

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-433X

IDAHO NORTHERN & PACIFIC RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN WALLOWA AND UNION COUNTIES, OR

Decided: March 12, 1997

The Idaho Northern & Pacific Railroad Company (IN&P), a Class III carrier, seeks an exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10903-04 to abandon a 60.58-mile portion of the Joseph Branch between milepost 23.0 near Elgin and milepost 83.58 at Joseph, in Wallowa and Union Counties, OR (the line).² In the event an exemption is granted, the Railway Labor Executives Association requests the imposition of labor protective conditions.

By decision served July 25, 1996, we stated that the record was not sufficiently clear to enable us to ascertain the impact of the proposed exemption, and thus, ordered the parties to supplement the record with regard to matters specifically outlined in the decision. Based on the supplemental information provided by the parties, we will grant the exemption request, subject to standard employee protective conditions and environmental conditions.

BACKGROUND

While we do not feel it is necessary to repeat all the facts and arguments previously raised and considered in the original decision, some background is necessary to understand fully this petition, which has had a long and contentious history.

IN&P was created in 1993 in a combination lease and purchase transaction involving 290.52 miles of Union Pacific Railroad Company (UP) lines, including the Joseph Branch located in Idaho

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² The petition was originally filed with the ICC on December 1, 1994, and was supplemented on February 15, 1995.

and Oregon.³ IN&P leased the first 21 miles of the Joseph Branch, from milepost 0.0 at LaGrande to milepost 21.0 at Elgin and acquired the remaining 60.58-mile portion of the line that it seeks to abandon here.⁴

The original protestants to the abandonment petition for exemption were the State of Oregon through its Oregon Public Utility Commission (OPUC) and the Oregon Department of Transportation (ODOT) (collectively referred to as Oregon).⁵ From March of 1995 through May of 1996, numerous additional filings were received and considered.⁶

IN&P's reason for seeking to abandon the line was the dramatic reductions in carload traffic due to the plant closings of the three largest shippers on the line. Boise Cascade Corporation (BCC), the largest shipper on the line, closed its Joseph lumber plant on May 27, 1994; R-Y Timber, the second largest shipper on the line, terminated operations at its Joseph facility on October 26, 1994; and Rogge closed operations in May of 1995. According to IN&P, BCC and R-Y Timber in combination

³ See Idaho Northern & Pacific Railroad Company--Lease, Acquisition and Operation Exemption--Union Pacific Railroad Company, Finance Docket No. 32370 (ICC served Dec. 7, 1993).

⁴ IN&P states that, if the abandonment petition is approved, it will continue to operate the first 23 miles of the branch line between the junction with UP's main line, between milepost 0.0 at LaGrande and milepost 23.0 near Elgin. This 23.0-mile line segment presumably includes 2.0 miles of track owned by IN&P.

⁵ Attached to OPUC's and ODOT's joint protest, filed February 21, 1995, were statements by the following parties: Wallowa County Court; the City of Joseph; Rogge Wood Products, Inc. (Rogge); Mautz Baum Hostetter & O'Hanlon, representing purchasers of R-Y Timber, Inc. (R-Y Timber); Dave Shriner, representing R-Y Timber; Ed Jones Fertilizer Co., Inc.; Tim Melville; Ed McLaughlin (McLaughlin); Great Western Malting Co. (GWM); Liquid Gas Co. (Liquid Gas); and the Wallowa County Bicycle and Pedestrian Committee. Letters were also filed by former Senator Bob Packwood and by former Congressmen Wes Cooley expressing their opposition to IN&P's proposal to abandon the subject line under the exemption procedures.

