

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33386

DECATUR COUNTY COMMISSIONERS, ET AL.

v.

THE CENTRAL RAILROAD COMPANY OF INDIANA

Decided: September 28, 2000

In a complaint filed on April 2, 1997, Complainants¹ allege that The Central Railroad Company of Indiana (CIND) discontinued operations over, and abandoned, its 58-mile rail line between Shelbyville, IN, milepost 81.0, and Greendale, IN, milepost 23.0 (Shelbyville Line or Line),² without obtaining abandonment authority under 49 U.S.C. 10903 or an exemption under 49 U.S.C. 10502. Complainants charge that CIND unlawfully embargoed³ the Shelbyville Line,

¹ Complainants include: (1) three government entities—the Board of Commissioners of Decatur County, IN, the Board of Commissioners of Shelby County, IN, and the City of Shelbyville, IN; and (2) five Shipper Complainants—Lowe's Pellets & Grain, Inc. (Lowe's), Premier Ag Co-op, Inc. (Premier), Kolkmeier Brothers Feed, Inc. (Kolkmeier), Greensburg Milling, Inc. (Greensburg Milling), and Kova Fertilizer, Inc. (Kova). Knauf Fiberglass, GmbH (Knauf), located on track just to the north of the Line, is participating as an interested party.

² The parties refer to the southern terminus of the Shelbyville Line, milepost 23.0, as Greendale, Lawrenceburg Junction, or Thatcher. We refer to the point as Greendale.

³ An embargo is a carrier's notice to the railroad industry and affected shippers that a disability or interruption in operations exists which temporarily prevents it from providing service or performing its common carrier duties. See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325 (1981) (Kalo Brick). An embargo does not require prior Board approval. Under the procedures of the Association of American Railroads (AAR) Circular TD-1, effective January 1, 1991, an embargo is issued by a railroad through notice to the AAR and may remain in effect for 1 year, unless the railroad cancels or amends it. An embargo allows an immediate cessation of operations and temporarily excuses a railroad's common carrier service obligation, but the obligation is not extinguished until abandonment authority or an exemption is granted. See Gibbons v. United States, 660 F.2d 1127, 1234 (7th Cir. 1981). A railroad may be liable for damages if its embargo is found unreasonable. See GS Roofing Products Co. v. STB,

(continued...)

in violation of its common carrier obligation to provide service on reasonable request, 49 U.S.C. 11101, and established surcharges that were unlawful and the establishment of which constituted an unreasonable practice under 49 U.S.C. 10701-04. Complainants request that the five Shipper Complainants—Lowe’s, Kolkmeier, Greensburg Milling, Premier, and Kova—be awarded \$848,690 in damages for higher motor carrier freight rates paid and business lost in the absence of viable rail alternatives during the embargo period.⁴

CIND filed an answer denying the allegations on April 22, 1997, and we served a decision on September 30, 1997, instituting an investigation under 49 U.S.C. 11701 and adopting a procedural schedule for submitting evidence.⁵ Complainants filed their opening statement on October 30, 1997. CIND filed its Reply on December 1, 1997, and errata on December 18, 1997, and complainants filed their rebuttal statement on December 19, 1997, and supplemental rebuttal on January 22, 1998.⁶ We have fully reviewed the evidence, and, for the reasons discussed below, we find that CIND’s failure to operate over the embargoed segment of the Shelbyville Line for the period in question was not unlawful; that CIND did not violate its common carrier obligation under 49 U.S.C. 11101(a); and that the establishment of the disputed surcharge did not violate 49 U.S.C. 10701-10704. Therefore, CIND is not liable for damages, and this complaint is dismissed.

BACKGROUND

History of The Line.

The Shelbyville Line is the last 58 miles of the Shelbyville Secondary Track. CIND, an affiliate of Central Railroad Company of Indianapolis (CERA) and a wholly owned subsidiary of Central Properties, Inc. (CPI), became a carrier in 1991, when it acquired the 85.4-mile Shelbyville Cluster from Consolidated Rail Corporation (Conrail). The transaction primarily

³(...continued)
143 F.3d 387 (8th Cir. 1998) (GS Roofing).

⁴ Complainants also initially requested that CIND be compelled to restore service or that another rail carrier be directed to operate the Line under 49 U.S.C. 11123. Because operations resumed in November 1998, however, the request for restoration of service and directed operations need not be considered.

⁵ The September 1997 decision also denied CIND’s request that the proceeding be held in abeyance pending its initiation of an abandonment proceeding.

⁶ The parties submitted both confidential and public versions of their statements, with the operating and financial information redacted from the latter. To the extent possible, we have honored the parties’ confidentiality requests.

included the Shelbyville Secondary Track, between Shelbyville, at milepost 81 (to the northwest), and Cincinnati, OH, milepost 0.0 (to the southeast),⁷ and 76.3 miles of overhead trackage rights between Shelbyville and Frankfort, IN.⁸ See The Central Railroad Company of Indiana—Acquisition and Operation Exemption—Lines of Consolidated Rail Corporation, Finance Docket No. 31897 (ICC served July 25, 1991), pet. part. rev. denied (ICC served Dec. 10, 1991).⁹ CIND initially intended to interchange traffic with Conrail in Shelbyville. The two carriers, however, subsequently agreed to interchange traffic in Indianapolis instead. Beyond Frankfort, traffic moved over the lines of CERA, Winamac Southern Railway, and Toledo, Peoria and Western Railway Corporation (TPW).

The Shelbyville Line had been approved for abandonment in 1982,¹⁰ but was subsequently returned to service when Conrail entered into an agreement with the State of Indiana and local interests to provide local and overhead non-common carrier rail service. See

⁷ In addition to the Shelbyville Secondary Track, the Shelbyville Cluster included: the Lawrenceburg Industrial Track (approximately 3.8 miles) between Lawrenceburg Junction and Lawrenceburg, IN, and both the Greensburg Industrial Track (approximately 1.2 miles) and the Westport Industrial Track (approximately 1.25 miles) in Greensburg, IN.

⁸ The trackage rights extended in a northwest direction from Shelbyville through Indianapolis, IN, to Frankfort, and included: (1) the Shelbyville–North Secondary Track between Shelbyville, milepost 81, and Indianapolis, milepost 109.3; (2) the St. Louis Line between milepost 0.0 and milepost 1.1 in Indianapolis; (3) the Crawfordsville Secondary Track between Indianapolis, milepost 0.7, and Clermont, IN, milepost 12.6; and (4) the Logansport Secondary Track between Clermont, milepost 0.0, and Frankfort, milepost 35.5.

CSX Transportation, Inc. (CSXT) now operates this track. See CSX Corp.--Control and Operating Leases/Agreements--Conrail Inc., STB Finance Docket No. 33388 (Decision No. 89) (STB served July 23, 1998), clarified and modified (Decision No. 96) (STB served Oct. 19, 1998), petitions for review pending sub nom. Erie Niagara Rail Steering Committee v. STB, Nos. 98-4285, et al. (2d Cir. filed July 31, 1998). (Conrail Acquisition). (We hereafter refer to the Norfolk Southern entities collectively as NS.)

