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SERVICE DATE - OCTOBER 3, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-32 (Sub-No. 90)

BOSTON AND MAINE CORPORATION--ABANDONMENT--IN ESSEX COUNTY, MA, AND ROCKINGHAM COUNTY, NH

Decided: October 2, 2001

On June 15, 2001, the Boston and Maine Corporation (B&M) filed an application under 49 U.S.C. 10903 seeking authority to abandon and discontinue service over a 3-mile line of railroad known as the Manchester and Lawrence Branch extending from milepost 1.4 in Lawrence, MA, to milepost 4.4 in Salem, NH, in Essex County, MA, and Rockingham County, NH.[1] On July 23, 2001, the Brotherhood of Locomotive Engineers (BLE) filed a comment in opposition to the application and on July 27, 2001, United Transportation Union (UTU) filed a protest. On August 8, 2001, B&M filed a reply to both filings. Upon review of the record, we will grant the application, subject to employee protective conditions.

BACKGROUND

The Massachusetts Bay Transportation Authority (MBTA),[2] an agency of the Commonwealth of Massachusetts, owns the portion of the line extending from milepost 1.4 to approximately milepost 3.72 (at the State line). B&M provides service over this portion of the line pursuant to an exclusive freight easement. Presumably, B&M owns the remaining .68 miles of the line that is in New Hampshire.

The line has been embargoed since February 2001. B&M contends that the embargo, which was occasioned by snow and ice conditions, remains in place due to the long-term effects of severe winter weather conditions. According to B&M, the actual condition of the line will not support regular freight service. Both BLE and UTU blame the current condition of the line on deferred maintenance.[3] Contrary to their claims, B&M submits that it has invested significant

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[1] Notice of the filing was served and published in the Federal Register (66 FR 35508-09) on July 5, 2001.

[2] MBTA is not a freight carrier. It operates commuter rail service in Massachusetts.

[3] In addition, BLE states that B&M (or its affiliate, Springfield Terminal Railway Company (ST)) built a runaround track off of the line with recycled track materials from another abandonment, and there was a derailment at the runaround that was not repaired.

resources to keep the line operational, but that future service is dependent on significant rehabilitation, which is not supported by present and reasonably foreseeable revenues.

TRAFFIC, OPERATIONS, AND REVENUES

Prior to the embargo, B&M states that traffic to the sole customer on the line, Key Packaging Products, Corp. (Key Packaging), was relatively constant. During the base year,[4] Key Packaging shipped 88 carloads of plastic products, B&M operated a total of 52 trains over the line, and service was performed on a once-a-week basis. Key Packaging has been using a transload facility at Fitchburg, MA, since shortly after the embargo was placed on the line. There is no overhead or bridge traffic.

B&M's base year revenues attributed to the line totaled $166,620. B&M projects that forecast year revenues would be $166,668 if it were to continue serving Key Packaging on the line.

AVOIDABLE COSTS

Avoidable costs are costs that applicant will cease to incur if it abandons and discontinues service over the line. B&M has submitted data showing avoidable on-branch costs for the base and forecast years. These include: maintenance-of-way and structures, maintenance of equipment, transportation, and freight car costs. B&M reports total avoidable on-branch costs of $36,551 for the base year and projects $38,426 for the forecast year. In addition, it reports total avoidable off-branch costs of $69,076 for the base year and projects $70,376 for the forecast year. Total avoidable costs are $105,627 for the base year and $108,802 for the forecast year. These figures are not challenged.

LINE CONDITION AND REHABILITATION

B&M states that, despite regular maintenance and inspections conducted in accordance with the Federal Railroad Administration (FRA) regulations at 49 CFR part 213, the line has fallen into a weakened track condition. The line is currently classified as "excepted track," and, according to B&M, rehabilitation of the line to FRA Class 1 safety standards would require an expenditure of approximately $600,000.[5] B&M also states that there are four bridges along the

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[4] B&M's base year reflects actual operations from October 1, 1999, through September 30, 2000.

[5] B&M's Exhibit C, "Rehabilitation of Line," which depicts rehabilitation costs by item, shows a total of $601,240, which B&M incorporated in its Exhibit B, "Revenue and Cost Data."

(continued...)

line, built between approximately 1894 and 1925, that would require extensive rehabilitation in the near future. B&M expects that approximately 5,533 cross ties, 68 rails, 80 switch timbers, 260 joints, and 6,500 rail anchors would need to be installed or replaced to bring the track up to FRA Class 1 safety standards.[6]

As previously noted, BLE and UTU attribute the current condition of the line to deferred maintenance. BLE contends, and UTU concurs, that B&M allowed "historic deterioration" of the line by deferring maintenance until the line could no longer function. BLE further contends that B&M's alleged failure to repair a runaround track (see supra note 3) further impeded service for Key Packaging. BLE argues that approval of the application is not in the public interest and that the request for abandonment has come about as a result of activities and past conduct by B&M taken in order to receive permission to abandon and discontinue services over the line.