⁶ IN&P replied to Oregon's protest on March 10, 1995. On March 20, 1995, the Wallowa County Planning Department (Wallowa County) filed a statement in opposition and on April 5, 1995, Oregon filed additional statements in opposition from: Rogge; Joseph Timber Company (Joseph); Ed Immel, ODOT's State Rail Planner; James W. Seifert, OPUC's Railroad Inspector; and Claudia L. Howells, OPUC's Rail Services Coordinator. Subsequently, on May 25, 1995, IN&P filed a letter to supplement its petition with recent developments bearing on the merits of its proposal. Additional letters were filed by: IN&P on July 18, 1995, and March 27, 1996; Wallowa County on August 28, 1995; DR Johnson Lumber Company (Johnson) on September 11, and November 8, 1995, and March 4, 1996; Rogge on September 18, 1995; Oregon on November 2, 1995; and Wallowa Forest Products (Wallowa, formerly Johnson) on May 28, 1996.

accounted for approximately 66% of the total traffic (307 cars for BCC and 197 cars for R-Y Timber out of a total of 770 carloads) and \$186,885 of the total revenues (\$282,911) generated from the line in 1994. From January 1, 1995, through April 10, 1995, IN&P stated that shippers had tendered only 131 carloads for shipment. With the loss of Rogge's traffic, it estimated that it would handle only 170 additional carloads during the remainder of 1995.⁷

In an attempt to make the line profitable, IN&P proposed to shippers that they guarantee a minimum of 1,800 annual carloads of traffic, and it also requested funds from Oregon in the amount of \$992,662 to rehabilitate the line, which according to IN&P, is classified as excepted track under Federal Railroad Administration (FRA) standards and is deteriorating.⁸ When it did not receive rehabilitation funds, IN&P issued a tariff on June 2, 1995, which imposed a \$1,208.00 per car surcharge on the line in addition to the line-haul transportation charges.

Throughout this proceeding, Oregon and various shippers have rigorously challenged IN&P's contention that the line is not profitable. While recognizing that the three mills have closed, Oregon contends that new ownership at two of the mills would provide additional traffic. It is IN&P's position that the tendering of any additional traffic by entities reopening the closed facilities is much too speculative.

Based on the foregoing, we were unable to determine, on the record before us, whether the abandonment exemption should be granted or denied. Accordingly, as previously stated, we asked the parties in the July 25, 1996 decision to submit supplemental information by responding to specific questions enunciated in the decision. The questions posed to IN&P covered three basic areas: (1) traffic and revenues; (2) track condition; and (3) costing information. The questions posed to protestants sought information concerning: (1) use of the line for the most recent 12-month period; (2) traffic projections; and (3) transportation alternatives. IN&P and protestants responded to the questions we posed and also replied to each other's answers.⁹ We will address this supplemental evidence below, focusing on areas of disagreement between the parties and areas where we believe specific analysis is necessary.

⁷ The remaining shippers on the line are Brink Ranches, Liquid Gas, McLaughlin Farms, Tim Melville, and Wallowa County Grain Growers, Inc. (WCGG), all located at Enterprise.

⁸ Oregon disagrees with IN&P's assessment of the poor condition of the track. Citing a track inspection report made by an FRA certified OPUC track inspector in October 1994, it refutes the claimed condition of the track and the cost of refurbishing the line.

⁹ Supplemental evidence was filed by McLaughlin, Joseph, Wallowa and WCGG. A reply was filed by Oregon (OPUC's functions have been transferred to ODOT; we will continue to refer to this protestant as Oregon). Contained within Oregon's reply were pleadings by Wallowa and GWM. The filings by the five shippers were primarily in the form of one-page statements.

DISCUSSION AND CONCLUSIONS

Traffic Levels and Revenues

There is strong disagreement between the parties concerning traffic projections for the line. While IN&P paints a very bleak picture regarding traffic projections, protestants are very optimistic about the future of the lumber business in Oregon. Overall, Oregon estimates that shippers could generate traffic in excess of 1,500 carloads a year. Although long-time shippers on the line, McLaughlin, WCGG and GWM, have supplied specific traffic figures, the volume of traffic they project (12 carloads a year for McLaughlin, 2 carloads for WCGG and 30 carloads for GWM) is minimal. Wallowa and Joseph project far greater carloads. Wallowa states that it is in the process of installing new equipment that will increase production substantially. It anticipates producing the equivalent of 1,000 carloads of lumber and 800 carloads of wood chips in the next 12 months. Joseph anticipates shipping between 250 and 400 carloads of lumber a year, but with the caveat that "obviously this requires re-orienting customers and destinations in our sales program." It does not intend to ship wood chips by rail because, according to Joseph, rail rates for wood chips appear to be noncompetitive compared to truck rates.