⁹ The acquisition was related to a concurrently filed exemption petition for CPI to continue in control of CIND when CIND became a rail carrier. See Central Properties, Incorporated—Control—The Central Railroad Company of Indianapolis and The Central Railroad Company of Indiana, Finance Docket No. 31896 (ICC served July 25, 1991) (Central Control), pet. rev. denied (ICC served Nov. 18, 1992).

¹⁰ See Conrail Abandonment Between N. Thatcher Glass and Sunman, IN, Docket No. AB-167 (Sub-No. 119N) (ICC served June 11, 1982); Conrail Abandonment in Ripley, Decatur and Shelby Counties, IN, Docket No. AB-167 (Sub-No. 197N) (ICC served June 11, 1982).

Consolidated Rail Corp.—Petition for Declaratory Order, 1 I.C.C.2d 284 (1984). When that agreement expired, Conrail and the States of Indiana and Ohio negotiated to return the Line to common carrier service. The agreement between Conrail and CIND resulted from this effort. See Central Control, slip op. at 1-2.

When CIND acquired the Line, almost all of it met Federal Railroad Administration (FRA) Class 2 standards.¹¹ CIND spent approximately \$271,000 to return the Line to service. Over the next 2½ years, CIND continued to maintain the segment between milepost 22 and milepost 0.0, but maintenance otherwise was deferred, and approximately 30 miles of track deteriorated to FRA Class 1 standards. In October 1994, CIND applied for \$704,804 in Federal Local Rail Freight Assistance (LFRA) funds to rehabilitate the track between milepost 22 and milepost 40 (essentially, the subsequently embargoed segment) to FRA Class 2 standards. The application was based on a cost/benefit analysis that included a projected \$476,515 increase in incremental revenues. The LFRA funds were to be used to replace cross-ties and perform ditching and surfacing.

CIND replaced its management in November 1994. The new management embarked on a program to rehabilitate the entire Line to FRA Class 2 standards. The segment between Greensburg, at milepost 63.0, and Sunman, IN, at milepost 39.0, was rehabilitated to FRA Class 2 standards in 1995. CIND's application for LFRA funds was also granted in part, and in May 1995, CIND was awarded \$172,521. However, as a condition of the grant, CIND was required to spend \$30 of its own funds for each \$70 of LFRA funds that it spent. CIND never used the LFRA grant funds.

The Embargo And Its Aftermath.

CIND states that it became aware of slippage, erosion, slides, and other problems between milepost 23.0 and milepost 39.0 during an inspection trip after heavy spring rains in 1996. The railroad made temporary repairs to permit continued operations but held off on a permanent resolution, claiming uncertainty over the Shelbyville Line's viability. CIND ceased operating over the 16-mile segment between milepost 23.0 and milepost 39.0 on February 24, 1997, after its personnel and a consultant inspected the line and found that significant slippage had occurred at milepost 32.8.

¹¹ FRA guidelines prescribe minimum track safety standards for railroads. See 49 CFR 213. FRA Class 2 standards require that track be maintained so as to permit operating speeds of up to 25 m.p.h. FRA Class 1 standards require that track be maintained so as to permit operating speeds of up to 10 m.p.h.. A railroad can continue operations on track that does not comply with minimum FRA Class 1 standards by designating it as "excepted" track. See GS Roofing, 143 F.3d at 390.

On the same day, CIND's President, Mr. Christopher Burger, telephoned the Shelbyville Line shippers and notified them by letter that rail operations were being discontinued over the affected segment but that they would continue to be served from the west. Mr. Burger advised the shippers that they would soon be notified of rate changes in connection with the new routing. He also warned that the affected segment might not be repaired, stating, "Based upon our knowledge of existing and potential traffic, we do not believe at this time that the expense of repairing, rehabilitating and continuing to operate the line can be justified." CIND Reply, V.S. Burger, Appendix 1, at 1.

At the time CIND stopped operations over the affected segment, the Shelbyville Line handled primarily overhead traffic. Premier, Kova, Lowe's, and Greensburg Milling at Greensburg,¹² and Kolkmeier at St. Paul, at milepost 73.0 (the Northend Shippers) were responsible for all of the local traffic that originated or terminated on the Line; none is located on the portion between milepost 23.0 and 39.0 on which CIND ceased to operate. Most of the Line's overhead traffic originated and/or terminated with shippers located on the 23 miles of CIND line between Greendale and Cincinnati (the Southend Shippers) and was interchanged with Conrail at Indianapolis or CERA at Frankfort.

A week after CIND ceased operating the 16-mile segment, CIND, on March 1, 1997, rerouted its Conrail interchange traffic from Indianapolis to Sharonville. Two weeks later, on March 13, 1997, CIND announced surcharges (CIND-9010) of \$700 or \$1,000 on all carloads moving between the Shelbyville Line and interchange points at Shelbyville, Indianapolis, or Frankfort, to become effective on April 2, 1997--the date this complaint was filed. On April 10, 1997, CIND placed the disputed embargo on the portion of the Line between milepost 23.0 and milepost 39.0.¹³ CIND Reply, V.S. Burger at 6.

¹² Kova, Lowe's, and Greensburg Milling are located on or at the 1.25-mile Westport Industrial Track. Apparently, Lowe's is located at the end of the spur, Greensburg Milling is located just off the main line, and Kova's traffic moves through Greensburg Milling's facility. See Central Railroad Company of Indiana—Abandonment Exemption—In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X) (STB served May 4, 1998) (CIND Abandonment), slip op. at 4 and 7.

¹³ In addition, CIND ceased operating the 1.25-mile industrial lead serving Lowe's. CIND notified Lowe's of this on March 17, 1997, immediately after CIND personnel had made a walking inspection of the lead, which, CIND stated, disclosed serious track structure problems that had been caused by poor drainage.

CIND gave notice of its intent to abandon the Shelbyville Line on July 2, 1997, and filed an amended System Diagram Map with the Board on August 7, 1997.¹⁴ CIND also negotiated with NS and CSXT seeking favorably restructured traffic flows and other concessions. No agreement was reached, however, and, on January 14, 1998, CIND filed a petition for exemption to abandon the entire 58-mile Shelbyville Line pursuant to 49 U.S.C. 10502.

The petition for abandonment exemption—which complainants and one additional shipper, Consolidated Grain & Barge Co., opposed--was denied. See CIND Abandonment. We found the record inadequate and advised that a formal application should be filed under 49 U.S.C. 10903, if CIND wished to pursue the abandonment. CIND filed a petition to reopen on May 22, 1998, and replies in opposition were filed on June 11, 1998. RailTex, Inc., then sought authority to acquire CIND and CERA, which was granted in RailTex, Inc.—Control Exemption—Central Properties, Inc., The Central Railroad Company of Indianapolis, and The Central Railroad Company of Indiana, STB Finance Docket No. 33585 (STB served June 26, 1998).

In a letter filed on November 3, 1998, CIND, now a RailTex subsidiary, notified the Board that it had decided to resume operations over the entire Shelbyville Line and withdrew its petition to reopen the abandonment proceeding.¹⁵ Accordingly, we discontinued the abandonment proceeding in a decision served on November 12, 1998.

