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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 140)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT—
IN LANCASTER AND GAGE COUNTIES, NE, AND MARSHALL COUNTY, KS

Decided: January 28, 2000

By decision and certificate of interim trail use or abandonment (CITU) originally served on December 17, 1999 (December decision),[1] we approved an application under 49 U.S.C. 10903 by Union Pacific Railroad Company (UP) to abandon a 57.72-mile rail line known as the Beatrice Branch extending from milepost 66 near Jamaica, NE, to milepost 125 near Marietta, KS,[2] in Lancaster and Gage Counties, NE, and Marshall County, KS.[3] The abandonment was scheduled to become effective on January 16, 2000. On January 3, 2000, Southeast Nebraska Cooperative Co. (SNC) filed a petition to stay the effective date pending disposition of its accompanying petition asking that we reopen the proceeding and deny abandonment of the 28.72-mile southern segment of the line.[4] In addition to SNC's petition, we received a letter dated December 23, 1999, from United States Senator J. Robert Kerrey on behalf of a number of his constituents, including Mr. Monty Johnson of SNC, expressing their concerns over our decision to grant the abandonment application, and a letter dated January 13, 2000, from United States Congressman Doug Bereuter, urging careful review of SNC's petition to reopen. UP replied to SNC's petition. In a decision served January 14,

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[1] A corrected decision and CITU was served on December 22, 1999. All references in this decision to the decision and CITU are to the corrected decision.

[2] The track mileage is 1.28 miles less than the milepost differential because a track relocation on the line between Beatrice and Holmesville, NE, created a milepost discontinuity. (Milepost 101.72 now coincides with milepost 103.)

[3] Notice of the filing of the application was served and published at 64 FR 50863-64 on September 20, 1999.

[4] Service over the Beatrice Branch was performed as two separate movements: (1) a local train originating in Lincoln, NE, provided service, as needed, over the 29-mile northern segment between milepost 66 near Jamaica and milepost 95 north of Beatrice; and (2) a local train originating in Marietta provided service, as needed, over the 28.72-mile southern segment between milepost 95 and milepost 125 near Marietta. UP submitted bifurcated data for the separate segments.

2000, the effective date of the abandonment with respect to the 28.72-mile southern segment was stayed until January 31, 2000. After considering all of the arguments raised on appeal, we will deny the petition to reopen.

## DISCUSSION AND CONCLUSIONS

Under 49 CFR 1152.25(e)(4), a petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. Petitioner argues that we committed material error by: (1) misstating and misapplying the law involving burden of proof issues in abandonment proceedings; (2) not accepting SNC's reply verified statement; (3) not finding that UP has an obligation to provide 75-car trainload service; (4) accepting UP's forecast year normalized maintenance-of-way (MOW) costs; and (5) not finding that SNC's 715-car scenario was the best evidence of record. Additionally, SNC argues that virtually every finding that we made in our analysis regarding a need for continued service over the southern segment involved material error.

Burden of Proof. In December decision, slip op. at 9, we stated that the statutory standard governing an abandonment or discontinuance of service is whether the present or future public convenience and necessity permit the proposed abandonment or discontinuance. SNC is correct that the ultimate burden of proving that the public convenience and necessity permits a proposed abandonment rests with the railroad, but UP has clearly met that burden. The continued operation of the southern segment would impose a substantial economic burden on UP, and any harm to the shippers and the community from the proposed abandonment is outweighed by the demonstrated harm to UP and the burden on interstate commerce through continued operation.

75-Car Service. Virtually all of the arguments in the petition to reopen are tied to one overriding issue: UP's termination of 75-car service to SNC. The Burlington Northern and Santa Fe Railway Company (BNSF) provides direct service to SNC's elevator at Beatrice, and UP must use BNSF's rail siding to provide service to SNC. BNSF's track is designed to accommodate 54-car service. UP re-designated SNC's facility from a 75-car to a 26-car facility in April 1998 for two reasons: (1) the 75-car operation created a safety hazard because road crossings in Beatrice were blocked for extended periods of time; and (2) two crews were required to switch the larger 75-car trains. See December decision, slip op. at 10-11 n.23. SNC argues that the safety concerns can easily be eliminated because BNSF is willing to extend its yard limits to allow trains to be assembled farther north,[5] and SNC has offered to pay the cost of a second UP train crew outright or to adjust the transportation rate to provide compensation for that cost. Accordingly, SNC contends that UP's refusal to restore 75-car service is unreasonable and unjustified. SNC argues that a carrier has an obligation to seek means of continuing a service for which a demand has been shown and that abandonment is to be denied when the carrier has failed or refused to honor that obligation.

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[5] Providing service in 75-car trains would require additional construction costs that would presumably have to be borne by UP.

UP maintains that its decision to reduce SNC's facility to 26-car service was an appropriate exercise of its "ratemaking freedom and managerial discretion," citing Burlington Northern RR. Co.—Abandonment, 7 I.C.C.2d 308 (1990), aff'd sub nom. Association for Branch Line Equality v. ICC, 972 F.2d 1336 (9th Cir. 1992) (Table) (BN).[6] Given the safety and cost considerations involved, we agree that UP's decision to provide service at BN's siding in 26-car lots was a reasonable exercise of UP's management discretion. (Indeed, BNSF—the owner of the track—does not offer 75-car service at this location.) Thus, there is no evidence to support a finding that UP has ignored or deliberately suppressed the demand for its service by deciding not to offer 75-car service.

Moreover, we are not persuaded that, if the legitimate safety and operating problems that UP raises could be overcome and 75-car service were restored, traffic levels would climb to the higher levels of several years ago. SNC has failed to explain why its demand for UP's rail service would be significantly higher than it is with the existing 26-car service. Ordinarily, the attraction of unit-train, as opposed to single-car, service is that costs and rates can be substantially reduced. It is far from clear, however, that 75-car service could be provided here at a lower cost and rate than 26-car service. In fact, the opposite appears to be the case. SNC has not shown any other reasons that would make 75-car shipments more attractive to it than 26-car shipments.

Refusal to Accept SNC Reply. SNC's argument that, by not accepting a reply verified statement from it (even though such pleadings are prohibited under our rules), we improperly gave weight to false or materially misleading allegations by UP, also lacks merit. For the most part, the information in the reply relates to the circumstances surrounding UP's decision to limit SNC's facility to 26-car service.[7] The tendered evidence was not crucial to our analysis and would not alter

[6] In the cited case, after Burlington Northern Railroad Company (BN) canceled its 26-car multiple-origin rate, the majority of the line's traffic was diverted to motor carriers because local elevators were not large enough to meet the required volumes under the remaining 26-car single-origin rate. An Administrative Law Judge (ALJ) initially found that the line segment would generate a substantial profit if BN were to reinstate "reasonably-related" 26-car multiple-origin rates and he denied the abandonment application. Burlington Northern RR. Co.—Abandonment, 7 I.C.C.2d 272, 296 (1990). On administrative appeal, the Interstate Commerce Commission (ICC) granted the abandonment, finding that the "ALJ's holding went beyond Commission and judicial precedent defining the present or future public convenience and necessity," BN, 7 I.C.C.2d at 315, and that the ALJ had "imposed an additional obligation on the carrier that would impermissibly constrain its ratemaking freedom and managerial discretion," id. at 316.

[7] SNC's reply purports to correct allegedly false or misleading factual allegations in UP's reply statement with regard to: (1) 1997 traffic levels; (2) UP's share of SNC's traffic prior to April 1998, when UP switched from 75-car train service to 26-car service; (3) UP's explanation for the switch to 26-car service; (4) a UP contract offer; and (5) SNC's failure to tender newly available traffic. December decision, slip op. at 1-2.

the outcome of this proceeding, in view of our declination to second-guess UP's discretionary management decision regarding the level of service offered at the SNC facility.

Tie Replacement Costs. We also reject SNC's allegation that we erred in accepting UP's forecast year normalized MOW costs as the best evidence of record.[8] The thrust of SNC's argument is that we should have rejected UP's cost for crosstie replacement, which would have reduced MOW costs for the southern segment by $1,354 per mile or a total of $38,887.[9] However, SNC does not claim to have made an inspection of the line and does not cite any credible evidence that would enable it to determine the condition of the crossties. Instead, SNC bases this argument in part on our asserted "finding" that 70% of the line's crossties are non-defective. Because this number exceeds the FRA Class 1 safety standard, SNC contends that we should have found that normalized MOW costs are unneeded and inappropriate where the current condition of the line significantly exceeds FRA Class 1 safety standards. But saying that ties are "non-defective" for salvage in garden use does not mean that they are not in need of replacement in their intended function as rail ties.[10]

Moreover, UP's crosstie replacement costs appear to be reasonable and are supported by credible expert testimony. UP's witness developed MOW costs based on two personal inspections of the line. In accepting his testimony as the best evidence of record, we noted that UP's material replacement quantities are reasonable,[11] that UP's crosstie replacement rate was somewhat lower than we usually see for a line in FRA Class 1 condition, and that UP's unit cost of $6,877 per route-mile was within the range of maintenance costs we expect to see for FRA Class 1 track based on

[8] UP estimates MOW costs of $6,877 per route-mile, or a total of $197,498 per year for the southern segment.

[9] SNC did not raise the issue of crosstie replacement costs in its protest. Instead, SNC argued that UP's use of normalized MOW costs results in an overstatement of expenses because the line currently meets Federal Railroad Administration (FRA) Class 2 safety standards. Moreover, because of the low volume of traffic on the line, SNC argued that it would be unnecessary for UP to perform normalized FRA Class 1 maintenance in the forecast year and for some time into the future. Thus, SNC argued that historical MOW costs, prorated on a mileage basis, should be used to determine MOW costs for the southern segment. December decision, slip op. at 5-6.

[10] As we explained in December decision, slip op. at 6 n.17:

> FRA Class 2 safety standards require a minimum of 36% non-defective ties. UP indicates that 20% of the ties are relay quality, 50% are landscape quality, and 30% are scrap. (Landscape grade ties can be classified nondefective as long as they are left in place, even though they would be rendered inappropriate for relay purposes due to damage during removal.)

[11] UP's maintenance cycle is 8 years; its annual crosstie replacement rate is 20 per mile. December decision, slip op. at 6 n.18.

other recent abandonments. We noted that, unlike the situation in Union Pacific RR. Co. — Aban — Wallace Branch, ID, 9 I.C.C.2d 325 (1992) (Union Pacific),[12] there is no evidence here to support a conclusion that historical maintenance cost would be adequate to maintain this line either at its current condition or at FRA Class 1 safety standards.

Traffic Projections. Contrary to SNC's assertions, UP's traffic projection of 190 cars appears reasonable and is supported by the record, including the evidence of recent very light traffic levels.[13] At the 190-carload level, operation of the southern segment would result in an annual total economic loss of $338,347.

In contrast, SNC's 715-carload scenario is extremely unlikely. SNC argues that the historic base year traffic volume (415-carloads for this line segment)[14] should be the beginning point for forecast year traffic volume, and it claims that traffic will increase by 300 carloads due to SNC's recent acquisition of Herkimer Cooperative Business Association (HCBA), a company with three nearby grain elevators.[15] But, as explained in our prior decision, the newly acquired grain elevators are not located on this rail line and grain would have to be trucked to SNC's facility at Beatrice for reshipment. Moreover, as of October 18, 1999, none of the new traffic had moved via UP. SNC had only shipped 77 carloads (from any source, HCBA or otherwise) via UP between January 1 and October 18, 1999, all moving in the month of January. We presume that there was some good reason that much of this traffic was not routed over this UP line before SNC acquired these offline elevators, and that the reason continues.

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[12] There, a 51.1-mile segment of the 71.5-mile Wallace Branch met the higher FRA Class 3 safety standards and the evidence indicated that it would take approximately 12 years for the track to deteriorate to FRA Class 1 safety status. Union Pacific, 9 I.C.C.2d at 370.

[13] The 190-car projection includes 156 cars of SNC grain traffic and 34 cars of non-grain traffic. UP's projection that SNC's traffic would decline from 381 carloads in the base year to 156 carloads in the forecast year because BNSF can use its own facilities to handle larger, 54-car unit trains at lower rates (BNSF does not have to absorb reciprocal switching charges) is reasonable. See December decision, slip op. at 4. Reasonable minds could differ on the precise level of carloads UP would lose, but UP's analysis is sound.

[14] This consists of 381 carloads of grain (sorghum and soybeans) and 34 carloads of other non-grain commodities, including 3 carloads of fertilizer for SNC.

[15] SNC estimated that it would ship an additional 300 carloads via UP based on an assumed 800 to 1,000 (average of 900) carloads of new traffic from HCBA's elevators. Historically, SNC has shipped approximately 40% of its traffic via UP. Thus, SNC estimated that 360 carloads of this new traffic would move over UP's line and that the remainder would be handled by BNSF. Because these additional carloads were projected to begin moving in October of 1999, SNC anticipated that it would ship an additional 300 carloads via UP during the remainder of the forecast year. December decision, slip op. at 4 n.10.

SNC argues that we should not disregard HCBA traffic simply because it had not begun to move by rail in the first 18 days after the acquisition was consummated. Contending that it takes more than two weeks to alter grain shipping patterns, SNC asserts that a 25-car shipment of HCBA grain was scheduled to move via UP during the second or third week of November 1999. That still would not support a 300-carload projected increase in traffic.[16] Rather, SNC's position is undermined by its failure to ship any traffic, other than the 25-carloads of new HCBA traffic, via UP during the first four months of the forecast year. The actual traffic between January 1 and October 15, 1999 was below 100 cars.

SNC attempts to excuse its failure to tender traffic to UP by arguing that the period from January to mid-October does not include SNC's heavy rail shipping season. We are left to conclude that SNC's heavy shipping season falls somewhere outside of the period from January to mid-November. It simply is not credible that in the past, when UP's traffic averaged 1,281-carloads annually, most of that traffic moved in the short period between mid-November and the end of December. Rather, the logical conclusion is that BNSF has been handling SNC's traffic.

Accordingly, we reject the 715-carload level for the southern segment as wholly speculative. We believe that even the 415-carload base year figure is an optimistic projection for total future traffic. But even if we were to use that 415-carload traffic projection figure, we do not believe that the revenue that might be achieved would justify our requiring retention of this line. Because we have no evidence concerning per-car revenues at the 415-car traffic level,[17] we have assumed, for purposes of our analysis, that UP could achieve the same per-car revenues as at the 190-carload level ($1,803 per carload). Even excluding the $38,887 crosstie replacement expense (the only expense that protestant disputes), the southern segment would incur an overall yearly economic loss of $172,561. When crosstie replacement costs are included, as they should be, the yearly total economic loss at the optimistic 415-car level would be $211,448.

[16] We note that SNC's noncommital statement that it can cause the HCBA traffic to move over UP does not mean that it will truck the HCBA grain to Beatrice for rail movement via UP.

[17] The revenue per carload at the 415-car level for the forecast year would depend on where the grain is actually being shipped. Neither party developed forecasts at the 415-carload level.

Opportunity Cost. SNC would have us compare what it incorrectly[18] asserts would be UP's return on the net liquidation value of the southern segment to UP's latest systemwide return on investment. That is not the appropriate methodology for computing opportunity costs.[19] To compute such costs, we multiply the net liquidation value of the line by the rail industry cost of capital, not by the carrier's actual rate of return. The ICC properly rejected the kind of approach urged here by SNC. See Cartersville Elevator, Inc. v. ICC, 724 F.2d 668, aff'd on reh'g en banc, 735 F.2d 1059 (8th Cir. 1984).

Public Interest Balancing. The railroad's economic loss here is substantial. As we stated in December decision, slip op. at 11, economic loss alone does not warrant abandonment where rural and community development would be seriously harmed by abandonment. Based upon a 190-car per year traffic projection, which we think is most likely, the line would lose $338,347 per year. Even using the more optimistic 415-car traffic projection, the line would lose $211,448 per year. Here, SNC argues that it would be seriously harmed by the loss of UP's rail service because often the most advantageous market for its grain is a location most economically and efficiently reached by UP. We previously found this argument unconvincing, given that SNC had not shipped any traffic via UP since January 1999. On appeal, SNC still does not identify any particular points that are served by UP but not by BNSF. Thus, SNC has failed to show how it would be seriously harmed by the loss of UP's rail service. SNC will continue to have direct rail service from BNSF, its primary carrier. Although SNC will no longer be able to take advantage of reciprocal switching to play off UP and BNSF against each other, motor competition will remain to mitigate this impact. Thus, we again conclude that any harm to the shippers and the community from the proposed abandonment of this line segment is outweighed by the demonstrated harm to UP and the burden on interstate commerce through continued operation.

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[18] SNC wrongly excludes all crosstie replacement costs and assumes that there would be 715 carloads of traffic per year.

[19] Opportunity costs reflect the economic loss experienced by a carrier from forgoing a more profitable, alternative use of its assets.

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

It is ordered:

1. The petition to reopen is denied.

2. This decision is effective on January 31, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes and Commissioner Clyburn.

Vernon A. Williams
Secretary

Computation of Revenue Attributable to the Line, Avoidable Costs, and
Reasonable Return on the Value of the Line to Be Abandoned
Southern Segment - MP 95 to MP 125 With Adjusted MOW Expense
**(Including Tie Replacement for Subsidy Calculation)**

| | Railroad's Forecast Year. 190 Carloads | Railroad's Forecast Year 715 Carloads | Using Base Year Figure of 415 Carloads |
|---|---|---|---|
| 1. Freight Orig. and/or Term. on Branch | $342,484 | $1,243,504 | $748,245 |
| 2. Bridge Traffic | 0 | 0 | 0 |
| 3. All Other Revenue and Income | 17,375 | 17,375 | 17,375 |
| **4. Total Attributable Revenue (Ls. 1 thru 3)** | **$359,859** | **$1,260,879** | **$765,620** |
| **5. On-branch Costs:** | | | |
| a. Maintenance-of-Way and Structures | $158,611 | $158,611 | $158,611 |
| b. Maintenance-of-Equipment (Including Depreciation) | 3,727 | 5,862 | 4,058 |
| c. Transportation | 29,846 | 80,958 | 45,109 |
| d. General & Administrative | 0 | 0 | 0 |
| e. Deadheading, Taxi and Hotel | 0 | 0 | 0 |
| f. Overhead Movement | 0 | 0 | 0 |
| g. Freight Car Costs (Other Than Return) | 7,505 | 27,314 | 16,459 |
| h. Return on Value - Freight Cars | 6,856 | 26,521 | 16,039 |
| i. Return on Value - Locomotives | 3,527 | 5,924 | 4,114 |
| j. Revenue Taxes | 0 | 0 | 0 |
| k. Property Taxes | 0 | 0 | 0 |
| **l. Total On-Branch Costs (Ls. 5a thru 5k)** | **$210,072** | **$305,190** | **$244,390** |
| **6. Off-branch Costs:** | | | |
| a. Off-Branch Costs (Other Than Return) | $179,374 | $652,344 | $379,613 |
| b. Return on Value - Freight Cars | 41,699 | 155,628 | 92,431 |
| c. Off-Branch URCS Multi-Car Adj. | (4,672) | (20,123) | (11,258) |
| **d. Net Off-br Costs (Ls. 6a+6b - 6c)** | **$216,401** | **$787,849** | **$460,786** |
| **7. Total Avoidable Costs** | **$426,473** | **$1,093,039** | **$705,176** |
| **8. Rehabilitation (Tie Replacement)** | $38,887 | $38,887 | $38,887 |
| 9. Administrative Costs (Subsidy Year Only) | 0 | 0 | 0 |
| 10. Casualty Reserve Account | 0 | 0 | 0 |
| **11. Total Subsidization Cost (Ls. 8 thru 10)** | **$38,887** | **$0** | **$0** |
| 12. Valuation of Road Properties | | | |
| a. Working Capital | $8,143 | $11,110 | $9,164 |
| b. Income Tax Consequences | (84,987) | (84,987) | (84,987) |
| c. Net Liquidation Value | 1,736,409 | 1,736,409 | 1,736,409 |
| **d. Total (Ls. 12a thru 12c)** | **$1,659,565** | **$1,662,532** | **$1,660,586** |
| 13. Nominal Rate of Return | 15.6% | 15.6% | 15.6% |
| l4. Nominal Return on Value (L. 12d x L. 13) | $258,892 | $259,355 | $259,051 |
| 15. Holding Gain (Loss) | $26,046 | $26,046 | $26,046 |
| **l6. Total Return on Value (L. 14 - L. 15)** | **$232,846** | **$233,309** | **$233,005** |
| **l7. Avoidable (Loss) or Profit from Operations (L. 4 - l. 7)** | **($66,614)** | **$167,840** | **$60,444** |
| **l8. Avoidable (Loss) or Profit Including Return on Value (L.4 - Ls. 7&16)** | **($299,460)** | **($65,469)** | **($172,561)** |
| **19. Estimated Subsidy Payment Without Tie Replacement(L.4 - Ls. 7, 11, & 16)** | **($299,460)** | **($65,469)** | **($172,561)** |
| **20. Estimated Subsidy Payment With Tie Replacement (Includes an additional $38,887 for tie replacement)** | **($338,347)** | **($104,356)** | **($211,448)** |