29635 SERVICE DATE - LATE RELEASE OCTOBER 6, 1998
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-545

SOUTH ORIENT RAILROAD COMPANY, LTD.—
ABANDONMENT AND DISCONTINUANCE OF TRACKAGE RIGHTS—
BETWEEN SAN ANGELO AND PRESIDIO, TX

Decided: October 5, 1998

On June 18, 1998, South Orient Railroad Company, Ltd. (SORC), filed an application under 49 U.S.C. 10903 seeking authority to discontinue service over and abandon the San Angelo-Presidio line (the line) extending from milepost 722 near Mertzon station south of San Angelo to milepost 945.3 at Alpine Junction and from milepost 956.7 at Paisano Junction to the end of the line at milepost 1029.1 on the International Bridge near Presidio, a distance of approximately 296.4 miles;[1] and to discontinue its trackage rights over the Union Pacific Railroad Company's (UP) line extending from milepost 945.3 at Alpine Junction to milepost 956.7 at Paisano Junction, a distance of 11.4 miles, for a total distance of approximately 307 miles in Brewster, Crane, Crockett, Irion, Pecos, Presidio, Reagan, Tom Green, and Upton Counties, TX. Notice of the filing of the application was served and published in the Federal Register (63 FR 36989) on July 8, 1998.[2]

The South Orient Rural Rail Transportation District (SORRTD), a political subdivision of the State of Texas responsible for preserving essential rail transportation services, filed a motion to dismiss the application and, in the alternative, a protest. Protests also were filed by the Texas Department of Transportation (TxDOT); the Texas Comptroller of Public Accounts, John Sharp (Comptroller); the Railroad Commission of Texas (RCT); Ferrocarril Mexicano, S.A. de C.V. (Ferromex); Mining Hard Rock Inc. (Hard Rock); and jointly by DinoSoil, Inc. (DinoSoil) and Geronimo Properties, Inc. (Geronimo). Comments opposing the abandonment were filed by the Texas Department of Economic Development (TDED); Ferrocarriles Nacionales De Mexico (Ferrocarriles); the City of Presidio (City); Congressman Henry Bonilla; Congressman Charles W.

---

[1] According to applicant, the distance between mileposts 731 and 732 on the north end of the line is actually 9,873 feet due to a track relocation related to a flood control project. The line also includes an additional 14.4 miles of side track.

[2] SORC filed a supplement to its application on July 29, 1998. The supplement concerns a recent embargo placed on the portion of the line between milepost 1002.9 near Casa Piedra to the end of the line at Presidio. The embargo was necessitated by a fire that damaged a bridge located one mile south of Casa Piedra.

Stenholm; Texas State Senator Jeff Wentworth; Presidio Appraisal District (Appraisal District); Presidio Independent School District (Independent School District); Garl Boyd Latham; and Elizabeth R. Covos.[3] A request for issuance of a certificate of interim trail use (CITU) was filed by Rails to Trails Conservancy (RTC), and a protest opposing the imposition of a public use or trail use condition was filed by Walter D. Noelke. SORC filed a reply. In addition, wavier requests to file rebuttal to SORC's reply, along with rebuttal statements, were filed by Ferromex and SORRTD. SORC replied to each of these rebuttal statements.

Upon review of the record, we conclude that the motion to dismiss should be denied and that the public convenience and necessity is best met by not granting an abandonment but rather approving the discontinuance of SORC's service over the San Angelo-Presidio line and the discontinuance of SORC's trackage rights over the UP line, subject to standard employee protective conditions.

PRELIMINARY MATTERS

Motion to Dismiss. SORRTD argues that the abandonment application should be dismissed because SORC does not own the line, and, therefore, lacks standing to abandon it.[4] Although SORRTD acknowledges that, on December 30, 1991, it entered into a lease arrangement with SORC that contained an option that would allow SORC to purchase SORRTD's interest in the line after 2 years, SORRTD argues that SORC never exercised the option, and, in any event, the option could not be exercised without SORRTD's Board of Directors adopting an order declaring the property "surplus" and "not needed."[5] Therefore, SORRTD asserts that, at best, SORC holds an unexercised option to purchase the track and related materials in order to preserve rail operations

---

[3] Correspondence was also received from Senator Phil Gramm, forwarding letters from his constituents, Mr. George Wight, president of Hard Rock, and Mr. Robert P. Post, chairman of the board of SORRTD.

[4] TxDOT owns the right-of-way, and SORRTD owns the track, ties, and other track materials.

[5] According to SORRTD, this requirement is mandated by an amendment to §5(1) of Texas Art. 6550c, which was adopted in 1993, after the lease was entered into. Thus, SORRTD argues that Texas state law prevents SORC from abandoning the line. SORC rejects this argument. It is well settled that state law provisions do not affect our mandate under 49 U.S.C. 10903 to consider whether the public convenience and necessity require or permit the proposed abandonment and discontinuance. Any abandonment or discontinuance authority we grant is permissive; any state law process that has not been preempted or contractual impediments to abandonment and/or discontinuance would remain outstanding and subject to resolution in the appropriate state forum. SORC is not seeking any preemption finding at this time.

over the line. SORRTD cites Southern Pacific Transp. Co.—Abandonment, 8 I.C.C.2d 495 (1992) (Southern Pacific), to support its contention that SORC lacks standing to abandon the line.[6]

In Southern Pacific, the Los Angeles County Transportation Commission (LACTC), the state entity that acquired the fixed assets to the rail lines in that case, possessed the unrestricted right to terminate Southern Pacific Transportation Company's (SP) leasehold interest and limit SP's access to trackage rights subordinate to LACTC's mass transit operations. Consequently, LACTC was found to have incurred the common carrier obligation to operate the lines and LACTC, not SP, was the proper party to abandon them.