DISCUSSION AND CONCLUSIONS

Reasonableness of the Embargo

An embargo can be issued by a carrier to temporarily cease or limit service when it is physically unable to serve specific shipper locations. Embargoes, which may be of varying duration, are quite common in the railroad industry and typically do not result in government intervention. They can be challenged, however, and in the rare case in which they are used improperly, a rail carrier may be liable for damages and/or an injunction. Under its common carrier obligation, the embargoing railroad must restore safe and adequate service within a reasonable period of time to any line as to which it has not applied for abandonment authority. A service curtailment that extends beyond a reasonable time can be construed as an illegal abandonment if unaccompanied by an abandonment application or exemption request. See GS Roofing Products Company, Inc., Beazer West, Inc., d/b/a Gifford-Hill & Company, Bean

¹⁴ See 49 CFR 1152.10.

¹⁵ In correspondence and related pleadings in December 1998 and January 1999, Complainants and CIND argued about some of the statements made in CIND's letter of November 3, 1998, withdrawing its abandonment proposal. We find these arguments to be either duplicative of or extraneous to the embargo and surcharge issues and thus will not separately address these claims here.

Lumber Company and Curt Bean Lumber Company v. Arkansas Midland Railroad and Pinsky Railroad Company, Inc., Docket No. 41230 (STB served Mar. 11, 1997) (GS Roofing Products), slip op. at 8, rev'd sub nom. GS Roofing.¹⁶

The reasonableness of an embargo is determined by a balancing test, taking into consideration such factors as the length of the service cessation, the carrier's intent, the cost of repairs, the line's traffic volume and revenues, and the carrier's financial condition. GS Roofing Products, slip op. at 9; Overbrook Farmers Union—Petition for Declar. Order, 5 I.C.C.2d 316, 322 (1989) (Overbrook); ICC v. Baltimore and Annapolis Railroad Company, 398 F. Supp. 454 (D. Md. 1975), aff'd, 537 F. 2d 77 (4th Cir.), cert. denied, 429 U.S. 859 (1976); Louisiana Railcar, Inc. v. Missouri Pacific R. Co., 5 I.C.C.2d 542, 545 (1989). The cost of repairs, relative to the volume of traffic on the line and the financial condition of the carrier, often is particularly important. See Overbrook, 5 I.C.C.2d at 323. Typically, an embargo is found to be invalid, or to constitute an unlawful abandonment, where the embargo is a long one and the cost of repairs is not substantial. See Overbrook, 5 I.C.C.2d at 323.

In applying the traditional balancing test to CIND's actions, we do so in the context of examining: (1) whether CIND's initial decision to impose an embargo was reasonable; and (2) whether CIND made all efforts that it reasonably could under the circumstances be expected to make to facilitate the reinstatement of service. See GS Roofing Products, slip op. at 9. Here, we believe the answer to both questions is yes, and hence, that CIND should not be found to be liable for damages.

A. The Imposition of the Embargo. At the outset, we find that CIND acted reasonably in imposing the embargo on the 16-mile segment of the Line in the first place. As we have noted, under well established procedures, the railroad decides in the first instance whether there exists an unsafe condition that temporarily prevents it from operating. Where, as here, we are called on to review such a determination, we defer to a railroad's judgment as to whether a line is safe to operate at a given point in time, so long as it is reasonable. GS Roofing Products, slip op. at 9.

¹⁶ In GS Roofing, the court agreed with the Board's conclusion that the railroad acted reasonably in initially embargoing a storm-damaged line, but concluded that the railroad should have repaired the track as soon as possible, even though the railroad made a determination shortly after instituting the embargo to abandon or otherwise dispose of it. The court therefore remanded GS Roofing Products for the Board to determine damages.

GS Roofing is inapposite. Here, the estimated costs of repairs needed to resume operations at pre-embargo levels (FRA Class 1 and 2) are far higher than in GS Roofing Products. See 143 F.3d at 392-393. Moreover, this Line carried mostly overhead traffic. Thus, unlike the situation in GS Roofing Products, alternative rail transportation was available for the entire time in which CIND stopped operating over the embargoed segment.

1. The Condition of the Track and the Cost of Repairs. Here, no one disputes that the affected 16-mile segment was unsafe on February 24, 1997, when CIND discontinued operating over it. Moreover, the problem clearly remained for some time. When Complainants' primary witness, Mr. Henry Weller (CIND's chief operating officer from 1991-94, and CERA's president and chief operating officer from 1989-94) visually inspected the Shelbyville Line between milepost 32.8 and milepost 37.7 and the Lowe's Industrial Spur on October 23, 1997, he found that there was slippage at milepost 32.8 and that the slippage should be repaired before it would be "prudent to operate trains." Complainants' Opening Statement, V.S. Weller at 5-6.¹⁷ Similarly, on October 15, 1997, Mr. G. Allen Davis, Jr. (president of Tri-States Railroad Consultants, Inc.) inspected the then-embargoed segment for Complainants and found that portion of the Line unsafe to operate. Complainants' Opening Statement, V.S. Davis at 4 and Exhibit A.

Complainants concede that there was a potential for slippage at milepost 32.8 but argue that the slippage would have been comparatively easy, and relatively inexpensive, to repair had it been addressed when first noticed in 1996, and that the failure to make the repair immediately exacerbated the problem and resulted in the repair cost's more than doubling. Complainants' Opening Statement, V.S. Davis at 4; V.S. Weller at 9. Specifically, Complainants submit a July 8, 1996 memorandum from Mr. John S. Johnson (CIND's vice president) to Mr. Burger and other CIND personnel (Johnson Memorandum), which contained a contractor's estimate for repairing the washout at milepost 32.8 and damage at other points. The contractor estimated that it would cost only \$41,303 to repair the line at milepost 32.8 and that the line at mileposts 33.5, 28.4, 23.5, and 14 could be repaired for \$4,560, \$6,080, \$13,600, and \$3,400, respectively, for a total of \$68,943. Complainants' Opening Statement, V.S. of John A. Broyles.

CIND does not provide any evidence or argument regarding the cost of repairing the washout in 1996,¹⁸ but submits a verified statement prepared by its engineering consultant, Mr. Richard H. McDonald, addressing the repair costs by 1997. Mr. McDonald inspected the Line over a 2-day period in May 1997 and identified four major problem areas along the embargoed segment that he attributed to erosion or washouts. He estimated: (1) that \$262,000 would be required to repair the embargoed segment and bring it up to FRA Class 1 standards (\$142,000 for repairs at milepost 32.8, and \$120,000 for repairs at mileposts 33.3-35.3, milepost 28.4, and milepost 23.5); that a total of \$775,000 would be required to upgrade the Line to FRA Class 1

¹⁷ Mr. Weller found that the Lowe's Industrial Spur met FRA Class 1 standards but that it was in a "less desirable condition" than the portions of the main line.

¹⁸ We accept the Complainant's estimates because they are the only evidence regarding the initial cost in 1996, and they have not been shown to be unreasonable.

standards (\$278,000 for erosion repairs,¹⁹ \$190,000 for tie replacement, and \$307,000 for bridge repairs); and (3) that a total of \$1,980,250 would be required to upgrade the Line to FRA Class 2 standards (in addition to the erosion and bridge repairs, \$1,395,250 was for tie replacement, resurfacing and weed control). Mr. McDonald claimed that, unless the line were upgraded to FRA Class 2 standards, the line could not be operated efficiently because train crews would not be able to complete a full trip under the Federal Hours of Service Law and the 10 mph speed limitation applicable to FRA Class 1 track. CIND Reply, V.S. of McDonald at 3-5.

