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THOMAS F. MCFARLAND

July 10, 2009

By e-filing

Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

Re: Docket No. AB-33 (Sub-No. 275), *Union Pacific Railroad Company -- Abandonment Exemption -- in Rusk County, TX*

Dear Ms. Quinlan:

Hereby transmitted is a Protest for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Protestants

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BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC RAILROAD	)	DOCKET NO. AB-33
COMPANY -- ABANDONMENT	)	(SUB-NO. 275)
EXEMPTION -- IN RUSK COUNTY, TX	)	

PROTEST

WEST FRASER TIMBER CO., LTD.
RAYMOND MITCHELL, Manager
P.O. Box 460
Henderson, TX 75653-0460

HENDERSON ECONOMIC
DEVELOPMENT CORPORATION
SUE HENDERSON, Director
400 West Main Street
Henderson, TX 75652

RUSK COUNTY RURAL RAIL DISTRICT
JOHN CLOUTIER, President
209 Carthage Highway, Suite B
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Protestants

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Attorney for Protestants

DUE DATE: July 10, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC RAILROAD	)	DOCKET NO. AB-33
COMPANY -- ABANDONMENT	)	(SUB-NO. 275)
EXEMPTION -- IN RUSK COUNTY, TX	)	

PROTEST

Pursuant to 49 C.F.R. § 1152.25(a) and the Board's procedural decision served June 15, 2009, WEST FRASER TIMBER CO., LTD. (West Fraser), HENDERSON ECONOMIC DEVELOPMENT CORPORATION (Hedco), and RUSK COUNTY RURAL RAIL DISTRICT (the Rail District), referred to collectively as Protestants, hereby submit this Protest of the Abandonment Application (Applic.) filed by Union Pacific Railroad Company (UP) on May 26, 2009.

IDENTITY AND INTEREST OF PROTESTANTS

West Fraser is an integrated forest products company producing lumber, wood chips, fibreboard, plywood, pulp, liner board, kraft paper, and newsprint. In April, 2007, West Fraser acquired a sawmill at Henderson, Texas from International Paper Company. That sawmill is located on the Overton-Henderson rail line that is proposed for abandonment. UP's application correctly identifies West Fraser's use of that rail line in 2008. However, as identified in the Verified Statement of West Fraser's Sawmill Manager, Mr. Raymond Mitchell, which is attached as Appendix 1, West Fraser's 2008 rail traffic was depressed as a result of extremely adverse market conditions in the forest products industry. West Fraser's rail traffic will increase appreciably in the foreseeable future when those market conditions normalize as they always have following market downturns. Mr. Mitchell also provides evidence that the proposed abandonment would have a serious adverse effect on West Fraser.

Hedco was created to further economic development in the community of Henderson, Texas, and in the rural area of Rusk County, Texas that surrounds Henderson. As identified in the Verified Statement of Hedco's Director, Ms. Sue Henderson, which is attached as Appendix 2, the proposed abandonment would have a serious adverse impact on rural and community development in Henderson and the surrounding rural area.

The Rail District was formed in 2008 as a means of securing the future of commercial and industrial rail service in Rusk County, Texas. As established in the Verified Statement of the Rail District's President, Mr. John Cloutier, the proposed abandonment would be directly contrary to that goal.

CONTENT OF PROTEST

Protestants' position is that the present and future public convenience and necessity do not permit or require abandonment of the Overton-Henderson rail line because the serious adverse effect of loss of rail service on West Fraser and on rural and community development in Henderson and surrounding rural Rusk County outweighs the minimal harm to UP from continued operation of the rail line consisting solely of a temporary economic loss.

Protestants support and explain that position in an Argument, next following. That position is also supported by the attached Verified Statements of Mr. Raymond Mitchell of West Fraser (Appendix 1), Ms. Sue Henderson of Hedco (Appendix 2), and Mr. John Cloutier of the Rail District (Appendix 3).