The motion to dismiss will be denied. The San Angelo-Presidio line was originally part of a 381.9-mile line that was transferred from The Atchison, Topeka and Santa Fe Railway Company (ATSF) in two parts: (1) the right-of-way and other fixed assets were sold to SORRTD; and (2) an exclusive permanent easement and all rights to operate over the line were granted to SORC. In South Orient Railroad Company, Ltd.—Acquisition and Operation Exemption—Line of The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 31971 (ICC served Sept. 2, 1992) (South Orient), SORRTD's acquisition of the fixed assets of the 381.9-mile line was found not subject to the Interstate Commerce Commission's (ICC) jurisdiction under 49 U.S.C. 10901 because, unlike SP in Southern Pacific, SORC would retain sufficient ability to provide unrestricted freight service as a rail common carrier and would not be subject to restrictions on abandonment or operational control.[7] Thus, we conclude that SORC is the proper party to seek abandonment or discontinuance authority to extinguish its common carrier obligation to operate the line and also to discontinue its trackage rights operation over the UP line.

Petitions for Waiver. On August 24 and August 25, 1998, Ferromex and SORRTD, respectively, filed petitions pursuant to 49 CFR 1117.1 seeking leave to file rebuttal to SORC's August 17, 1998 reply statement. On September 4, 1998, SORC replied in opposition to the petitions for leave to file and also replied to the rebuttal statements, arguing that, if we grant the petitions and allow Ferromex's and SORRTD's rebuttal filings, we should also accept SORC's reply to those filings.

The submissions constitute replies to a reply and are not permitted under our rules. 49 CFR 1104.13(c). When good cause is shown or when additional information is necessary to develop a more complete record, we may waive the rule. 49 CFR 1100.3. Because no matters were raised

---

[6] In their protests, TxDOT and Ferromex also allege that the abandonment application has been filed improperly by SORC.

[7] The decision noted that SORC had asserted that "the parties desire that SORRTD never operates and never has the right to operate a railroad over the Railroad Line." South Orient, slip op. at 1.

that we have not adequately considered in our analysis, Ferromex's and SORRTD's petitions for leave to file replies to SORC's reply will be denied, and their replies tendered on August 24 and August 25 (as well as SORC's further reply tendered on September 4) will be rejected.

TRAFFIC, OPERATIONS, AND REVENUES

SORC states that only three of the seven shippers located on the line are active.[8] Traffic for these shippers during 1997, the base year, amounted to 276 carloads, consisting predominately of sand and sodium hydroxide.[9] SORC also handled 857 carloads of overhead or bridge traffic during this period. In addition, 20 UP trains containing a total of 865 carloads were moved over the line in detour service.[10]

Traffic Levels, Revenues, and Cost of Operations. SORC's estimate of revenues and costs for the forecast year is based on the movement of 280 carloads originating or terminating on the line, as well as 1,132 carloads of overhead traffic (984 for other rail carriers and 148 for SORC stations not on the line subject to abandonment). SORC estimates forecast year revenues of $815,474, based on those traffic levels plus a small amount of other demurrage revenue and other miscellaneous revenue. The forecast year figures do not include any detour traffic from UP.[11] Our restatement of the revenue and cost estimates is based on the following analysis of the evidence.

Expected Traffic Volume and Revenues. The applicant's estimate of forecast year revenues of $815,474 is based on the traffic levels noted above plus a small amount of other demurrage revenue and other miscellaneous revenue. As previously indicated, the forecast year figures do not include any detour traffic from UP. Ferromex estimates forecast year revenues of $1,111,835 but includes $151,536 in revenue for UP detour trains in its forecast year figure of $181,987 under the revenue item consisting of all other revenue and income, which was SORC's base year figure for that revenue item. Ferromex also increases freight revenue originated or terminated on the line, plus bridge traffic (other than UP detour trains) from $779,489 to $929,848. This increase is based on the difference between actual freight revenues and the unaudited income statement for SORC during 1997. In its reply, SORC contends that the actual freight revenue figures are correct because the

---

[8] SORC identifies the active shippers as Belding Farms (Belding), Big Lake Gas (Big Lake), and Unimin (Unimin). Border Mines (Border), DinoSoil, South Orient Partners, and an unidentified company are the inactive shippers on the line.

[9] Other commodities handled were oil, bentonite, fertilizer and phosphate, glass, molasses, and sodium sulfur.

[10] During 1997 and 1998, UP detoured some traffic over this line in order to help relieve the operational bottlenecks that existed on the UP system.

[11] SORC indicates that the last detour train moved on April 20, 1998, and it does not anticipate that there will be future detour train traffic over this line.

income statement includes approximately $700,000 of revenue from prior years that was not correctly invoiced until 1997.

We find that Ferromex has overstated the revenues for the forecast year by including both revenues from traffic moved in prior years but recorded in 1997 and revenues from UP detour trains, even though no detour traffic is currently moving over the line. Therefore, we accept SORC's revenue projections for the forecast year.

Protests regarding the line's potential to transport significant shipments of humate, a natural fertilizer, were filed by Hard Rock, DinoSoil, and Geronimo.[12] SORC did not include estimates for any of these protestants in its forecast year traffic.