Complainants contend that CIND's estimates are overstated. They argue that \$103,160 would be adequate to make the repairs at milepost 32.8 and that "several small washouts" on the embargoed segment could be repaired with very little trouble as normal maintenance. Complainants' Opening Statement, V.S. Davis at 4 and Attachment. Complainants estimate that an additional \$252,505 would bring the entire embargoed segment up to FRA Class 1 standards and that an additional \$457,697 (\$248,897 for normal rehabilitation and \$208,800 to repair roadbed damage caused by the installation of fiber optic cable)²⁰ would bring the entire line up to FRA Class 1 standards. Complainants assert that the Line's tie condition is adequate for operations at both FRA Class 1 and Class 2 standards and, presumably for that reason, did not submit a separate FRA Class 2 estimate.

It is clear from the record that here the cost of rehabilitation was quite high. The evidence is insufficient to determine which of the parties' 1997 estimates to repair the slippage at milepost 32.8 (\$103,160 or \$142,000) is more accurate. Because of an inconsistency in Complainants' presentation,²¹ we will accept CIND's estimate of \$142,000 as the best evidence of record. Moreover, the parties' estimates for repairing the embargoed segment and bringing it up to FRA Class 1 standards (\$252,502 for Complainants and \$278,000 for CIND) are not directly comparable because they do not always address the same locations. Based on our

¹⁹ According to CIND, two other points on the embargoed segment (milepost 36.1 and milepost 30.6) and two other points on the Line (milepost 57.8 and milepost 57.5) required \$16,000 in erosion repair, which would have brought the total erosion repair cost up to \$278,000. CIND Reply at 11; and V.S. of McDonald at 4.

²⁰ Conrail had reserved the underground rights and revenues related to the installation of fiber optic cable, and, between April and August 1997, CIND operated a work train used by a contractor to install the cable between Shelbyville and Cincinnati. CIND Reply, V.S. Burger at 9.

²¹ When estimating the cost to repair the washout at milepost 32.8, Complainants included \$13,890 for rip rap, but, when estimating the cost to repair the entire embargoed segment, they included \$62,500 for the same rip rap at milepost 32.8. CIND's rip rap estimate was the same under both scenarios.

examination of the underlying evidence, we have determined that \$227,230 would be required to repair the rest of the embargoed segment and bring it up to FRA Class 1 standards.

We find CIND's cost estimate to rehabilitate the non-embargoed segment of the Line to FRA Class 1 standards to be overstated. Its tie replacement estimate fails to recognize that the 24-mile segment between milepost 39 and milepost 63 was upgraded to FRA Class 2 standards in 1995. See CIND Abandonment, slip op. at 10. Complainants' tie replacement rate is based on repairing defective tie clusters and appears to be the better evidence of record in view of CIND's evidence showing that a substantial number of ties recently had been replaced at a number of locations. We also exclude CIND's repair cost attributable to the installation of fiber optic cable because it should be reimbursable from the contractor. Furthermore, CIND's general bridge rehabilitation cost estimate is excluded because there is no specific bridge rehabilitation requirement under FRA Class 1 standards, and Complainants submitted a detailed bridge evaluation that establishes that, although there is need for routine bridge maintenance, no rehabilitation was necessary to reopen the line.

Based on our analysis of the record, we find that \$187,250 (\$137,500 for tie repair, \$16,000 for erosion repair at three points, \$20,000 for weed control and surfacing, and \$13,750 for contingencies) would be required to rehabilitate the non-embargoed segment of the Line, and that a total of \$556,480 (\$142,000, \$227,230, and \$187,250) would be required to rehabilitate the entire Line to FRA Class 1 standards. And we reject as overstated CIND's FRA Class 2 estimate, except for CIND's reasonable inclusion of an additional \$25,000 for weed control and surfacing, thus bringing to \$581,480 the total cost to rehabilitate the entire Shelbyville Line to FRA Class 2 standards.

2. CIND's Intent. We also find that CIND acted reasonably in not making \$68,943 in erosion repairs in 1996. Prior to the slippage at milepost 32.8, CIND had adopted a policy of applying its limited resources to the profitable southeast end of its system (between milepost 23.0 and milepost 0.0) to hold down expenses. This is a normal and acceptable practice for carriers seeking to reduce their operating losses. See, e.g., The New York, Susquehanna and Western Railway--Corporation--Abandonment Exemption-- Portion of the Edgewater Branch in Bergen County, NJ, Docket No. AB-286 (Sub-No. 2X) (ICC served June 19, 1991).²² As discussed in more detail below, operationally, CIND was in a difficult financial condition and faced dim prospects for increased traffic and revenues. We find no credible evidence that CIND was deliberately downgrading, or actively discouraging traffic on, a viable line simply to facilitate its abandonment. Similarly, the evidence fails to show that CIND should have known that the

²² See also Missouri Pacific Railroad Company—Abandonment—Between Opelousas and Church Point in St. Landry Parish and Acadia Parish, LA (Church Point Branch), Docket No. AB-3 (Sub-No. 81) (ICC served June 14, 1989); Seaboard System Railroad, Inc.—Abandonment—In Fannin County, GA, and Cherokee County, NC, Docket No. AB-55 (Sub-No. 154) (ICC served Feb. 3, 1986).

slippage at milepost 32.8 would worsen, that the cost of repair would escalate, and that the failure to make the repair in 1996 would eventually lead to a discontinuance of CIND'S operations over the affected segment.

3. The Shippers and the Amount of Traffic on the Line. Another criterion used to assess the reasonableness of an embargo is the volume and type of traffic on the line. Complainants claim that the Shelbyville Line is the "best and shortest rail route between Cincinnati and Indianapolis and a ... direct, logical, and economically advantageous route to the Cincinnati Gateway and the Ohio River." Complainants' Opening Statement, V.S. Weller at 3; V.S. Larry Merritt at 1. Mr. Weller states that the five complaining shippers as well as another shipper became customers of, and sought additional rail service from, CIND during its first 3 years of operation; that CIND's revenues were on an upward track and the Shelbyville Line was largely self-sustaining when he left in 1994; and that the complaining shippers' level of usage continued to increase after he left. Complainants' Opening Statement, V.S. Weller at 4. Complainants claim that 8,170, 9,742, and 7,759 carloads moved over the Line in 1994, 1995, and 1996, respectively. Complainants' Rebuttal, V.S. Weller at 2 and Exhibit 1. They submitted copies of documents prepared for CIND in February and March 1995 by Mr. Roy Blanchard, a marketing expert, which suggested that the Line could have 9,000 carload movements a year, producing \$3.6 million in gross revenues. Complainants' Supplemental Rebuttal at 5 and Exhibit A-4.