We had certain questions about the historic carload and revenue data submitted by IN&P in its petition that were clarified by IN&P as follows. First, IN&P states that the 1,779 carloads for 1992 and 1,333 carloads for 1993 represent only traffic for the line proposed for abandonment and not for the entire Joseph Branch. Second, IN&P explains that during 1994 the revenue per car for each shipper on the line (except BCC) did not vary from shipper to shipper due to a Junction Settlement Agreement¹⁰ with UP, IN&P's only line-haul connection to the Joseph Branch. Under their rate division arrangement, for all traffic interchanged with IN&P, UP collected all of the applicable interline rates from customers using any portion of the Joseph Branch, including IN&P's portion of the carload movement over the Joseph Branch. In return for IN&P's connecting branch line services, UP compensated IN&P on the basis of a fixed per car allowance of \$361 per car.¹¹ IN&P further explains that the reason it received an average of \$379.09 per car for traffic handled for BCC during 1994 was because BCC had intra-branch traffic that was handled pursuant to higher contract rates.¹² Third, IN&P clarifies that the traffic that moved from the closed facilities of BCC and R-Y Timber consisted of lumber products that had been held in inventory and not shipped until after their respective operations had closed. Fourth, IN&P updated its

¹⁰ IN&P avers that the type of agreement is commonplace between shortline railroads and their Class I connections.

¹¹ In its explanation, IN&P stated that the per car allowance was \$361, however, in calculating its revenues, it assumed a \$362.00 per car allowance from UP. See Exhibit F to IN&P's response filed August 26, 1996. We will use the \$362.00 figure in our restatement. See Appendix to this decision.

¹² IN&P had agreed to honor a rail service contract that was previously negotiated between UP and BCC.

previous traffic figures with a chart showing that only 65 carloads moved over the line between August 1995 and February 1996;¹³ no traffic has moved over the line since February 1996, due to an embargo.¹⁴

IN&P contends that, while shippers show "impressive production estimates," they make no commitments to routing any of this production by rail, and IN&P claims that both Joseph and Wallowa realize that it is cheaper to transport their products by truck to another railhead than to use the rail line in question.¹⁵ Alternatively, IN&P uses the traffic transported for the 12 months ending July 31, 1996, to forecast future traffic levels. From this base year, it projects a volume of 120 carloads a year moving over the line.

We agree with IN&P that the shippers' traffic projections are speculative. Not only are there no guarantees as to how much they will produce, but also lacking is the commitment to ship by rail. IN&P's forecasts are also deficient because the time period it uses as a base year is inappropriate due to the embargo in place on the line beginning in February of 1996. Accordingly, we have used the traffic levels actually transported in 1994, adjusted to reflect the loss of shippers on the line, and have calculated an historically based traffic level of 260 carloads for use in projecting forecast year revenues.

¹³ This traffic included: 25 carloads for Melville & McLaughlin Farms in November 1995; 10 carloads for Melvin Brinks in January 1996; and 1 carload for WCGG in December 1995. In addition, IN&P states that during the months of August, September and October 1995, it handled a special series of rail movements for Wallowa River L.L.C. (WRR), consisting of 29 carloads of harvested logs, which will not recur for another 20 to 25 years. Thus, IN&P submits that only 36 carloads were generated by regular customers for the past 12 months.