Hard Rock states[13] that it owns extensive, recently discovered deposits of humate, bentonite, and zeolite in Brewster and Presidio Counties, and has invested over $1 million in preparation of mining and distributing these products domestically and internationally. It anticipates tendering approximately 40 carloads a day, or over 10,000 carloads a year, of humate to SORC at Alpine.[14] Assertedly, Hard Rock has entered into lease agreements with SORC, and its affiliate, Bristol Real Estate, covering spur track and other rail property, to handle these shipments. Specifically, Hard Rock states that it has leased a spur line from SORC at Alpine, purchased 15 acres of rail front property on the Fort Davis highway, and leased a spur track extending from SORC's main line to Hard Rock's facility at Plata in Presidio County. Hard Rock projects that its 1999 income for the Alpine plant will be approximately $10 million and that it expects to transport 100,000 tons of material from its plant. Hard Rock asserts that UP has refused its request to provide rates and service at Alpine.

---

[12] SORRTD also submitted verified statements concerning potential future traffic from Hirschfeld Steel Company (Hirschfeld); Texas Tank Car Works (Texas Tank); Twin Mountain Supply Co., doing business as Twin Mountain Fence Co. (Twin Mountain); and Kasberg Grain Company, LLC and Kasberg Gin Co., Inc. (Kasberg).

As a part of its protest, the Comptroller conducted a survey of shippers located on SORC's entire line. The survey results include comments from five of the shippers that used the line during the base year. DinoSoil, Unimin, Big Lake, and Belding generally indicate that they would lose business or suffer some hardship if the application is granted and Border states that it would not be concerned if the abandonment is authorized.

[13] Hard Rock's evidence is in its protest and in its verified statement submitted by SORRTD.

[14] Hard Rock states that it has negotiated a multimillion-ton contract to sell humate to the Government of Quatar and is currently negotiating with the Government of Egypt for additional sales.

Geronimo, a property holding company, states that it has acquired title to and leases on certain properties containing large deposits of humate in Brewster County and that DinoSoil, the company created to market and distribute the humate, has leased a rail site on SORC's line in Alpine. Assertedly, DinoSoil has spent in excess of $400,000 to develop domestic and international markets for humate during the past 2 years. It is apparently ready to begin shipping traffic and, based on its current contracts, DinoSoil anticipates that by May 1999, it will be shipping 76 covered hopper cars via SORC every other day, which would amount to 13,680 carloads annually.[15] Both Geronimo and DinoSoil state that they also have obtained leases on a UP rail site at Alpine, but have been unable to negotiate rates or car pick-up schedules with UP. Due to the lack of dependable forecasting by UP, DinoSoil submits that it intends to conduct most, if not all, of its rail shipping via the SORC rail site.

In reply, SORC states that the protestants identify only six specific sources of new traffic on the line. SORC asserts that these traffic prospects are speculative: four of the six future shippers—Hirschfield, Texas Tank, Twin Mountain, and Kasberg—were unable to provide any estimate of anticipated rail movements via the line; two other future shippers—DinoSoil and Hard Rock—provide carload estimates but have not made any commitments to ship via the line, and it is not clear to SORC that their traffic would move south over the Presidio gateway. Furthermore, with respect to DinoSoil and Hard Rock, SORC states that their statements indicate that both companies intend to truck their product to Alpine, where they have direct rail access to UP.[16] We agree with SORC that, in these circumstances, this new traffic projected to begin moving over the line in the future should not be included in our restatement of forecast year revenues and costs.

AVOIDABLE COSTS

As reflected in the first column of figures in the attached appendix, SORC shows an avoidable loss from operations of $720,043, based on its estimate of avoidable costs totaling $1,535,517, which are all on-branch avoidable costs. Avoidable costs are costs that applicant will cease to incur if it abandons and discontinues service over the line. On-branch avoidable costs are shown for: (1) maintenance of way and structures; (2) transportation expenses (consisting of trackage rights fees to UP, crew costs, and fuel and communications expenses); and (3) maintenance of equipment, general and administrative expense, car hire costs, return on value and holding gains for locomotives, and deadheading expenses. No off-branch avoidable costs are shown.

---

[15] DinoSoil's estimate is based on a current contract pending with a buyer from the Philippines for the purchase of DinoSoil's product coupled with current consummated and prospective domestic and international orders. Assertedly, DinoSoil would be unable to perform its contracts, specifically the Philippine contract, if SORC is authorized to abandon this line.

[16] Both DinoSoil and Hard Rock claim that UP has refused to provide them with rates and service to Alpine.

Maintenance-of-Way and Structures (MOW). SORC did not provide specific normalized maintenance costs, and rather relied instead on an estimate of approximately $2,500 per mile for a total of $748,776, which represents the normalized maintenance levels necessary to maintain the line at Federal Railroad Administration (FRA) Class 1 safety standards. SORC submits that this is a very conservative estimate because the track is Class 2 or 3 and is maintained at that level. While we agree with SORC that normalized maintenance costs at FRA Class 2 or 3 might be somewhat higher depending on the traffic density of the line, for the purposes of this proceeding, we will accept SORC's estimate of $748,776.

The figures in the second column of the attached appendix reflect Ferromex's restatement of costs for the line. In general, these are based on an allocation of 15% of SORC's total expenses from the line and its other operations. Ferromex justifies this adjustment by citing an internal letter, written in 1996, from SORC's chief operating officer to its president which suggested allocation of 15% of expenses to the line due to the fact that 15% of SORC's total revenues came from that line.