Complainants claim that there was also a demand for service from new shippers. For example, they claim that: (1) CIND had agreed to expand Lowe's siding prior to the cessation of service and this would have generated 600 cars or more per year, a 50% increase in rail usage, Complainants' Opening Statement, V.S. Don Lowe (president of Lowe's); (2) Kova expressed interest in rehabilitating the "north secondary" in the summer of 1996 to give CIND direct access to Kova's plant (as opposed to access through the Greensburg lead), and that Kova's volume of freight received would have doubled; Complainants' Opening Statement, V.S. John Reed (a vice president of Kova); and (3) Next Generation, Inc. (Next Generation), expressed interest in rehabilitating the "north secondary" in October 1993 to give CIND direct access to Next Generation's Greensburg warehouse, and that CIND would have gained at least 225 cars per year of "high rate freight" moving through Cincinnati. Complainants' Opening Statement, V.S. Todd Reed (president of Next Generation).

Complainants further contend that CIND's present management acted imprudently in rerouting the Conrail overhead traffic. They dispute CIND's claim that the Sharonville interchange is more efficient or economical than the Indianapolis interchange, Complainants' Rebuttal Vol. 1, V.S. Weller at 5-6, and argue that the Conrail overhead traffic was not rerouted but rather was lost. Complainants' Rebuttal Vol. 2, V.S. Weller at 1. Additionally, they contend that CIND failed to communicate with its shippers, and, as a consequence, unreasonably denied itself and them the opportunity to protect and improve service. Shipper Complainants claim that they were never contacted in any effort to increase freight volumes or to persuade them to accept increased freight rates or to contribute to maintenance, repair, or restoration. Had this been done, Shipper Complainants claim, they would have worked out mutually agreeable terms to permit

CIND to continue operating the line. Complainants' Rebuttal at 9-23. Complainants contend that certain of CIND's statements betray a lack of familiarity with the needs of its shippers, *id.* at 23-30, and that CIND denied the shippers any opportunity to restore service after the embargo was imposed and failed to offer any terms or conditions for restoring service.

On the other hand, CIND explains that it took various actions to increase traffic on the Line but that its efforts were unsuccessful. Specifically, CIND states that it maintained extremely low, pre-surcharge grain rates (approximately \$275 per carload) to promote local traffic and that it otherwise marketed the Line in an aggressive manner. It notes that it negotiated extensively with James River for plastics traffic between 1993 and 1995; that it hoped to tap into intermodal traffic moving from Fort Madison, IA, to Cincinnati; that it had worked hard since 1992 to obtain a coal delivery contract with Citizens Gas & Coke (Citizens) in Indianapolis; and that it actively solicited traffic from existing customers and potential new customers through February 24, 1997. However, James River sold its facility before rail service could be implemented, and Citizens renewed its contract with CSXT. CIND claims that, by September 1996, when it had lost out to CSXT on its bid for part of the Citizens coal traffic and when its other efforts to attract significant new traffic had failed, it had no choice but to consider seeking abandonment authority. CIND Reply, V.S. Berger at 5-7; and V.S. Johnson at 7.

CIND also states that, although it entered into 500-car minimum commitment ("take or pay") contracts with Greensburg Milling and Lowe's in 1992 and a similar 250-car minimum commitment contract with Kolkmeier in 1993, none of the three entered into subsequent contracts or tendered volumes as large as those contemplated in the initial contracts. CIND Reply, V.S. Johnson at 3-7. According to CIND, the complaining shippers' traffic and the attributable revenues declined from 1994 to 1996, as illustrated in the following chart:

SHIPPER TRAFFIC ²³	<u>1994</u>	<u>1995</u>	<u>1996</u>
Greensburg	210	110	58
Kolkmeier	94	211	120
Lowe's	315	399	365
Kova	59	94	42
Premiere	<u>63</u>	<u>122</u>	<u>46</u>
Total Traffic	741	936	631
Total Attributable	\$223,000	\$258,000	\$178,000

²³ CIND Reply, V.S. Johnson at 3-7. The totals depicted here are somewhat less than presented by Mr. R. Scott Morgan, a director and the treasurer and chief financial officer of CIND, CERA, and CPI. Because the discrepancies are minor, we will use the higher volume figures in our subsequent discussions.

Revenues²⁴

Overhead traffic accounted for approximately 80% of the carloads moved over the Shelbyville Line in 1994, 1995, and 1996, and Conrail traffic accounted for 67%, 61%, and 55%, respectively, of all carloads handled in those years. CIND states that overhead traffic and total traffic decreased from 1994 to 1996, as illustrated in the following chart:

TRAFFIC TYPE ²⁵	<u>1994</u>	<u>1995</u>	<u>1996</u>
Originating/Terminating	802	947	648
Conrail Overhead	2,856	2,701	1,811
TPW Overhead	304	421	420
CERA Overhead	<u>315</u>	<u>373</u>	<u>386</u>
Totals	4,277	4,442	3,265

CIND disputes Complainants' assessment of the Line's future potential. It notes that the Line remained virtually idle for the almost 10-year period following the ICC's authorization of abandonment by Conrail and that, although Knauf filed an offer of financial assistance under 49 U.S.C. 10905 (now 49 U.S.C. 10904) to buy the Line through an affiliated railroad, Knauf's affiliate declined to consummate the transaction after the ICC set the price for the sale.

CIND argues that Complainants' optimistic view of the Line's ability to compete in the Cincinnati-Indianapolis corridor ignores the paucity of on-line traffic, which made it extremely difficult for the Shelbyville Line to compete on the basis of rates and service with CSXT's high density Cincinnati-Indianapolis mainline, via Hamilton, OH (with at least 30 times the traffic density). Moreover, the Line ends 25 miles east of Indianapolis, and CIND's trackage rights agreement with Conrail restricts it to serving only one Indianapolis customer, Citizens (which never used CIND's service and declined CIND's bid to provide service), and against interchanging traffic in Indianapolis with any carrier other than Conrail.

Moreover, CIND explains that, while the unsafe condition of the portion of the Line where the slippage had occurred may have expedited the March 1, 1997 rerouting of Conrail overhead traffic to Sharonville, the rerouting would have happened anyway. CIND also states

²⁴ CIND Reply, V.S. Morgan at 3 and Attachment 2. Additional revenue figures have been redacted.

²⁵ Id., Attachment 2.

that there was virtually no likelihood of rerouting Conrail's overhead traffic back over the Line.²⁶ CIND submits that it began considering rerouting the Conrail traffic in 1996, CIND Reply, V.S. Burger at 7, because the Line's traffic density was low and declining and CIND had failed to attract significant new traffic. Additionally, CIND states that continuing financial difficulties had prevented it from rehabilitating and maintaining the Line at FRA Class 2 standards. This meant that the Line could not be operated with a single crew, negating one of the reasons for the original decision to interchange traffic at Shelbyville.²⁷

According to CIND, between January 1, 1991, and December 31, 1996, the 23-mile eastern segment between Cincinnati and Greendale originated and terminated approximately 90% of CIND's traffic. CIND Reply, V.S. Johnson at 3. When the Conrail acquisition proposal was announced in October 1996, CIND apparently concluded that most of its Conrail traffic was from points that could be better served via Cincinnati than via Shelbyville. CIND Reply, V.S. Burger at 7. CIND was of the view that the shorter haul to Cincinnati would improve its operating efficiency, particularly since track congestion at Cincinnati had improved as a result of track construction and likely would continue to improve if the proposed sale of Conrail were approved and implemented. Id.