¹⁴ IN&P states that it embargoed the line because of a series of mud and rock slides and track washouts. It contends that it has not reopened the line because it has not received any shipper requests for rail service under the existing light density surcharge tariff. In fact, IN&P submits that no traffic has moved subject to the surcharge since its establishment on July 18, 1995. According to IN&P, WRR's shipments were tendered at an intermediate point nearest to Kimmel, a station not listed on the subject surcharge tariff, and the remaining traffic was handled under separate agreements between the railroad and the shippers to avoid the imposition of the surcharge.

¹⁵ IN&P notes that, although none of the shippers provided details concerning their transportation alternatives, Joseph transfers at least a portion of its truck traffic to a nearby IN&P-served rail transloading facility at Alice, OR, and Wallowa uses a UP-served rail transloading facility at Baker, OR. Oregon admits in its reply that shippers have found alternatives, but submits that they are not ones that can be sustained in the long term. It does, however, qualify this statement with the comment that "[w]hile some commodities may be more likely to move by rail, there is no commodity that is entirely captive to any mode of transportation.

IN&P actually came up with two forecast years using the 120 carloads per year volume amounts. They outlined their revenues and costs for once a week train service and once a month service. Revenues of course, are unaffected by the different schedules, but costs are impacted as weekly service is four times more costly than monthly operations. We asked IN&P to support its assumption of operations on a once a week basis. Absent any discussion by IN&P supporting the more costly weekly schedule, we believe that monthly service would be the most economical, makes the most business sense, and, therefore, should be used for analysis.

We will now analyze the operations based on our projected traffic levels of 260 carloads a year, on monthly service, and on a revenue of \$362 per car.¹⁶

Track Condition

We asked IN&P to provide documentation of the condition of the track to substantiate its classification as FRA excepted track and to explain why the track failed to meet FRA class 1 standards. We also wanted to know whether a detailed on-site inspection had been conducted because IN&P had stated that, as of February 1995, winter weather conditions had prevented such an inspection.

IN&P retained the services of Mr. Bernard R. Forcier, P.E., a professional track engineering expert to perform a detailed on-site inspection of the line. IN&P states that Mr. Forcier's report supersedes any information it has previously filed concerning the condition of the line. IN&P also states that it never asserted that the entire line fails to meet FRA class 1 or class 2 standards, but only that the line was operated as excepted track in full compliance with FRA regulations. The Forcier report concludes that, although much of the line could be operated at class 1 or 2 operating speeds, numerous sections of the track fail to meet either class 1 or 2 standards. Oregon submits that the Forcier report is consistent with the state's track inspection report as it states that most of the line is in good to fair condition.

On-Branch Avoidable Costs

On-branch avoidable costs are those specifically associated with the line, which the railroad will avoid if it abandons the line. IN&P contends that, like most other shortlines it does not, nor is it required to, maintain separate branch-by-branch accounting records for maintenance and transportation costs. Accordingly, IN&P states that its prior cost calculations were by

¹⁶ See note 11, supra. In providing a breakdown of the revenue generated on the line for the most recent 12-month period, we asked IN&P to reflect the \$1,208.00 per car light density surcharge for those carloads, where appropriate. Inasmuch as no traffic has moved under that surcharge in the past, we believe that it is unreasonable to assume IN&P will be able to earn the surcharge amount on traffic on the line for the future and reject the inclusion of the surcharge for purposes of analyzing the line's profitability in this case.

necessity an apportionment of its actual system-wide costs.¹⁷ However, it now provides estimated cost per track mile figures based upon its independent track engineering expert's inspection report.