We do not accept Ferromex's restatement. Actual expenses during the base year, and projected expenses for the forecast year, belie this overly simplistic cost allocation scheme, which is based on a ratio of expenses to revenues. This is especially true of the MOW, which accounts for approximately half of SORC's total expense projection, but less than one-third of Ferromex's. Ferromex claims MOW costs should be 15% of the railroad's total MOW expense. At this level of cost allocation to the line, only $650 per mile would be allocated to MOW expenses.

We find SORC's estimate to be the better one. We agree with SORC that $2,500 per mile is the minimum amount needed to keep the line open using minimal maintenance.

Other On-branch Costs. SORC argues that other expenses are also higher than those projected by Ferromex. We agree. Ferromex significantly reduced SORC's projected costs for maintenance of equipment, transportation, and general and administrative (G&A) expenses. G&A expense, as calculated by Ferromex, is based on the 15% allocation factor, and fails to take into account actual costs. Absent cost data based on actual train runs and mileage, we cannot accept Ferromex's figures. SORC appears to have followed acceptable procedures for allocating these expenses. SORC's calculation of maintenance of locomotives and transportation expenses is reasonable given the number of trips planned for the forecast year. Thus, we accept SORC's estimates for these cost items.[17]

[17] Even if we were to accept all of Ferromex's non-MOW expenses ($488,032), when this figure is added to SORC's MOW of $748,776, it produces total on-branch costs of $1,236,808. When forecast revenues of $815,474 are considered, use of Ferromex's non-MOW costs would still result in avoidable costs from operations of $415,221.

LINE CONDITION AND REHABILITATION

SORC states that the line is presently classified as FRA Class 2 and 3 track, with most of the FRA Class 3 track on the north end of the line and most of the FRA Class 2 track on the south end of the line. Speed limits are 25 m.p.h. and 30 m.p.h., respectively. The condition of the line is generally good. However, the track at the south end contains 70 miles of 90-pound rail rolled in 1919 and 75 miles of 70-pound rail rolled in 1912. According to SORC, the rail would not be adequate to handle the type and volume of heavy overhead carload traffic necessary to justify retention of the line. SORC estimates that it would cost approximately $37 million ($19 million and $18 million, respectively) to replace the existing 70- and 90-pound rail with more suitable, new rail of a higher weight.[18]

SORC states that there has been no significant tie replacement or surface work done on the line since 1982, and, thus, the ties on the line are in uniformly poor condition. Moreover, at least half of the ties on the southern segment of the line are the original ties from that segment's 1929-1930 construction. According to SORC, only 9% of the ties would be suitable for reuse. The line currently has 11 speed restrictions to 10 m.p.h. because of the poor tie and track surface conditions and SORC anticipates that there will be more slow orders in the future without tie renewals.

There are many bridges on the line, most of which are old, short timber trestles. SORC estimates that the repair and maintenance work required in the next 2 years will be approximately $60,000-$100,000.

Although SORC does not show any rehabilitation expenses in its revenue and cost data, it does discuss rehabilitation in its application. It contends that a minimal program to replace one of every five ties (624 ties per mile for a total of 185,000) and perform associated surfacing would cost approximately $11 million and that, without rehabilitation, operation of the line would likely cease by the year 2000 or shortly thereafter.

We reject SORC's claim that replacement of all 70-pound and 90-pound rail is a necessary part of rehabilitation. We do not accept SORC's replacement of light rail based on its assumption that heavier rail is needed should additional traffic develop. There is no evidence that the condition of the rail is limiting traffic on the line. Because SORC admits that the light weight rail can support the line's current traffic and speeds, we see no need to upgrade the entire line. We agree with SORC that additional ties and surfacing would help in prolonging the rail's life. However, SORC has not provided data to support its figure of $11 million for ties and surfacing. Without detailed data showing costs and the rationale for replacing one in every five ties, we reject SORC's rehabilitation estimate. We accept SORC's bridge repair estimate that $60,000 to $100,000 will be needed to be spent in the next 2 years. Because SORC did not finalize a cost, we accept its most conservative

[18] SORC did not consider using second-hand rail because of the difficulty of obtaining 148 miles of good quality second-hand rail.

estimate of $120,000 ($60,000 a year for 2 years). In our restatement of the revenue and cost data, we have placed this expense under rehabilitation because it is not a recurring item.

SUMMARY OF COST AND REVENUE EVIDENCE

Our analysis of the evidence indicates that for the forecast year, total revenue attributable to the line would be $815,474. Total avoidable costs would be $1,535,517, resulting in a forecast year operating loss of $720,043. The record also shows that rehabilitation costs of $120,000 are required to bring the line into conformity with FRA Class 1 standards. A complete summary of the revenue and cost data is set forth in the appendix.

SHIPPER AND COMMUNITY INTERESTS

As noted above, applicant identifies seven shippers as significant users on the line, but of these, only three are active users—Belding, Big Lake, and Unimin. None of these shippers has filed a protest to the abandonment and discontinuance.

SORRTD argues that SORC's application for abandonment should be denied on the ground that abandonment of the line is not required or permitted by the future public convenience and necessity. According to SORRTD, SORC's portrayal of the line as incapable of generating sufficient local and overhead traffic to permit it to earn a profit, is baseless and misleading. SORRTD contends that SORC is aware of several potential sources of traffic that would cause operations over the line to be profitable, e.g. DinoSoil, Geronimo, and Hard Rock. In addition, SORRTD cites other sources of potential traffic, namely Hirschfeld, Texas Tank, Twin Mountain, and Kasberg.