In its reply, B&M states that the rail on this line was installed between 1919 and 1928, and has been maintained by B&M in operating condition for over 70 years. It contends that the line only recently reached a condition that required significant rehabilitation to allow for consistent operation. According to B&M, it had not even considered abandonment and discontinuance of operations over the line until the winter weather had wreaked havoc on the branch, and did not include this line in category 1 (subject to abandonment) on its system diagram map until December 2000.

OPPORTUNITY COSTS

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[5](...continued)
This amount, however, appears to be an error because, when the individual items in Exhibit C are added up, the total is $637,093, not $601,240.

[6] B&M has overstated the number of ties required to bring the line up to FRA Class 1 minimum safety standards. B&M's estimate of 5,533 ties equates to 1,844 ties per mile or 13 ties per 39-foot section of rail. (We will use the 39-foot section of rail as a benchmark because the FRA track safety standards are expressed in this unit of measure.) Most of the additional ties are located in B&M's line item labeled "curved alignment." The FRA track safety standards, however, require only five ties per 39-foot rail section and do not provide for additional ties on curved alignment. We have restated the tie installation estimate by combining the tangent and curved alignment ties into a single category and applying the FRA track safety standards. (We will use a slightly higher figure of 5.5 ties per 39-foot rail section to account for uneven tie spacing.) We accept B&M's installation of additional ties at joints because the joints on non-welded track must be supported. We also accept the additional line items proposed by B&M, resulting in a restated rehabilitation cost total of $390,530. Appendix A shows our restatement of the rehabilitation costs.

Opportunity costs (or total return on value of road property) reflect the economic loss experienced by a carrier from forgoing a more profitable alternative use of its assets. Under Abandonment Regulations–Costing, 3 I.C.C.2d 340 (1987), the opportunity cost of road property is computed on an investment base equal to the sum of: (1) allowable working capital; (2) the net liquidation value (NLV) of the line; and (3) current income tax benefits (if any) resulting from abandonment. The investment base (or valuation of the road properties) is multiplied by the current nominal rate of return, to yield the nominal return on value.[7] The nominal return is then adjusted by applying a holding gain (or loss) to reflect the increase (or decrease) in value a carrier will expect to realize by holding assets for 1 additional year.

We accept B&M's forecast year working capital of $1,532. As explained in Appendix C, B&M's NLV is ambiguous, and we accept the lowest of its various calculations ($210,000). B&M claimed no income tax benefits.

B&M applies an unsupported 12% cost of capital figure. We have substituted the pre-tax nominal cost of capital for the railroad industry for the year 2000 (15.4%),[8] and accept B&M's holding gain of $942. Based on the corrected cost of capital, B&M's forecast year return on value of $24,442 is restated as $31,634 (($210,000 + $1,532) x .154 - $942).

SUMMARY OF COST AND REVENUE EVIDENCE

Based on the above analysis, and as shown in our restatement at Appendix B, the line would realize a profit from operations of $57,866 in the forecast year if B&M were to retain Key Packaging's traffic. When the return on value is considered, the line shows an avoidable profit of $26,232 in the forecast year. However, when rehabilitation costs are included, the line would require a subsidy of $365,965 in the forecast year.

ALTERNATIVE TRANSPORTATION

B&M states that it has been working with Key Packaging to identify alternative service options. According to B&M, it assisted Key Packaging in locating the transload operation in Fitchburg, MA, that Key Packaging is currently using for final delivery of its shipments by truck.

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[7] Under 49 CFR 1152.34(d), the rate of return used to calculate return on value represents the individual railroad's current pre-tax nominal cost of capital. Our most recent after-tax cost of capital finding for the railroad industry is used as a basis for developing the appropriate nominal rate of return.

[8] Applying a combined Federal and state income tax rate of 37% to our 2000 after-tax cost of capital finding of 11.0% (see Railroad Cost of Capital–2000, STB Ex Parte No. 558 (Sub-No. 4) (STB served July 2, 2001)) yields 15.4%.

B&M plans to continue to work closely with Key Packaging to ensure that its transportation needs are satisfied. B&M notes that the beginning of the line is accessible from Route 495 in Lawrence, MA, and Route 28 in Salem, NH.