Maintenance-of-Way and Structures (MOW). Mr. Forcier has estimated these costs at \$10,888 per mile, which amounts to more than \$659,595.¹⁸ While Oregon argues that this is excessive, it fails to provide alternative estimates. The following is a breakdown of the items that constitute MOW.

a. Cross Tie Replacement. Mr. Forcier assumes 100% tie replacement and, as a result, we believe his cost estimates are flawed. Complete replacement of ties is far in excess of FRA class 1 standards, which require only that five nondefective ties be present per rail segment and that one nondefective tie be within 2 feet of each rail joint (49 CFR 213.109). Interpolating these requirements over an entire line results in either a 23.8% replacement rate or a 28.6% replacement rate, depending on the placement of the nondefective ties around the joints. Mr. Forcier calculates an annual need for 47.5 ties per mile. However, using the "worst case" scenario of a 28.6% replacement rate as just described, we calculate a need for at most 13.6 ties per mile to meet minimum FRA class 1 requirements. IN&P uses a unit cost of \$45 per tie, which we believe is excessive. However, because it is the only evidence of record, we will use it to calculate a tie MOW expense of \$612 (13.6 ties at \$45 per tie) per mile.

b. Surfacing and Lining Track; Ballast Installation. IN&P bases its costs associated with surfacing and lining the track and installing the ballast on a 6-year cycle.¹⁹ Thus, if all track in a mile is to be surfaced and lined over 6 years, 880 feet would be treated annually. Similarly, the 400 tons of ballast per mile that IN&P estimates is needed is spread over 6 years, resulting in 66.7 tons of ballast per mile annually. Mr. Forcier states that the track where ties have been installed should be lined and surfaced. In view of the fact that we allowed 28.6% of IN&P's requested tie replacements, we will allow 28.6% of IN&P's requested lining and surfacing and ballast units for a total of 252 feet of track per mile (28.6% of 880 feet) to be surfaced and lined and 19.1 tons of ballast (28.6% of 66.7 tons) to be placed. Additionally, IN&P estimates that 300 tons of ballast per mile is needed to reestablish the shoulder and fill in cribs along the line. Given the relationship between ballast and tie replacement and given IN&P's estimated tie life of 60 years, we calculate 5 tons of ballast per mile (300 tons divided by 60 years). IN&P states that its unit cost for ballast is \$15 per ton, which is twice that accepted in recent abandonments. However, because Oregon has failed to present any

¹⁷ We had asked IN&P to support its use of system-wide operation costs.

¹⁸ MOW costs are developed by Forcier on a per-mile basis and then multiplied by the mileage to give a total MOW expense for the line.

¹⁹ The work and cost are spread over 6 years, the minimum cycle we would expect for a line such as the subject line.

alternative estimates, we will use IN&P's amount in our calculations. Thus, the MOW expense for lining and surfacing is \$252 per mile (252 feet at \$1 per foot) and for ballast is \$362 per mile (19.1 tons at \$15 per ton plus 5 tons at \$15 a ton).

c. Track Inspection and Repairs. IN&P's estimate reflects weekly inspections. As previously stated, we believe monthly service by the railroad constitutes a more reasonable level of service for this line and is the service level we are using in our analysis of the line's profitability. Accordingly, because FRA class 1 standards do not require weekly inspections for monthly service, we will adjust IN&P's estimate to correspond with monthly service. Although we realize the line has a number of curves, passes through difficult terrain and is subject to extreme weather conditions that increase maintenance costs, IN&P's estimate of \$3,120 per mile for this item is approximately twice as large as estimates accepted in recent abandonment cases.²⁰ Nevertheless, we will accept the railroad's estimated cost under the assumption that it includes the cost of rail repair and replacement as in other recent abandonment estimates, and we note that our acceptance here will result in our disallowance of other cost estimates involving these cost items, as discussed below.

d. Weed Control. IN&P's estimate of \$300 per mile is not challenged, appears reasonable and, therefore, will be accepted.

e. Rail Replacement. As discussed under track inspection and repairs, the rail is in good condition and does not support the railroad's additional amount for rail replacement. Accordingly, and inasmuch as we assume that the outlay for track inspection and repairs includes a provision for rail repair and replacement, an additional expense under this category will not be allowed.

In summary, we conclude that MOW expenses should be \$136,063 for monthly service.