Three additional Appendices show the profitability of operating the rail line in the forecast year when UP costing errors are corrected, and even more so when a more representative traffic level is considered. Using UP's 124-car forecast year traffic level, Appendix 4 shows the effect of eliminating the cost of a second locomotive that is used on the rail line solely for UP's operating convenience. Using that same traffic level, Appendix 5 shows the effect of that elimination plus determination of locomotive-related costs based on a more accurate three hours, rather than five hours per train trip on the line. Appendix 6 reflects those corrections, and uses a more representative 167-car forecast year traffic level.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

The statutory standard for approval or denial of a rail abandonment is "public convenience and necessity." Thus, under 49 U.S.C. § 10903(d), an abandonment is to be authorized "only if the Board finds that the present or future public convenience and necessity require or permit the abandonment." The statute does not identify the criteria that the Board is to consider in determining whether public convenience and necessity warrant abandonment, except that the Board is specifically directed to consider "whether the abandonment . . . will have a serious adverse impact on rural and community development." *Id.* The Supreme Court has stated that public convenience and necessity is to be determined by weighing any harm to the rail carrier and interstate commerce from continued operation of a rail line against any harm to shippers and other local interests that would result from the line's abandonment. *Colorado v. United States*, 271 U.S. 153, 168-169 (1926).

II. THE PRESENT AND FUTURE PUBLIC CONVENIENCE AND NECESSITY DO NOT PERMIT OR REQUIRE ABANDONMENT OF THE RAIL LINE BECAUSE MINIMAL HARM TO UP FROM A REQUIREMENT OF CONTINUED OPERATION IS OUTWEIGHED BY SUBSTANTIAL HARM FROM ABANDONMENT TO WEST FRASER AND TO RURAL AND COMMUNITY DEVELOPMENT IN HENDERSON AND THE SURROUNDING AREA OF RUSK COUNTY

A. There Would Be A Forecast Year Operating Profit At The Current 124-Car Traffic Level

The most serious element of harm to a rail carrier from denial of abandonment is a forecast year avoidable operating loss that is likely to continue in the foreseeable future. A rail carrier facing the prospect of permanent operating losses should not be forced to continue operations.

In the present case, there would be no forecast year avoidable operating loss at the 124-car traffic level used by UP in its forecast year calculations, let alone an operating loss that would continue in the foreseeable future.

The principal reason why UP shows a forecast year avoidable operating loss at that traffic level is that UP erroneously charged the rail line with costs associated with use of a second locomotive on the rail line. As shown below, that second locomotive is not required for transportation of traffic on the involved rail line. The second locomotive is required, if at all, to transport traffic on UP's main line at and west of Longview, TX, which is served on the same day that the Overton-Henderson Branch is served. Thus, the second locomotive operates over the involved line solely for UP's own operating convenience. It is more convenient for UP to operate that locomotive on the line than to unhook it at Overton before entering the rail line and to reconnect it at Overton when exiting from the line. In that circumstance, the costs associated with that locomotive are not attributable to the subject rail line, but instead are attributable to UP's main line operation between Longview and points west, for which use of a second locomotive may be required. *Cf. Wyoming & Colorado R. Co., Inc. -- Abandonment Exemption -- Jackson County, CO*, 1995 ICC LEXIS 107 at * 12-14 (Docket No. AB-307 [Sub-No. 2X], decision served May 19, 1995).

According to UP's evidence, the 124 cars that originated on the line in 2008 were transported in 52 train trips over the line. (Applic. at 159). Thus, there were an average of only 2.38 loaded cars per train trip in that year. UP used that experience in 2008 as the basis for locomotive-related costs in the forecast year. <u>It is indisputable that only a single locomotive is required to transport an average of 2.38 loaded cars</u>. It follows that the costs associated with use of a second locomotive for that transportation cannot reasonably be charged against the involved rail line.

It is provided at 49 C.F.R. § 1152.32 as follows:

> . . . The avoidable costs of providing freight service on a branch shall be just and reasonable, and shall not exceed those necessary for an honest and efficient operation . . .

UP's assignment of costs for a second locomotive as avoidable costs of the involved rail line in the circumstances identified above is in violation of 49 C.F.R. § 1152.32 because such costs are not just and reasonable, and exceed locomotive costs necessary for honest and efficient operation of the line.

UP's evidence contains the following forecast year on-branch locomotive costs based on the use of two locomotives. (Applic. at 61, 62):

Cost Item	Costs
Locomotive Maintenance and Depreciation	$2,570
Locomotive Train Inspection and Lubrication	4,776
Locomotive Fuel	94,051
Locomotive Servicing	182
Locomotive Return on Value	3,087
Total	$104,666

In order to reflect just and reasonable locomotive costs in the forecast year, those costs must be reduced by 50 percent to eliminate the costs associated with a second locomotive. That reduces forecast year total avoidable costs by $52,333.