SORRTD also argues that authorization of the abandonment of the line and the resultant closure of the Presidio gateway would violate the North American Free Trade Agreement's (NAFTA) goal of facilitating the cross-border movement of goods, because the Presidio gateway is the only rail crossing for almost 500 miles along the U.S-Mexico border. SORRTD avers that, given the advantages that the Presidio gateway offers over the other four rail gateways between Mexico and Texas, it makes no sense to permit the abandonment of this vital rail link. Even though this link may have been underutilized in the past, SORRTD argues that this fact has no bearing on the future potential of the line. SORRTD submits that Ferromex is one of two entities[19] that are ready and able to negotiate an arrangement with SORC and SORRTD to guarantee future rail operations over the line. If we were to grant the abandonment, Ferromex (or presumably another carrier) would have to rebuild the entire line, which would compromise its ability to provide cross-border service.

---

[19] SORRTD does not identify the other entity.

While it opposes abandonment, SORRTD states that it does not object to SORC being authorized to discontinue service. However, because the trackage rights over UP's line between Alpine Junction and Paisano Junction are crucial to any future operations over the line, SORRTD objects to SORC being authorized to discontinue service over that segment.

TxDOT argues that the line is important not only to rural and sparsely populated areas through which the line runs, but also to the commerce between Mexico and the United States. It states that the line serves as a critical link between the Mexican railroad lines to the south and the United States railroad system to the north and that it is interested in preserving this rail gateway as a means of serving the future transportation needs of the State. TxDOT, like SORRTD, is not opposed to SORC's discontinuance of service on the line.

The Comptroller, who is the chief fiscal and revenue official for Texas, states that research and analysis conducted by staff members indicate that the proposed abandonment will have a negative economic impact in the region served by the line. According to the results of a survey of 34 shippers along SORC's line from Presidio to Fort Worth that was conducted between July 17 and July 24, 1998, five employers indicated that they would reduce employment because of the proposed abandonment, eliminating 73 jobs. Other possible impacts include: the relocation of 15 to 20 jobs; the diversion of 150,000 pounds of scrap into local landfills as a result of a San Angelo scrap processor declining business because of the additional cost of shipping its low value, high bulk commodity; and generally increased operating costs that could result in local companies losing business.

The RCT states that the line is an integral part of a potentially very important through route that extends from the Dallas/Fort Worth areas to the Mexican port of Topolobompo, which in the future may prove to be an uncongested alternative to the ports of Los Angeles/Long Beach and Oakland/San Francisco. According to the RCT, Presidio is a future gateway that holds significant promise for efficient routing of cross-border rail traffic as the northwestern part of Mexico becomes heavily industialized over the next 20 years and begins to ship huge volumes of manufactured goods to the United States. The RCT asserts that the line proposed for abandonment is a valuable segment of the North American rail system that must be preserved and that to allow the Presidio gateway to be closed would be economically short-sighted and contrary to NAFTA.

Hard Rock, Geronimo and DinoSoil express concern that the proposed abandonment will greatly affect the future of their businesses and the Brewster County economy. They state that they recently established facilities in Alpine and that the line was an integral factor in determining the location of these facilities. They state that the growth of their businesses will benefit the economics of the counties and create jobs.

Ferromex is a newly privatized Mexican railroad that is owned and controlled by Grupo Ferroviario Mexicano, S.A. de C.V.[20] Ferromex connects with SORC at Ojinaga/Presidio and is opposed to the proposed abandonment for the reason that the line provides a vital link between Ferromex and the rail system in the United States and thus is an important means for moving burgeoning commerce between the two countries fostered by NAFTA. It states that the interchange between Ferromex and SORC ended on June 23, 1998, when SORC's bridge 1003.9 was damaged by fire. Ferromex claims that SORC has refused to make repairs and, as a result, it has had to reroute 85 cars to other less direct gateways and presumably, an equal number of southbound cars have had to be rerouted. Ferromex claims that SORC cites the mishap as a further justification for the abandonment of the line. It argues that such bootstrapping should not be countenanced, citing Northwestern Pac. R. Co. Abandonment, 320 I.C.C. 19 (1963), aff'd, Northwestern Pac. R. Co. v. United States, 228 F. Supp. 690 (N.D. Cal. 1964), aff'd mem., Northwestern Pac. R. Co. v. I.C.C., 379 U.S. 132 (1964), to support its contention that damage to a railroad will not permit its abandonment where there is a continuing requirement for its use.[21]

Ferromex states that it is confident of the growth of traffic on the line, especially because of NAFTA. It first began serving the Ojinaga/Presidio gateway in late February 1998, and during its first 3 months of operations, it interchanged with SORC 217 carloads of freight and nearly equal the number of empty cars. The company's confidence in the potential of the Ojinaga/Presidio gateway for the movement of Mexico-U.S. traffic is reflected in its decision to acquire the Topolobompo-Chihuahua-Ojinaga line. Ferromex's planning staff made a projection of the traffic potential on the Chihuahua-Ojinaga line for movement via the Ojinaga/Presidio gateway, which shows that approximately 2,250 additional cars annually originating on the Chihuahua-Ojinaga line would move via Ojinaga/Presidio annually. It states that the Presidio-San Angelo line provides the most direct route between the port of Topolobompo and the city of Chihuahua to Dallas/Fort Worth, and points beyond. Ferromex states that it is ready, willing, and able to operate the line or arrange for a third party to conduct service and is prepared to negotiate with SORRTD to become the line's new operator.