Transportation. These costs are directly related to the movement of traffic over the subject line. They include payroll (crew wages, vacation and holiday pay, and other fringe benefits); fuel expenses; servicing locomotives-road; and patrol truck expenses. We specifically asked IN&P to provide the crew consist needed, the number of train trips required, the service time per trip, and the number of locomotives required, for the traffic for the most recent 12 months. IN&P complied and Oregon did not specifically refute IN&P's estimates or provide estimates of its own.²¹ Because Oregon has not provided any convincing

²⁰ IN&P's estimate is particularly high given Mr. Forcier's statement that the track has been fairly well maintained.

²¹ While not specifically protesting the expense listed, Oregon questions why certain on-branch costs--specifically, transportation, general administrative, and deadheading, taxi, and hotel--vary between the once a week service level and the once a month service level, when carloadings are projected as being static. IN&P explains that these categories of costs vary more closely with the number of trains operated over the line

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evidence to refute IN&P's projected forecast year total transportation costs of \$27,139 for monthly service, we will use these figures.

Return on Value-Locomotives. We asked IN&P to update its calculations of return on value for locomotives and freight cars. It calculates this return (\$539) using a 1995 after-tax cost of capital rate of 11.7%, however, this rate should be adjusted as required in 49 CFR 1152.34(d). The after-adjustment rate is 17.5% and the recomputed return on locomotives is \$807. Also, offsetting holding gains must be applied against this allowed return. We calculate this holding gain to be \$189 (IN&P's locomotive valuation base of \$4,611 x .041 holding gain rate).

Other On-Branch Avoidable Costs. Oregon did not specifically challenge IN&P's calculations for general and administrative costs, deadheading, taxi, and hotel costs, and property taxes; therefore, we will accept IN&P's figures, See the Appendix.

Rehabilitation Cost

Based upon his inspection, Mr. Forcier estimates that it would cost over \$2,000,000 to return the track to class 1 standards. His rehabilitation figures are a combination of those expenses IN&P must incur out of necessity to open the line (clearing rock and gravel slides, weed and bush cutting, and washout repair) and those expenses that IN&P must incur over the span of the next 12 months to ensure that the line satisfies class 1 standards.

Oregon contends that no large scale rehabilitation of the line is required, and only clean-up of the slide material, weed control, and a minimum maintenance program is necessary to make the line fully operational. Mr. Edward Immel, State Rail Planner, estimates a cost of between \$55,000 and \$70,000 to place the line in pre-flood condition. Mr. James W. Seifert, Track Inspector for Oregon, states that the elaborate rehabilitation costs stated by IN&P are merely "gold plating" and are not needed but that the \$88,630 expense listed by IN&P for clearing the mud slides, weed and brush cutting, repairing the washout, and ditching appears reasonable.

The evidence shows that much of the track is in good condition and could be operated at class 1 or 2 operating speeds and that only certain sections of the track fail to meet either class 1 or 2 standards. Because rehabilitation is not intended to maintain track but merely to elevate its condition to meet FRA class 1 standards, in our restatement of expenses we exclude those costs associated with maintenance and not required to rehabilitate the track or to reopen the line. As necessary to explain our decision, we will discuss the various elements associated with this expense.

(...continued)

than with the number of carloadings. Oregon provides no evidence to refute this assumption. Moreover, as stated above, we do not believe that once a week service is justified, and instead are using a monthly service level in our analysis.

Tie and Spike Replacement. Although Mr. Forcier's estimates are unsubstantiated, we will accept his rehabilitation cost for ties at joints of \$245,349, and related spike rehabilitation cost of \$8,040, because Oregon has not provided any alternative unit cost. We will not, however, allow any additional tie or spike rehabilitation cost to insert ties to break-up "clusters of bad ties" because Mr. Forcier states that this replacement could be conducted on an on-going basis after the line reopened. Accordingly, we restate the total tie and spike rehabilitation cost at \$253,389.

Drain Pipe Installation at MP 40.67. Mr. Forcier, apparently in error, doubled the amount of this expense. We will restate the estimate at \$500.