The result of appropriate elimination of those unjust and unreasonable costs is a forecast year operating profit of $9,166, as shown in Appendix 4 attached to this Protest.

The actual forecast year avoidable operating profit is considerably greater than $9,166, but it is not possible to show precisely how much greater because of UP's failure to have followed the Board's abandonment regulations in determining on-branch locomotive hours.

UP's time-related on branch locomotive costs are based on five on-branch hours per train trip for 52 forecast year trips, each with two locomotives (i.e., 5 x 52 x 2 = 520 on-branch locomotive hours). (Applic. at 159). As shown earlier, 260 hours associated with one of those locomotives must be eliminated, leaving 260 on-branch locomotive hours claimed by UP.

UP's claim of five on-branch hours per train trip is based on an unexplained and unsupported estimate by an unidentified representative of UP. (Applic. at 159). There are no workpapers that show how that number of hours was determined. Nor is there any such explanation in the verified statement of UP Cost Witness Drelicharz. (Applic. at 59-73).

UP's estimate of locomotive hours on-branch violates the Board's abandonment regulations, which require rail carriers to collect data, including service units required under 49 C.F.R. § 1152, on all branch lines, as here pertinent, that are listed in Category 1 in the rail carrier's System Diagram Map. 49 CFR 1201, Subpart B, Section 920(a)(1) and (b), Branch Line Accounting System, Collection of Data. The collection of data is to commence on the first day of the month after the line has been designated in Category 1. *Id.*, Section 920(a)(1). In the present case, the subject rail line was designated in Category 1 on August 28, 2008. (Applic. at 6). Accordingly, UP was required to begin to collect data of on-branch service units as of September 1, 2008, and to calculate on-branch costs utilizing actual service units collected between that date and the present. UP's on-branch costs that are calculated through the use of five hours per train are thus required to be disallowed altogether because UP did not sustain its burden of proof as to such costs in accordance with Board regulations.

A workpaper at page 161 of the Application indicates that three hours per train trip is a more reasonable estimate. That workpaper shows train statistics for Train LHA 43, Longview, TX to Longview, TX, on April 11, 2009, a day on which service was also provided on the Overton-Henderson line. The train sheet does not show the round-trip train time on-branch between Overton and Henderson, but it shows five minutes of terminal time at Henderson. At train speed of 10 miles per hour, it can be estimated that it would take approximately 2.86 hours for a train to complete the 28.6-mile round trip between Overton and Henderson (i.e., 2 hours and 51 minutes). Adding the terminal time at Henderson and rounding upward, it can be reasonably estimated that a train spends about three hours per trip on the rail line. That is consistent with the train sheet that shows that the train took 4 hours and 15 minutes to move from its terminal at

Longview to the off-branch point of Hume, TX, including a round-trip on branch between Overton and Henderson. Certainly, that total time undermines UP's contention that trains spend five hours per round-trip on the branch alone.

Thus, the time-related locomotive costs claimed by UP for a single locomotive are overstated by 40 percent (5 - 3 = 2 ÷ 5 = .4). That results in a corrected forecast year avoidable costs for 3 locomotive-hours on branch viz.:

Cost	**Claimed by UP ***	**60 Percent Thereof**
Loco. Depreciation	$940	$564
Train Inspection	2,388	1,433
Loco. Fuel	47,025	28,215
Loco. ROI	1,544	926
Total	$51,897	$31,138

* Adjusted for one locomotive instead of two.

That reduction of forecast year avoidable costs increases forecast year operating profit correspondingly such that forecast year operating profit becomes $29,926, as shown in Appendix 5 attached to this Protest.

B. Avoidable Operating Profit Would Be Greater In Years Following The Forecast Year

As the Board is well aware, current market conditions in the forest products industry are severely depressed, primarily due to a radically depressed housing market. It is virtually unanimously agreed that before long the housing market will improve, as it always has following downturns, and that correspondingly, market conditions in the forest products industry will return to normal. (*See* VS Mitchell, Appendix 1 attached to this Protest).