According to CIND, its decision to give notice of an intent to abandon the Line in July 1997 was based on an analysis of its post-embargo options prepared for CPI by Mr. Andrew A. Jennings.²⁸ Mr. Jennings determined that there was little justification for doing the rehabilitation and repairs needed to resume operations over the entire Line, concluding, that: (1) the Line's traffic had never reached expectations, despite what originally appeared to be a reasonable operating plan and "significant efforts" by CIND; (2) Next Generation's traffic would have had little effect on the bottom line; and (3) the Line was the best engineered route between Indianapolis and Cincinnati, but, as a low volume, poorly maintained, two-carrier joint route, it would not be able to compete in the evolving railroad landscape. CIND Reply, V.S. Jennings at 5-9.

²⁶ CIND Reply, V.S. Morgan at 7.

²⁷ CIND states that two Conrail interchanges would have been too expensive to operate and that it chose the Shelbyville interchange because of the congestion in the Cincinnati area and the higher allowances it would receive on high-revenue, westbound chemical traffic, and because the Line could be operated at 25 mph or more, allowing a single crew to perform round trips. CIND Reply, V.S. Johnson at 3-7.

²⁸ Mr. Jennings, a senior consultant for Mercer Management Consulting, Inc. (Mercer), worked as a senior consultant for Mercer's predecessor, Temple, Barker, and Sloane (TBS), which had reviewed CPI's original operating plan for CIND.

Complainants' criticism of CIND's marketing efforts and overall management is not persuasive. The record does not show that CIND intentionally held down traffic levels in the years preceding the embargo. Complaining shippers' assertions that they would have made more traffic available, and would have paid higher transportation charges, if CIND had discussed its difficulties with them, are self-serving and fail to account for why more traffic was not tendered to CIND instead of to the other, allegedly more expensive transportation alternatives.

Under the circumstances, CIND reasonably decided to divert overhead traffic from a line that was in need of substantial rehabilitation and lost money in each of the preceding 5 years. Complainants' evidence fails to distinguish between the Shelbyville Line and CIND's systemwide traffic. The traffic volumes and revenues Complainants attribute to CIND's Southend Shippers do not move over, and therefore are not relevant to, the Shelbyville Line.

Moreover, we agree with CIND that all of the Line's overhead Conrail traffic, which averaged 77% of CIND's overhead traffic in 1994, 1995, and 1996, has been lost and will not be rerouted back. CIND possibly could have retained a portion of CERA's and TPW's overhead traffic, which accounted for an average of 23% of CIND historical overhead traffic. But even if all of CERA's and TPW's overhead traffic were added back into the historical traffic levels for purposes of projecting future traffic volumes, CIND at best would have had only 1,421, 1,741, and 1,454, overhead carload movements, respectively, in 1994, 1995, and 1996. Projected revenues from such traffic would be significantly less than what would be needed to cover operating expenses and provide a return on investment (ROI), let alone to cover the needed repairs and rehabilitation.

4. CIND's Financial Condition. Based on CIND's income statements for 1996 and the first three quarters of 1997, Complainants contend that CIND had more than enough funds available to make the repairs required for CIND's operations over the entire Line to continue. They note that CIND's 1996 net income and cash on hand greatly exceeded the estimated slippage repair cost at milepost 32.8. Additionally, they observe that the \$172,521 in LFRA funds were more than adequate to make the repairs at milepost 32.8, pointing out that the funds had not been used, and were still available, as of October 1997. Complainants' Opening Statement at 14-15 and 36; and V.S. Weller at 8 and Attachments E and F.

Complainants also challenge CIND's financial evidence, alleging, among other things, that the submitted financial statements were not audited and do not include information about CPI or CERA. Complainants contend that CIND was financially sound and had a positive cash flow and a positive working capital that was increasing every year. Complainants' Rebuttal, V.S. Peter A. Fisher.

CIND replies that its financial condition precluded it from repairing and further investing in the Line. It explains that the Line was never self-sustaining, with or without overhead traffic, that the railroad realized a net annual loss every year through 1995 and would have suffered its

second worst loss in 1996 had it not been for the fortuitous sale of real estate,²⁹ and that its working capital was negative at the end of each year through 1996. CIND acknowledges that it repaid its primary loan after the 1996 sale of real estate and that it was financially successful in 1997, but claims that its working capital remained negative until September 1997, when a large cash contribution from CPI resulted in its first month of positive working capital. CIND Reply at 18; V.S. Morgan at 7.

CIND further states that it was in default to its primary lender and faced foreclosure for virtually its entire operating history. The precariousness of its financial condition allegedly was apparent as early as June 1992, when CIND breached its financial covenants with its lending bank, and liberalized covenants had to be negotiated. In August 1993, the original obligation had to be refinanced to reduce principal payments, but the interest rate was increased, and CPI shareholders had to infuse \$100,000 of additional equity. In March 1994, CIND defaulted on the amended, liberalized covenants that had been negotiated in 1992, and \$100,000 in subordinated loans had to be arranged. CIND claims that its financial condition continued to deteriorate to the point that it was unable to make its fourth quarter 1994 and first quarter 1995 principal payments, and it had to negotiate a forbearance arrangement that required the infusion of an additional \$500,000 of equity. CIND Reply at 18-19; V.S. Morgan at 1-2.

CIND explains that it would have been too costly to use the \$172,521 LFRA grant for erosion repair³⁰ because the terms of the LRFA Agreement required that \$30 of a recipient's own funds be spent for each \$70 of grant funds. Additionally, CIND claims that it would have been a waste of LFRA funds—and of its own limited resources—to rehabilitate and make costly repairs to a rail line that could not support the cost of operations.

²⁹ In 1996, CIND sold 2.2 miles of right-of-way between Lawrenceburg Junction and Lawrenceburg to the Indiana Gaming Company for a substantial after-tax profit.

³⁰ The LFRA grant was to be used only for track work; the LRFA Agreement prohibited any other uses absent written authorization by the Indiana Department of Transportation (INDOT). This limitation, however, was not a factor in CIND's decision not to use LFRA funds. CIND states that INDOT would probably have supported a modification to allow the grant to be used for necessary erosion repairs. CIND Reply, V.S. Burger at 3.

We have reviewed the parties' financial presentations and find CIND's to be credible.³¹ The evidence related to CIND's financial condition from 1992 through the first 9 months of 1997 shows that CIND suffered a net pretax loss every year through 1995. The largest loss occurred in 1994, on a systemwide traffic volume of 8,170 carloads. The 1994 loss was more than 10 times greater than CIND's 1993 loss and more than double its 1995 loss, when CIND's systemwide traffic volume reached a high of 9,742 carloads. In 1996, CIND realized its second worst operating loss, on a declining systemwide traffic volume of 7,758 carloads. Were it not for the 1996 real estate sale, CIND would have suffered its second worst pretax net loss. Instead, the proceeds from the sale resulted in CIND's realizing a substantial net after tax income in 1996 and a dramatic increase in equity, which had declined by 70% over the preceding 4-year period. The proceeds from the real estate sale were used to pay off most of CIND's outstanding debt and the transaction fees and taxes from the sale, and the relatively small remainder was placed in reserve to cover the balance of CIND's bank debt.