Contingencies at 10%. Without a plausible reason to include a contingency reserve, we will exclude such a fund.

Activities Not Necessary to Reopen the Line. Several items are not necessary in order for the line to reopen. Accordingly, these costs, which include lining and surfacing track and ballast, rail installation at MP 38.5, herbicide treatment, joint bolt tightening, and joint and tie inspection, will be excluded as rehabilitation costs.²²

Other Rehabilitation Costs. Oregon agrees with IN&P's calculations for rock/gravel slide costs, weed and brush cutting costs, track ditching costs at MP 42.24 and washout repair costs at MP 37.1. In addition, Oregon does not dispute IN&P's road crossing installation costs at MP 69.8. Accordingly, we will accept IN&P's figures. See the Appendices.

Summary

Our analysis of the evidence for 260 carloads a year on a one train per month basis results in an avoidable loss from operations of \$86,331.²³ Our analysis also shows a rehabilitation cost of \$330,193.

Exemption Criteria

Under 49 U.S.C. 10903-04, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10505, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction or service is of limited scope, or (b)

²² Some are included in MOW expenses.

²³ We note that IN&P has estimated that it will incur some \$432,900 in opportunity costs during the forecast year based on a net liquidation value (NLV) for the line of \$3.7 million. IN&P, however, has failed to support its NLV estimate. While we expect that there are significant opportunity costs associated with the continued operation of this line, we need not consider opportunity costs given the substantial avoidable loss from operations shown for the line.

regulation is not necessary to protect shippers from the abuse of market power.

Based on our analysis of the evidence of record, we find that further detailed scrutiny under U.S.C. 10903-04 is not necessary to carry out the rail transportation policy. Exempting the proposed transaction will minimize the need for Federal regulatory control over rail transportation, and, by eliminating the administrative expense of processing an abandonment application, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101a(2) and (7)]. An exemption will eliminate the need for IN&P to spend significant sums to rehabilitate, maintain, and operate a line that has no potential for profitable operation. Thus, an exemption will foster sound economic conditions and encourage efficient management [49 U.S.C. 10101a(5) and (10)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation is not necessary to protect shippers from an abuse of market power. The record establishes that alternative truck service and rail transloading facilities are available. Alternative transportation must be available because the line has been embargoed and traffic has continued to move. And shippers have not shown with any specific evidence that these alternatives are not economically or otherwise viable.²⁴

Application of Standard for Abandonment Applications

While we have examined the petition, as supplemented, under our exemption criteria, we have also considered the additional evidence under the more rigorous statutory standard governing abandonment applications, which is whether the present or future public convenience and necessity permit the proposed abandonment. 49 U.S.C. 10903. Under this standard, we balance the potential harm to affected shippers 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). We have done this additional analysis due to the serious doubts that have been raised as to the propriety of the use of the exemption process for the subject abandonment proposal and due to the problems we have encountered with the evidentiary record in this proceeding.

In determining if the burden on the railroad of continued service is outweighed by the burden on shippers by the loss of rail service, the fact that shippers may or even likely will incur some inconvenience and added cost does not, by itself, outweigh the detriment to the public interest of continued operation of uneconomic operations. Protestants must show that the harm to their operations outweighs the harm demonstrated to the railroad. See Chicago and North Western Transp. Co.-- Abandonment, 354 I.C.C. 1, 7 (1977).

Here, the railroad has shown that continued operation of the line will result in a substantial avoidable loss and that shippers have alternative means of transportation. Conversely,

²⁴ Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

protestants' evidence of increased traffic is speculative at best. It has been long held that such unsupported evidence of future traffic is not enough to justify a denial of an abandonment. See CSX Transportation, Inc.--Abandonment Exemption--In Webster County WV, Docket No. AB-55 (Sub-No. 413X) (ICC served May 29, 1992), and Burlington Northern Railroad Company--Abandonment Exemption--Between Mesa and Basin City, Franklin County, WA, Docket No. AB-6 (Sub-No. 370X) (STB served Jan. 27, 1997). Thus, absent more specific documentation of the likelihood of future traffic, IN&P should not have to continue to incur losses on the line.