SHIPPER AND COMMUNITY INTERESTS

Although BLE and UTU represent labor interests, they argue that the abandonment should be denied based on shipper and community interests. BLE submits that Key Packaging is dependent on low cost rail service to compete and that increased transportation costs, as a result of switching to trucks, would more than likely drive Key Packaging out of business or force it to move to another location where low cost rail transportation is available.

UTU maintains that community development would be injured by this abandonment and that the timing of the application, in addition to discouraging existing and new traffic, could frustrate any attempt to use this line for commuter service. UTU requests that we reject the application or at least postpone any decision until a determination is made regarding the use of this line for commuter rail service.

The sole shipper, Key Packaging, has not filed a protest or comment in opposition to the abandonment. Nor have any community interests filed comments. In its reply, B&M notes that either Massachusetts or New Hampshire could use our public use procedures to request that abandonment be conditioned upon making the line available for commuter rail service prior to disposal by B&M.[9] In addition, B&M avers that, apart from out public use procedures, it is required by state statute to provide each state with a right of first refusal prior to any sale of the line.

DISCUSSION AND CONCLUSIONS

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. 49 U.S.C. 10903(d). In implementing this standard, we must balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. Colorado v. United States, 271 U.S. 153 (1926). Essentially, the Board must determine whether the burden on the railroad from continued operations is outweighed by the burden on the shippers and the community from the loss of rail service.

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[9] B&M states that the portion of the line owned by MBTA is already used for a public purpose, and that MBTA would need to be consulted regarding future alternative uses. B&M also states that the remainder of the line is appropriate for use for other public purposes as well.

As stated above, the line would realize a profit from operations of $57,866 in the forecast year if it were to retain its base-year traffic. When the return on value is considered, the line shows an economic profit of $26,232 in the forecast year, but when rehabilitation costs are included, the line would require a subsidy of $365,965 in the forecast year.

BLE and UTU have not supported their allegation that B&M has improperly deferred maintenance on the line. There is no evidence showing that B&M discouraged existing or potential traffic on the line simply to facilitate its abandonment. B&M submits that it regularly maintained and inspected the line and that it was not until harsh weather conditions forced it to embargo the line that it discovered the extent of the deterioration of the track. There is no evidence to refute the fact that rehabilitation of the line to FRA Class 1 safety standards would require an expenditure that cannot be justified by the limited and speculative future profitability of the line.

In view of the lack of evidence contradicting B&M's estimates, we conclude that any harm to the shipper and the community from the proposed abandonment is outweighed by the demonstrated harm to B&M and the burden on interstate commerce through continued operation of the line. We will therefore grant the abandonment application.

LABOR PROTECTION

In approving this abandonment application, we must ensure that affected rail employees will be adequately protected. 49 U.S.C. 10903(b)(2). We have found that the conditions imposed in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979) (Oregon), satisfy the statutory requirements, and we will impose those conditions here.

BLE requests that we specifically impose labor protective conditions for the protection of ST employees, including its locomotive engineers. B&M did not respond to this request. We will grant the request to the extent those employees are affected.

ENVIRONMENTAL ISSUES

The Board is also required to consider the environmental and energy impacts of the proposed abandonment. B&M has submitted an environmental report with its application and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on July 18, 2001, and requested comments by August 16, 2001. No comments to the EA have been filed.

In its EA, SEA initially recommended that a condition be placed on any decision granting abandonment authority requiring B&M to retain its interest in and take no steps to alter the historic integrity of the line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. By letter dated August 13, 2001, however, the Massachusetts Historical Commission states that it has determined that the proposed abandonment will have no adverse effect on the Spiket Falls Historic District. Therefore, the section 106 process is unnecessary and the historic preservation condition need not be imposed.

SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. We note that no one has sought a public use condition, and none will be imposed.[10]

<u>We find</u>:

1. The present or future public convenience and necessity permit the abandonment of the above-described line, subject to the employee protective conditions in <u>Oregon</u>, which are being imposed for the protection of all affected B&M employees, including any ST employees affected by the abandonment and discontinuance.

2. Abandonment of service over the line will not have a serious, adverse impact on rural and community development.

3. The line may be suitable for other public purposes.

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

<u>It is ordered</u>:

1. This application is granted subject to the condition specified above.

2. B&M must promptly provide any interested persons the information they require to formulate an offer of financial assistance (OFA) to acquire or subsidize the line.

3. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by October 12, 2001, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904

[10] Public use requests were due no later than 20 days after publication of the notice of the application in the <u>Federal Register</u>, or by July 30, 2001.

and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a $1,000 filing fee. See 49 CFR 1002.2(f)(25).

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

5. Provided no OFA has been received, this exemption will be effective on November 2, 2001. Any petition to stay or petition to reopen must be filed as provided at 49 CFR 1152.25(e).