TDED is a Texas agency charged with the responsibility for planning and implementing the state's business development and tourism programs. Its duties include assistance with exporting products and services to international markets, assistance with business and community economic development programs, and promotion and development of tourism within the State. According to TDED, the abandonment of the line would be detrimental to the economic interests of the State of Texas and the potential for future growth of trade and tourism between Mexico and the United

---

[20] Grupo Ferroviario Mexicano, S.A. de C.V. is owned by Grupo Mexico, S.A. de C.V. (74%), Constructoras ICA, S.A. de C.V. (13%), and UP (13%).

[21] In its supplement to its application, SORC points out that it has not sought to amend its abandonment application to reflect the costs of the fire or the effects of its subsequent embargo of the line.

States, as NAFTA becomes fully operational. TDED states that in addition to alleviating the strain on cross-border traffic, the San Angelo-Presidio line could eventually open a new gateway to the Pacific for Texas by providing train service to the Mexican port city of Los Mochis on the Gulf of Cortez. Finally, TDED opines that there may be the potential for passenger service transportation, including tourism, particularly between Alpine and Presidio.

The City acknowledges the financial situation of SORC and that traffic on the line is not sufficient to continue operations. The City states that, although the line is unprofitable now, it may become profitable in the future as rail and motor carrier traffic pick up through the Presidio/Ojinaga area. The City expresses its concern about the future of the line and the physical track and states that, if the line is sold for scrap, there is no future for the line.

The Independent School District submits a resolution on behalf of the Board of Trustees of the Presidio Independent School District opposing the proposed abandonment. It states that Presidio County is one of the poorest and most geographically isolated counties in Texas and that the abandonment would have a devastating economic impact on an already improvished economy for Presidio and its residents, especially the children and their future in this community.

The Appraisal District submits a resolution on behalf of the local taxing entities of Presidio County opposing the proposed abandonment. It states that Presidio County is one of the poorest and geographically isolated counties in Texas and that the abandonment would have a devastating economic impact on an already impoverished area.

Ferrocarriles, on behalf of the Mexican government, opposes the abandonment. It expresses concern that, if economic relationships between Mexico and the United States are to thrive under the NAFTA regime, it is critical that rail transportation, as well as other modes of transportation, be maintained at levels that can meet the demands of shippers in both countries. It states that it would be adverse to the interest of both nations to permit the abandonment of the Presidio/Ojinaga interchange point and the scrapping of a line that forms an essential link between the Mexican and the United States railroad systems.

General comments in opposition to the abandonment were filed by Congressmen Henry Bonilla and Charles W. Stenholm. They state that the Presidio/Ojinaga gateway is one of only five rail gateways along the Texas-Mexico border and that preservation of the line is essential to the economic stability of Presidio and west Texas. They also state that, in recent years with the passage of NAFTA, the line has served as a critical facilitator of cross-border trade.

State Senator Jeff Wentworth opposes the proposed abandonment and states that continued service on the line is important not only to the economy of the region, but also to the commerce between Mexico and the United States that NAFTA intended to facilitate.

Garl Boyd Latham is a private citizen who asserts that the abandonment of the line would be a mistake. He states that, if after considering the record, the Board allows the removal of track between San Angelo and Alpine, it should retain the route from Paisano Junction to the Mexican border. Mr. Latham states that, with the continued interest in Texas/Mexico trade, we should not allow abandonment of one of only three trans-Texas railroad routes at the same time that there are serious ongoing discussions about building a new interstate freeway (69 through east Texas) to help handle NAFTA traffic.

Elizabeth R. Covos is a resident of the area served by SORC and states that she is opposed to the proposed abandonment. She contends that continued service on the line is important not only to the economy of the region, but also to the commerce between Mexico and the United States that NAFTA was intended to facilitate.

ALTERNATIVE TRANSPORTATION

According to SORC, shippers who use its services for the movement of overhead traffic to and from Mexico will have numerous other options, including service from UP and The Burlington Northern and Santa Fe Railway Company via the El Paso gateway, and, to a lesser extent, via the Eagle Pass, Laredo, and Brownsville gateways. Shippers on the line will continue to have access to rail service from SORC at San Angelo and from UP at Alpine. SORC submits that local shippers also have effective motor carrier service available because U.S. Route 67 parallels the entire length of the line, Interstate 10 bisects the line and provides direct access to Fort Stockton, as does U.S. Route 285, and Alpine is located on U.S. Route 90. All other locations on the line are served by at least one additional U.S. or Texas state route.

DISCUSSION AND CONCLUSIONS

The statutory standard governing an abandonment or discontinuance 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).

The Board must determine whether the burden on the railroad from continued operation is outweighed by the burden on the shippers and public parties from the loss of rail service. This involves a question of whether, and to what degree, shippers will be harmed if rail service is no longer available. The fact that shippers are likely to incur some inconvenience and added expense is insufficient by itself to outweigh the detriment to the public interest of continued operation of uneconomic and excess facilities. Protestants must show that the harm to shippers and communities outweighs the demonstrated harm to the railroad and interstate commerce by continued operation of the line. See Chicago and North Western Transp. Co.—Abandonment, 354 I.C.C. 1, 7 (1977).

In determining whether to grant or deny an abandonment or discontinuance application, we consider a number of factors, including operating profit or loss, other costs the carrier may experience (including opportunity/economic cost), and the effect on shippers and communities. No one factor is conclusive. See Cartersville Elevator, Inc. v. ICC, 724 F.2d 668, aff'd on reh'g, en banc, 735 F.2d 1059 (8th Cir. 1984).