Furthermore, IN&P has shown that it will have to expend a substantial sum to reopen and rehabilitate the line for operations to resume. And we note that interested persons may offer to purchase or to subsidize the line pursuant to our financial assistance procedures should they continue to believe that the line may become economically viable.

Although IN&P notified all former shippers of the proposed abandonment, to ensure that they are informed of our action, we will require IN&P to serve a copy of the decision on each of them within 5 days after the service date and to certify to us that it has done so.

Labor Protection

Under 49 U.S.C. 10505(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect employee interests. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

Environmental Analysis

IN&P has submitted an environmental report with its petition, and has notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impact of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effect of the proposed abandonment on the quality of the human environment.

SEA served an environmental assessment (EA) on February 7, 1995, in which it recommended that the following conditions be imposed:

1. IN&P shall not conduct salvage operations in the period July 1 through August 15, during which Chinook Salmon are hatching;
2. If bridges are to be removed, IN&P shall consult with the U.S. Army Corps of Engineers, Portland District, to determine if permits are required;
3. IN&P shall take all reasonable steps to preclude the leakage of fuel, lubricants and related substances from machinery used in salvage operations; and

4. Prior to commencing salvage operations, IN&P shall contact Wallowa County to determine what measures, if any, must be taken to comply with the Wallowa County/Nez Perce Salmon Habitat Recovery Plan.

Subject to the recommended conditions, SEA concluded that the proposed abandonment, if implemented, will not significantly affect the quality of the human environment or the conservation of energy resources. SEA also found that the right-of-way may be suitable for other public use following abandonment. Comments on the EA were due on March 7, 1995, but none was received.

Accordingly, based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources. Although SEA has indicated that the line may be suitable for other public use under 49 U.S.C. 10906, no one has requested a public use condition and none will be imposed. Nevertheless, we will provide a 20-day period after Federal Register publication for interested persons to request a public use condition.

It is ordered:

1. Under 49 U.S.C. 10505, we exempt from the prior approval requirements of 49 U.S.C. 10903-04 the abandonment by IN&P of the above described 60.58-mile rail line, subject to the following conditions: (1) the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979); (2) IN&P shall not conduct salvage operations in the period July 1 through August 15, during which Chinook Salmon are hatching; (3) if bridges are to be removed, IN&P shall consult with the U.S. Army Corps of Engineers, Portland District, to determine if permits are required; (4) IN&P shall take all reasonable steps to preclude the leakage of fuel, lubricants and related substances from machinery used in salvage operations; and (5) prior to commencing salvage operations, IN&P shall contact Wallowa County to determine what measures, if any, must be taken to comply with the Wallowa County/Nez Perce Salmon Habitat Recovery Plan.

2. Notice will be published in the Federal Register on March 18, 1997.

3. IN&P must serve a copy of this decision on each of the shippers on the line within 5 days after the service date of this decision and certify to us that it has done so.

4. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on April 17, 1997.

5. Formal expressions of intent to file an OFA²⁵ under 49 CFR 1152.27(c)(2) must be filed by March 28, 1997; petitions to

²⁵ See Exempt. of Rail Abandonment--Offers of Finan. Assist., 4 I.C.C.2d 164 (1987), for regulations applicable to OFAs in proceedings subject to the law prior to the ICCTA, as here.

stay must be filed by April 2, 1997; requests for a public use condition in conformity with 49 CFR 1152.28(a)(2) must be filed by April 7, 1997; and petitions to reopen must be filed by April 14, 1997.

6. If a formal expression of intent to file an OFA has been timely submitted, an OFA to allow rail service to continue must be received by the railroad and the Board within 30 days after publication, subject to time extensions authorized under 49 CFR 1152.27(c)(2)(ii)(C) and (D). The offeror must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(c)(2).

7. 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."**

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary