, which brings into question whether at least a portion of the line could be restored to service without significant costs to B&M.

On reply, B&M does not refute protestants' statements' that additional traffic is available. Rather, B&M offers its property for sale to Dalton subject to the State's and Cheshire's right of first refusal to acquire the property for public use.<sup>4</sup>

The record contains no information on what rehabilitation is necessary or what it would cost to restore the line to service. Nor does the record contain an estimate of the line's revenue potential if protestants' current traffic projections were taken into consideration. Based on the protests and comments received, and the concerns raised therein, without supporting evidence as to the cost of restoring the line to service and a more representative forecast year projection to reflect increased traffic, we are unwilling to exempt the abandonment and discontinuance of operations on the record before us. Upon review of the record before us, we conclude that petitioners have failed to establish (nor are we able to find) that continued regulation of this proposal is not necessary to carry out the rail transportation policy.<sup>5</sup>

We believe that the shippers' concerns warrant a more thorough review. We therefore conclude that use of the exemption process is not appropriate in these circumstances and that the petitions for exemption should be denied.

The exemption procedure under section 10502 for abandonments applies where the abandonment transaction is limited in scope or will not result in an abuse of market power. Typically, the type of abandonment transactions that are exempted are those where the shippers do not contest the abandonment or, if they do contest it, revenue from their traffic is marginal compared to the cost

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<sup>4</sup> If a shipper offers to purchase the property under 49 U.S.C. 10904 for continued rail service, and the offer is approved by the Board, then the property is not abandoned and, consequently, preexisting promises to sell the abandoned line for public use could not have effect.

<sup>5</sup> The rail transportation policy provides, among other things, that in regulating the railroad industry, it is the policy of the United States Government to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense.

of the operation of the line. Here, the shippers contest the abandonment and their traffic is the primary source of the line's revenues and appears to be potentially substantial compared to the line's costs. The fact that these shippers challenge the abandonment and, more importantly, that two of the shippers possibly have no transportation alternatives at the present time, causes us to conclude that an abandonment exemption is not the appropriate vehicle for seeking an abandonment in these circumstances. On the facts presented, we are unable to find that the transaction is limited in scope or that regulation is not needed to protect shippers from the abuse of market power.

In abandonment exemption proceedings where, as here, the record does not allow for the granting of the exemption, the Board has often allowed the parties to file additional comments in order to resolve whether the abandonment exemption was justified. Under the ICC Termination Act of 1995, however, we will, in essence, be required to decide an abandonment exemption petition in 110 days, to allow for offers of financial assistance to be submitted by the 120th day after filing of a petition for exemption. See 49 U.S.C. 10904 and Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996). We expect that in many cases, there will not be sufficient time for us to provide parties an opportunity to supply further evidence and still meet the statutory time limitations.

Consequently, in this proceeding, and, quite likely, in future abandonment exemption proceedings, where there is an inadequate record on which to grant the petition for exemption, the petition will be denied outright. The petitioner may refile the petition for exemption if it can cure the noted problems. In the alternative, it may file a formal application for abandonment in the first instance.

Our denial of B&M's and ST's requests to abandon and discontinue service via the exemption process moots labor protection issues and environmental issues (including the request for interim trail use filed by Cheshire). Our action also moots protestant Rex Forge's request for oral hearing.

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

It is ordered:

1. The petitions for exemption are denied.
2. This decision is effective 30 days after its service date.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams  
Secretary