As we discussed in connection with the motion to dismiss, there is some question about whether SORC's option to purchase the track is viable. While the question does not affect our jurisdiction to consider the application, it does impact opportunity costs, which the parties have addressed at length.[22] If there is no state law impediment to SORC's exercise of the option, then it is extremely valuable, giving SORC the right to acquire, at minimal cost, track materials which it values at over $15 million. If it has no such right, then it has no opportunity costs. While opportunity costs are important when forecast year operating losses are marginal, the record here shows that continued operation of the line will impose a substantial economic burden on SORC, involving a forecast year operating loss of $720,043. Thus, it is obvious that, even without considering opportunity costs, SORC cannot continue to operate the line without incurring heavy losses.

In deciding to grant a discontinuance and deny abandonment, we have considered a number of factors, including the potential harm to shippers. We note that none of the three active users of the line has appeared in opposition. However, two potential shippers, Hard Rock and DinoSoil, have presented evidence of possible substantial future traffic for the line. Hard Rock estimates that it would ship 40 carloads a day via SORC; DinoSoil projects shipping 76 carloads every other day. Although they have made no firm commitment of a specific amount of traffic they would ship over SORC, Hard Rock and DinoSoil both have made investments in rail facilities at Alpine, which they state they intend to use to tender traffic to SORC. In addition, SORRTD has submitted verified statements from four additional shippers who state that their businesses are expanding and that they would tender traffic to SORC. While this evidence falls short of assuring us that substantial traffic will be shipped over the line in the near future, it weighs in favor of keeping the track in place.[23]

We have also considered the legitimate concerns of protestants about the effect of an abandonment on the local communities, the larger region, and the free trade objectives of NAFTA.

---

[22] Costs that reflect the economic loss experienced by a carrier from forgoing a more profitable alternative use of its assets.

[23] Hard Rock's and DinoSoil's specific evidence of traffic volumes and leases of rail facilities at Alpine demonstrate a real possibility that the line may be needed. The evidence distinguishes this case from CSX Transportation, Inc.--Abandonment--In Barbara, Randolph, Pocahontas, and Webster Counties, WV, Docket No. AB-55 (Sub-No. 500) (ICC served July 11, 1995), reversed and remanded, CSX Transp., Inc. v. Surface Transp. Bd, 96 F.3d 1528 (D.C. Cir. 1996) (evidence of future traffic found to be "the idle speculations of a local businessman").

We are extremely concerned about maintaining adequate rail facilities and infrastructure.[24] We are also mindful of our responsibility to ensure that our actions foster the goal of North American economic integration embodied in NAFTA. See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company, Decision No. 44, Finance Docket No. 32760, slip op. at 147 (STB served Aug. 12, 1996).

In light of the shippers' evidence of potential traffic, the protestants' concerns that the line remain intact, and Ferromex's willingness to operate the line, we have decided that the public convenience and necessity is best met by approving discontinuance of SORC's service over the San Angelo-Presidio line and the discontinuance of SORC's trackage rights over UP's line. This will permit SORC to curtail the avoidable losses projected by continued operation, while allowing SORRTD to continue to explore the possibility of substituting Ferromex or another carrier as operator of the line. See Chicago and North Western, supra. If traffic projections do not come to fruition, SORC can of course seek abandonment in the future. By contrast, if the abandonment were approved and consummated and were the line to be salvaged, there would be no possibility (without incurring the costs of reconstructing the line) that SORC or a new operator could serve the shippers if the forecasted need for service proves accurate. In these circumstances, approval of abandonment of the San Angelo-Presidio line is not warranted at this time.

We note that 49 U.S.C. 10904 provides a mechanism for those who want to continue rail service that the Board has authorized to be discontinued or abandoned. Under section 10904, any financially responsible person (and all government agencies are deemed to be financially responsible) may file an offer of financial assistance (OFA) to subsidize the losses of the existing operator. In permitting SORC to discontinue operations over the line, including its trackage rights operations over the 11.4-mile segment owned by UP, we recognize that, unless service is continued by virtue of an OFA, there is a potential issue of access by a new service operator over the UP-owned segment. Should a replacement operator be found, we expect UP to be cooperative in facilitating the necessary access so that service over the entire line at issue in this proceeding is possible.

LABOR PROTECTION

In approving discontinuance of service, we must ensure that rail employees are 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), satisfy the statutory requirements, and we will impose those conditions here.

---

[24] In Joint Petition for Service Order, STB Service Order No. 1518, slip op. at 6-7 (STB served Feb. 17, 1998), we found that a key factor in bringing about the service emergency was the inadequate rail facilities and infrastructure in the region.

ENVIRONMENTAL ISSUES

We are also required to consider the environmental and energy impacts of the proposal. SORC 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 proposal. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on July 24, 1998. In the EA, SEA indicated: (1) that the U.S. Department of Commerce, National Geodetic Survey (NGS) has identified 172 geodetic station markers along the rail line that may be affected by abandonment and requests that it be notified 90 days in advance of any activities that may disturb or destroy these markers so that plans can be made for their relocation; and (2) that, based on information available at this time, it appears that the Texas Historical Commission (SHPO)[25] and the U.S. Army Corps of Engineers, Fort Worth District, (the Corps) have not completed their review. Therefore, SEA recommends that we impose conditions on any grant of abandonment authority requiring that SORC shall: (1) notify NGS and provide it with 90 days' notice prior to disturbing or destroying any geodetic markers so that plans can be made for their relocation; (2) retain its interest in and take no steps to alter any sites and structures on the line that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; and (3) not undertake any salvage activities until the Corps has completed its review and the Board has modified or removed this condition as a result of the Corps' review.