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), B&M shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by B&M's filing of a notice of consummation by October 3, 2002, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

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

Vernon A. Williams
Secretary

APPENDIX A

STB Restatement of Proposed B&M Rehabilitation Cost				
	B&M Proposal		STB Restatement	
Install cross ties - tangent	1,643	$133,085	2,227	$180,390
Install cross ties - curves	3,630	$293,868	0	$0
Install cross ties - joints	260	$35,757	260	$35,757
Maintenance of joints	260	$35,757	260	$35,757
Rail replacement	68	$30,056	68	$30,056
Switch Timbers	80	$10,000	80	$10,000
Rail anchors	6,500	$12,085	6,500	$12,085
Track surface & alignment	10,500	$24,885	10,500	$24,885
Rail/highway at-grade crossings	1	$35,000	1	$35,000
Drainage	3,800	$26,600	3,800	$26,600
Total		**$637,093**		**$390,530**

APPENDIX B

Forecast Year June 1, 2001 to May 31, 2002

	Proponent's Forecast Year (1)	OEEA&A's Restated Forecast Year (2)
1. Freight Orig. and/or Term. on Branch	$166,668	$166,668
2. Bridge Traffic	0	0
3. All Other Revenue and Income	0	0
4. Total Attributable Revenue (Ls. 1 thru 3)	**$166,668**	**$166,668**
5. On-Branch Costs:		
a. Maintenance-of-Way and Structures	$20,099	$20,099
b. Maintenance-of-Equipment (Including Depreciation)	4,596	4,596
c. Transportation	13,641	13,641
d. General & Administrative	0	0
e. Deadheading, Taxi and Hotel	0	0
f. Overhead Movement	0	0
g. Freight Car Costs (Other Than Return)	90	90
h. Return on Value - Locomotives	0	0
i. Return on Value - Freight Cars	0	0
j. Revenue Taxes	0	0
k. Property Taxes	0	0
l. Total On-Branch Costs (Ls. 5a thru 5k)	**$38,426**	**$38,426**
6. Off-Branch Costs:		
a. Off-Branch Costs (Other Than Return)	$70,376	$70,376
b. Return on Value - Freight Cars (Less Holding Gain)	0	0
c. Net Off-Branch Costs (Ls. 6a+6b)	**$70,376**	**$70,376**
7. Total Avoidable Costs (Ls 5l + 6c)	**$108,802**	**$108,802**
Subsidization Costs for:		
8. Rehabilitation	$637,093	$390,530
9. Administrative Costs (Subsidy Year Only)	1,667	1,667
10. Casualty Reserve Account	0	0
11. Total Subsidization Cost (Ls. 8 thru 10)	**$638,760**	**$392,197**
12. Valuation of Road Properties		
a. Working Capital	$1,532	$1,532
b. Income Tax Consequences	0	0
c. Net Liquidation Value	210,000	210,000
d. Total (Ls. 12a thru 12c)	**$211,532**	**$211,532**
13. Nominal Rate of Return	12.00%	15.40%
14. Nominal Return on Value (L. 12d x L. 13)	$25,384	$32,576
15. Holding Gain (Loss)	$942	$942
16. Total Return on Value (L. 14 - L. 15)	**$24,442**	**$31,634**
17. Avoidable (Loss) or Profit from Operations (L. 4 - L. 7)	**$57,866**	**$57,866**
18. Avoidable (Loss) or Profit Including Return on Value (L.4 - Ls. 7&16)	**$33,424**	**$26,232**
19. Estimated Subsidy Payment (L.4 - Ls. 7, 11, & 16)	**($605,336)**	**($365,965)**

APPENDIX C

Net Liquidation Value

B&M's evidence provides two separate NLV estimates for the line. In its Exhibit B forecast year data, B&M includes $210,000 for NLV. However, the $210,000 estimate for NLV is somewhat suspect because Footnote 4 to B&M's Exhibit B states that NLV for land value alone would equal $238,000. In addition, page 2 of B&M's Exhibit B shows various NLVs of $3,488,043 (January-September 2000); $2,616,032 (October-December 1999); and $5,232,064 (2000 and 1999).

B&M does not provide any explanation, documentation or supporting evidence for its NLV estimate. Nor is there any explanation for the different NLV figures. Furthermore, B&M failed to provide a real estate appraisal supporting its land values and did not support its track salvage estimate.

Based on applicant's claim that the land value for the line is approximately $238,000 there is no reason to believe the inclusion of any other assets, such as ties and rail on the .68 miles that B&M actually owns, would increase the NLV for the line to anything approaching 5 million dollars. Therefore, absent any other evidence, we include B&M's estimate of $210,000 for NLV in our restatement shown in Appendix B.