In the first 9 months of 1997, CIND earned its largest operating profit, more than 40% higher than in 1993, its next best year, and its second positive pretax net income. This operating profit, however, can be attributed to a significant decrease in operating expenses. The positive net income reflects this increased operating profit and dramatically lower interest expenses (as a result of the debt reduction in 1996).

Using CIND's average 1994-1996 operating results to project the Line's future operating results at FRA Class 1 and FRA Class 2 standards, our analysis finds that CIND's earnings would not be sufficient to cover its operating costs and provide a return on investment (ROI). Based on our analysis, at FRA Class 1 standards, CIND would lose more than \$311,000 annually using Complainants' annual maintenance cost of \$285,000 and amortizing CIND's repair and rehabilitation costs (\$397,419) over a 30-year period.³² The total loss increases to more than

³¹ Complainants presented no evidence to suggest that CIND submitted false financial data or improperly failed to submit all of the available financial data. Moreover, contrary to Complainants' claims, we neither require nor seek evidence related to the financial position of a railroad's corporate parent or affiliates in cases such as this, unless there is reason to believe that the parent or affiliate is acting as an alter ego of the railroad. Cf. New England Central Railroad, Inc.—Acquisition and Operation Exemption— Lines Between East Alburg, VT and New London CT, Finance Docket No. 32432 (ICC served Dec. 9, 1994).

³² Our analysis assumes that \$159,061 of the \$172,521 of LFRA funds would be spent to reduce the cost to repair and rehabilitate the embargoed segment to FRA Class 1 standards (from \$227,230 to \$68,169) and the cost to repair and rehabilitate the Line to FRA Class 1 standards (from \$556,480 to \$397,419). Even if the amortized cost of repair and rehabilitation (\$13,247) were totally disregarded, our analysis finds that the Line would realize comparable annual losses under all of the considered scenarios.

\$690,000 annually when a 10% ROI is included.³³ When overhead traffic other than Conrail's is considered, our analysis shows that CIND would lose more than \$291,000 annually before, and more than \$672,000 annually after, a 10% ROI is included. At FRA Class 2 standards, the annual loss on originating and terminating traffic would exceed \$276,000 annually before, and \$656,000 annually after, such an ROI is included. If all overhead traffic other than Conrail's is included, the annual loss would amount to more than \$188,000 annually before, and more than \$560,000 annually after, such an ROI is included.

We recognize that CIND could have repaired the Line and rehabilitated it up to FRA Class 1 or FRA Class 2 standards in 1996 with the use of borrowed funds, LFRA grant funds, or some of the proceeds from the real estate sale. CIND's decision not to, however, was a reasonable business decision given the fact that the Line's projected revenues under any realistic scenario were not sufficient to cover operating expenses and provide a return on investment.³⁴ Moreover, CIND's decision was reasonable given a record showing that, by the end of 1996, CIND: (1) had experienced 5 years of operating the Line at a loss and increasing indebtedness that was offset only by the fortuitous real estate sale; (2) had failed to negotiate a coal delivery contract with Citizens or to attract significant additional traffic from new shippers; (3) had failed to attract additional local traffic and actually saw local traffic decline by 17% since 1994; (4) had begun to consider rerouting Conrail's overhead traffic, which would necessarily affect the Line's future viability; and (5) had begun to factor into its decisional process CPI's decision to make CIND available for sale.

Complainants submit that CIND "intentionally or not—created the 'dilemma' it relies upon as an excuse for its failures," and that "at a minimum [it] failed to exercise prudent judgment and must be held accountable."³⁵ Complainants' Rebuttal at 3. They argue that the Line could have been operated successfully had CIND better maintained and marketed it. Complainants claim that the Line is a key link between the Ohio Valley and the Indianapolis-Cincinnati corridor, that the Line's traffic volumes were adequate and that there was potential for attracting additional local and overhead traffic, that funds were readily available to make the necessary repairs and perform maintenance, and that the Northend Shippers were supportive and willing to work to ensure continued operations. Referring to Mr. Morgan's evidence showing

³³ We used 10% as an ROI figure because CIND used a 10% ROI in projecting 1994-1996 operating results and Complainants did not challenge use of a 10% ROI. If CIND had used the agency's cost of capital rate for any of these years, the loss would have been even greater.

³⁴ As the Supreme Court has found, "[i]t is well settled that a carrier cannot legitimately be required to expend money to rehabilitate a line where it will lose money on the operation." Purcell v. United States, 315 U.S. 381, 385 (1942). See also Kalo Brick, 450 U.S. at 325.

³⁵ Complainants do not claim, and the evidence does not suggest, that CIND deliberately downgraded the Line.

that CIND spent a total of \$660,000 for track and equipment between 1992 and 1995, but only \$16,000 for equipment in 1996, Complainants question CIND's extreme cut in capital expenditures. They also claim that at least three other railroads were "ready, willing, and able to assume operation of the Shelbyville Line," Complainants' Opening Statement at 30-31, and that at least 27 railroads and businesses in the last 2 years expressed interest in purchasing the line, Complainants' Rebuttal at 61. In their view, this underscores the unreasonableness of CIND's refusal to restore rail service over the Line, or permit someone else to do so, and demonstrates that other entities considered the Line to be operable, profitable, and valuable.

Complainants have not supported their claims. Rather the record shows that CIND made a serious, long-term commitment, financially and otherwise,³⁶ to operate the Line until 1996, when a variety of circumstances led it to investigate other options. Complainants' allegations that other carriers were interested in acquiring, or being directed to operate, the Line are not persuasive. The two actual offers to provide directed service appear to have been based on the misconception that CIND intended to salvage the track. The offers were withdrawn when the matter was clarified. CIND Reply at 53; and V.S. Burger at 12-13.

Finally, we disagree with Complainants' criticism of CIND's imposition of a surcharge. It is well settled that a surcharge is not per se unlawful, or a "de facto abandonment," even if its effect will be to eliminate the movement of traffic from the Line. *City of Cherokee v. ICC*, 671 F.2d 1080 (8th Cir. 1982); *Mississippi Pub. Serv. Comm'n v. ICC*, 662 F.2d 314 (5th Cir. 1981).

In sum, we conclude that CIND acted reasonably in imposing the embargo in light of the cost of repairs, the economics of running the Line, and the carrier's financial condition.

B. Length of the Embargo. Having concluded that the embargo was not unlawful when it was imposed, we now consider whether CIND left the embargo in place for an unreasonably long period of time and whether it did too little to resolve the situation.

Initially, we note that the embargoed segment was not operated for 20 months, from February 24, 1997 (when CIND notified shippers that, as a result of significant slippage at milepost 32.8, it would cease operating between milepost 23 and milepost 39), to November 1998, when CIND, by then a RailTex subsidiary, withdrew its abandonment proposal). However, the embargo did not become effective until April 10, 1997, almost seven weeks after operations over the affected segment ceased. We accept CIND's explanation that it mistakenly believed that there was no need to impose an embargo earlier because it had intended to provide,

³⁶ As noted above, CIND acquired the Line in 1991 with the support of Conrail and the States of Indiana and Ohio, initially expended \$271,000 to raise the Line to FRA Class 2 standards, sought LFRA funds, and expended significant funds of its own through 1995 in an effort to return the Line to FRA Class 2 standards. To support continued operations, CIND also received a number of cash infusions from CPI.

and had arranged to continue providing, service to the shippers via alternate routes. Moreover, less than 3 months elapsed between the date the embargo became effective and the date CIND gave notice of its intent to abandon the line (on July 2, 1997). This is not unreasonable.

The record demonstrates that CIND did not sit idle until it filed the abandonment exemption petition in January 1998, and that CIND did not plan to leave the Line segment in an embargoed status indefinitely. Rather, the record shows that CIND was the victim of circumstances beyond its control, i.e., dim prospects for obtaining new traffic, and its facing financial difficulties, so that there was little justification for expending the resources needed to make the necessary repairs. Because the Line historically had carried primarily Conrail's overhead traffic, CIND reasonably determined the proposed Conrail acquisition initially announced in 1996--and the potential loss of the Conrail overhead traffic--would significantly affect the future viability of the Line. CIND engaged in substantive discussions with representatives of CSXT, NS, the City of Indianapolis, and INDOT between October 1996 and October 1997 to discuss various options for the Line but was not satisfied with the results. The discussions terminated on October 16, 1997, at which point CIND apparently felt that the time had come to seek abandonment authority. The petition for an abandonment exemption was filed less than 3 months later. CIND Reply V.S. Burger at 10-11.³⁷

Furthermore, it is clear from the record here that CIND took actions to protect shippers while the embargo was in effect. CIND rerouted all overhead traffic without apparent complaint from the affected overhead shippers. CIND also continued to operate the unembargoed portion of the Line. Most importantly, CIND made, or was prepared to make, alternative arrangements to assure uninterrupted rail service for originating/terminating traffic, albeit at a higher rate. At

³⁷ Additional uncertainty about CIND's future as an operating entity occurred in mid-1996, when CPI announced that CIND might be available for purchase. In April 1997, CPI retained Mercer, and Mercer subsequently recommended that CIND seek abandonment authority and, at the same time, initiate a competitive bidding process to sell the railroad. CIND Reply at 38-39. On April 29, 1998, RailTex filed for authority to acquire control of CIND and CERA through the purchase of all of CPI's stock. That request was granted in a decision served June 26, 1998.

no time was rail service unavailable to the affected shippers.³⁸ Thus, we find that CIND acted reasonably during the period of the embargo.

C. Summary. In sum, consistent with prior cases, we have balanced the length of the embargo, the cost of required repairs, the apparent intent of the railroad, the amount of traffic, the shippers' needs, and the financial ability of the railroad to make repairs in determining whether the embargo and its continuation were justified. This balancing of the circumstances in this case persuades us that here the cessation of operations over a portion of the Line was warranted initially and at no point became unreasonable. Accordingly, we find no violation of section 11101(a) in this case and hence no basis for damages.

Lawfulness of Surcharge

As noted above, CIND imposed a surcharge of \$700 per carload to Shelbyville Line movements interchanged at Shelbyville, and \$1,000 per carload to Shelbyville Line movements interchanged at other points (Indianapolis and Frankfort). Complainants challenge both the reasonableness of the surcharge itself and the reasonableness of the circumstances of its imposition. They request that CIND be ordered to cease charging unlawful rates or engaging in unlawful practices under 49 U.S.C. 10704 and that damages be awarded.

A. Unreasonable Practice. The surcharge that CIND published (CIND-9010) to be effective April 2, 1997, bore the notation, "ISSUED UNDER AUTHORITY OF 49 U.S.C. 10705 (a)." Complainants contend that the reference to 49 U.S.C. 10705(a) was an improper and unlawful attempt to give the impression that we had considered and approved the tariff. Additionally, they contend that the publication of the surcharge constituted an unreasonable practice because CIND failed to provide an alternate routing and was not, and had no intention of, operating the embargoed portion of the Line after the surcharge was announced. CIND Opening Statement at 41-43; and Rebuttal at 65-66.

CIND denies Complainants' claims. CIND states that it intended to reference former 49 U.S.C. 10705a, which governed joint rate surcharges, and that this was an inadvertent mistake because section 10705a recently had been repealed by the ICC Termination Act of 1995, Pub. L.

³⁸ Complainants allege that CIND told Kolkmeier (the only shipper that had requested rail service) that it would not provide service over the Line even with the surcharge in place and refused to provide the 14 cars Kolkmeier had ordered between March 28 and June 4, 1997. Complainants' Opening Statement at 20; and V.S. Kolkmeier at 8. However, CIND vigorously denies making the alleged statement, and the evidence shows that Kolkmeier did not receive the requested cars because its car order slips contained a written refusal to pay the applicable surcharges. CIND Reply, V.S. Burger at 11-12. Attached to Mr. Kolkmeier's statement are copies of three car order slips dated March 28, May 2, and May 23, 1997. The first two contain the notation "WILL NOT PAY SURCHARGE."

No. 104-88, 109 Stat. 803 (ICCTA). According to CIND, the reference to 49 U.S.C. 10705(a)-- which authorizes the prescription of through routes and joint classifications, rates, and divisions-- was a typographical error resulting from the inadvertent placement of parentheses around the "a." CIND Reply, V.S. Johnson at 7-8.

We do not see how a mere reference to a former section of the statute could be construed as having conferred any type of prior Board approval, as Complainants claim. Even under pre-ICCTA law, our predecessor, the Interstate Commerce Commission, did not substantively approve new or changed rates in the absence of a challenge, and permission to publish surcharges applicable to joint rates has not been required or granted since the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 895. See, e.g., Conrail Surcharge on Pulpwood, 362 I.C.C. 740 (1980).

We find no merit to Complainants' contention that CIND's publication of CIND-9010 constituted an unreasonable practice. CIND made arrangements to assure that rail service would continue to be available to affected shippers after it ceased operating the affected segment. CIND negotiated a temporary haulage agreement with NS and was prepared to make arrangements with Conrail to ensure continued rail service if CIND's service had been requested after the surcharge went into effect. The record thus does not support Complainants' contention that CIND refused to provide service on request.

B. Rate Reasonableness. Finally, Complainants argue that the imposition of a \$1,000 per car surcharge was punitive and that CIND failed to present credible evidence to show that the surcharges are reasonable. They suggest that the surcharge constituted CIND's attempt to price itself out of the competitive range for service to the Shelbyville Line shippers. Complainants' Rebuttal at 65-66. Complainants challenge CIND's limited cost presentation, but Complainants fail to make out even the barest essentials of a prima facie case of rate unreasonableness under 49 U.S.C. 10701. Indeed, they have failed to make a showing of market dominance, 49 U.S.C. 10707--a prerequisite to our consideration of a rate challenge.

Summary

CIND's cessation of operations over a portion of the Shelbyville Line was reasonable initially and at no point became unreasonable, and the challenged surcharges were not unlawful or unreasonable.

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

It is ordered:

1. The complaint is denied, and this proceeding is discontinued.

2. This decision is effective 30 days from the date of service.

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

Vernon A. Williams
Secretary