No comments to the EA were filed by the August 20, 1998 due date. Because we are authorizing only the discontinuance of service and the discontinuance of trackage rights, it is unnecessary to impose the conditions recommended by SEA. We conclude, therefore, that the discontinuance of service and trackage rights will not significantly affect either the quality of the human environment or the conservation of energy resources.

PUBLIC USE

SEA has indicated that, following abandonment and salvage of the rail line, the right-of-way may be suitable for other public use. No one has sought a public use condition here. We note, however, that under 49 U.S.C. 10905, we can only prohibit a railroad from disposing of whatever interest it has in the right-of-way. If the railroad does not retain a transferable interest, then a public use condition under section 10905 cannot be imposed. See Boston and Maine

---

[25] In a letter filed on July 13, 1998, the SHPO states that it has conducted its review and that none of the bridges included in the subject line of the Bridge & Structure Inventory of the environmental report in this proceeding are eligible for listing in the National Register of Historic Places and that no further review of this undertaking as it affects these bridges is required.

Corporation—Exemption—Discontinuance of Service in Essex County, MA, Docket No. AB-32 (Sub-No. 37X) (ICC served June 27, 1988). Here, SORC has no transferable interest because TxDOT owns the right-of-way. Therefore, a public use condition is unavailable.

TRAIL USE

RTC requests issuance of a CITU pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), to enable it to acquire that portion of the right-of-way between milepost 722 south of San Angelo near Mertzon Station and milepost 945.3 at Alpine Junction and between milepost 956.7 at Paisano Junction and milepost 1029+767 feet at the end of the line near Presidio Station for interim trail use as recreation and transportation facilities. RTC has submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation for rail service as required under 49 CFR 1152.29.[26] While the right-of-way may be suitable for other public purposes, we have approved only discontinuance of service and discontinuance of trackage rights. The potential use of the right-of-way for rail purposes will preclude other public uses, including use as a trail.

We find:

1. The present or future public convenience and necessity permit the discontinuance of service over the San Angelo-Presidio line and the discontinuance of trackage rights over the UP line, as described above, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

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

3. As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. SORRTD's motion to dismiss the application is denied.

2. Ferromex's and SORRTD's petitions for leave to file replies to SORC's reply are denied and their tendered replies and SORC's further reply are rejected.

---

[26] By letter filed September 15, 1998, SORC states that it is not willing to negotiate with RTC for interim trail use.

3. The discontinuance of service and the discontinuance of trackage rights over the above-described lines is granted subject to the conditions specified above.

4. The request for issuance of a CITU is denied.

5. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by SORC and the Board by October 16, 1998, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). Each OFA must be accompanied by the $1,000 filing fee. See 49 CFR 1002.2(f)(25). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1).

6. 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."**

7. Provided no OFA has been received, this decision will be effective November 5, 1998. Petitions to stay must be filed by October 16, 1998, and petitions to reopen must be filed by October 26, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX

COST AND REVENUE DATA

	Applicant's Opening Forecast Year Figures	Protestant's Forecast Year Figures	Applicant's Rebuttal Forecast Year Figures	STB Restatement Forecast Year Figures
1. Freight Orig. and/or Term. on Branch	$199,529	$238,017	$199,529	$199,529
2. Bridge Traffic	579,960	691,831	579,960	579,960
3. All Other Revenue and Income	35,985	181,987	35,985	35,985
4. Total Attributable Revenue (Ls. 1 thru 3)	$815,474	$1,111,835	$815,474	$815,474
5. On-branch Costs:				
a. Maintenance-of-Way and Structures	$748,776	$194,604	$748,776	$748,776
b. Maintenance-of-Equipment (Including Depreciation)	105,252	37,910	105,252	105,252
c. Transportation	382,400	275,759	382,400	382,400
d. General & Administrative	185,464	66,511	185,464	185,464
e. Deadheading, Taxi and Hotel	12,480	12,480	12,480	12,480
f. Overhead Movement	0	0	0	0
g. Freight Car Costs (Other Than Return)	71,600	71,600	71,600	71,600
h. Return on Value - Locomotives	35,658	23,772	35,658	35,658
i. Return on Value - Freight Cars	0	0	0	0
j. Revenue Taxes	0	0	0	0
k. Property Taxes	0	0	0	0
l. Total (Ls. 5a thru 5k)	$1,541,630	$682,636	$1,541,630	$1,541,630
m. Holding Gains - Locomotives	6,113	3,493	6,113	6,113
n. Holding Gains (Loss) - Freight Cars	0	0	0	0
o. Net On-br Costs (Ls. 5l - 5m & 5n)	$1,535,517	$679,143	$1,535,517	$1,535,517
6. Off-branch Costs:				
a. Off-Branch Costs (Other Than Return)	$0	$0	$0	$0
b. Return on Value - Freight Cars	0	0	0	0
c. Holding Gains - Freight Cars	0	0	0	0
d. Net Off-br Costs (Ls. 6a+6b - 6c)	$0	$0	$0	$0
7. Total Avoidable Costs (L. 5o + L. 6d)	$1,535,517	$679,143	$1,535,517	$1,535,517
8. Rehabilitation	$0	$0	$0	$120,000