The 124 carloads shipped by West Fraser in 2008 are a reflection of the bottom or near-bottom of market conditions in the forest products industry. In light of the historic business cycle in that industry, it is not at all speculative that market conditions in the forest products industry will improve meaningfully in the foreseeable future. When they do, West Fraser's rail shipments over the subject rail line will increase correspondingly. (*See* VS Mitchell, Appendix 1 attached to this Protest).

The likely increase in West Fraser's rail shipments over the line is entitled to consideration under the statutory criterion of the <u>future</u> public convenience and necessity. The concept of the forecast year is appropriate for consideration of near-term economic results, which often are indicative of longer-term results as well. But that is not always the case, and this case is one in which longer-term traffic and corresponding operating profit can reasonably be expected to meaningfully exceed the forecast year experience. In that circumstance, the forecast year is not to be treated as talismanic, but instead conditions in the longer term are also to be given consideration.

The testimony of Protestants' Witness Mitchell would support a traffic level of at least 300 carloads per year in the foreseeable future, i.e., 25 to 30 cars per month. (Protestants' Appendix 1 at 1). However, to be extremely conservative, West Fraser's rail traffic upon the initial return of more favorable conditions in the forest products industry is here deemed to consist of the 167 carloads that were actually shipped from the subject rail line in 2007, as shown in UP's evidence. (Applic. at 235). It certainly cannot be successfully argued that such an actually-experienced traffic level is unduly speculative.

UP's evidence shows that the average UP revenue from the 124 carloads shipped by West Fraser in the forecast year was $4,283 per car. (Applic. at 141; $531,080 divided by 124 cars = $4,283 per car). Protestants have applied that average revenue per car to the minimum of 43 additional cars that would be shipped by West Fraser under more favorable market conditions. The result is annual revenues of $715,249 ([43 x $4,283 = $184,169] + $531,080 = $715,249). Protestants increased all costs except for maintenance of way and structures by 34.7 percent to correspond to that 34.7-percent increase in traffic. Forecast year normalized maintenance costs would surely be adequate for the modestly-increased traffic level. A single locomotive would be adequate for the traffic level of 3.21 loaded cars per trip. As shown in Protestants' Appendix 6, there would be an <u>avoidable operating profit of at least $75,204 per year</u> at the 167-car traffic level.

C. <u>Summary Regarding Operating Results</u>

The foregoing shows conclusively that UP would not be burdened by an avoidable operating loss if it were to continue to operate the subject rail line.

D. <u>There Is No Requirement For Track Rehabilitation</u>

The next most serious harm to a rail carrier from denial of abandonment is a cost for track rehabilitation that cannot be amortized from rail line operating profits within a reasonable period of time. Unless the need for track rehabilitation is attributable to a rail carrier's systematic failure to carry out its track maintenance obligation, a rail carrier should not be required to make a large capital expenditure on a line for which it has no hope of recovery.

UP contends that it is necessary to replace 6,608 crossties at a cost of $799,595 in order to rehabilitate the line to FRA Class I standards. (Applic. at 47, 53). In addition, UP contends that surfacing and lining is required at a cost of $205,650 for Class I compliance. (*Id.*). Thus, UP claims a total cost of $1,005,245 for track rehabilitation to FRA Class I.

The testimony of UP's own track Witness Ghazai undermines those claims. Thus, Mr. Ghazai acknowledged that track conditions in the line already comply with FRA Class I standards, viz. (Applic. at 46, emphasis added):

> . . . while the entire line is designated as FRA Class I track, in my opinion it is FRA excepted track . . .

There is no supporting testimony in Mr. Ghazai's Verified Statement and no workpaper that purports to establish that the surface and alinement of the track at any location on the line fails to comply with minimum standards for surface and alinement in FRA regulations for Class I track. It thus appears that the claim of need for surfacing and alinement would arise only as an incident of the replacement of crossties. Thus, if the need for crosstie replacement is not sustained in the evidence, the need for surfacing and alinement would also fall.

Mr. Ghazai's workpapers show that he determined that 6 percent of the crossties in the rail line are of "relay" quality, i.e., they are in good enough condition to be relaid elsewhere in UP's system. (Applic. at 54). He also determined that 25 percent of the ties in the line are of "landscape" quality, i.e., they are in good enough condition to be sold for landscaping. (*Id.*). He determined that the remaining 68 percent of ties are of "scrap" quality, i.e., they are disposable because they are not in good enough condition to be relaid or sold for landscaping. (*Id.*). He stated that FRA Class I track standard requires that 21 percent of crossties in each 39-foot rail length are required to be "good". (*Id.*). He then concluded that only the 6 percent of relay quality ties are "good", and based his claim of need for crosstie replacement on the difference between the 21 percent of "good" crossties required by FRA Class I standards and the 6 percent of crossties that he considered to be "good" because they are of relay quality. (*Id.*).

Mr. Ghazai's testimony in that respect is not consistent with governing FRA regulations at 49 C.F.R. §§ 213.109(c)(1)-(4), which define a non-defective ("good") crosstie as a tie that is not —

(1) broken through;

(2) split or otherwise impaired to the extent the crosstie will allow the ballast to work through, or will not hold spikes or rail fasteners;

(3) so deteriorated that the tie plate or base of rail can move laterally more than ½ inch relative to the crossties; or

(4) cut by the tie plate through more than 40 percent of a tie's thickness.

Quite obviously, there is no correlation between Mr. Ghazai's testimony that only a relay quality crosstie is a good or non-defective crosstie and the FRA regulation that defines a good or non-defective crosstie on radically different criteria. It is highly likely that the 25 percent of crossties that Mr. Ghazai deemed in good enough condition to be sold for landscaping purposes would qualify as good or non-defective crossties under the definition in the FRA regulation, in which case at least 31 percent of the crossties in the line would be good or non-defective (easily more than the 21 percent required for FRA Class I compliance). But it is not Protestants' burden to prove that such is the case; it is UP's burden to prove that an insufficient number of crossties are good or non-defective under the FRA definition of that term to meet the FRA Class I minimum. It is indisputable that UP failed to sustain that burden. For that reason, it cannot rationally be found that UP would be burdened by an unrecoverable track rehabilitation cost if required to continue to operate the line.

E. Continued Operation Of The Line Would Cause Union Pacific To Experience A Temporary Economic Loss, Which Would Be Outweighed By The Serious Harm To West Fraser And To Rural And Community Development That Would Result From Abandonment

The third and least serious form of harm to a rail carrier from denial of abandonment is an economic loss. The opportunity cost associated with continued operation of a rail line is represented by the income that a rail carrier could derive as a result of making an alternative non-rail use of the assets that are devoted to the rail line. Cf. 49 C.F.R. § 1152.32(p). Opportunity cost is calculated by multiplying the net liquidation value of the rail line assets by the current cost of capital of the railroad industry. (*Id.*). An economic gain or loss associated with continued operation of a line is determined by comparing the profit or loss from operating the line with the line's opportunity cost. If rail line operating profit exceeds opportunity cost, there would be an economic gain to that extent. If operating profit is less than opportunity cost, there would be an economic loss to that extent. If there is an operating loss, the economic loss would be the sum of that operating loss and the opportunity cost.

Assuming without conceding the accuracy of the net liquidation value of the rail line posited by UP, the forecast year opportunity cost associated with continued operation of the line is $109,261. (Applic. at 69, line 16, forecast year). UP claims that such opportunity cost plus the forecast year operating loss of $43,165 equals a forecast year economic loss of $152,426. (*Id.*, line 18, forecast year).

As shown earlier, there would be a forecast year operating profit when locomotive-related costs are correctly determined, and an even greater operating profit in the years following the forecast year as market conditions in the forest products industry normalize. Those operating profits would significantly reduce the economic loss associated with continued operation of the line, and there soon would be an economic gain at a normalized traffic level.

The temporary economic loss, although constituting some measure of burden on UP from continued operation of the rail line, is outweighed by the serious harm to West Fraser and to rural and community development identified in the Verified Statements of Messrs. Mitchell and Cloutier and Ms. Henderson (*see* Section II F., *infra*). Several judicial and agency decisions support that proposition.

Thus, in *Southern Pacific Transp. Co. v. ICC*, 871 F.2d 838 (9th Cir. 1989), the Court upheld a determination by the Board's predecessor, the Interstate Commerce Commission (ICC), that an opportunity cost of $1,442,000 per year would not dictate approval of abandonment when the rail line was operationally profitable and abandonment would seriously harm shippers and the community, viz. (at 843):

> . . . (B)y treating Southern Pacific's estimate of opportunity costs as if it were correct, the Commission accorded it as much weight as the Commission could without treating it as dispositive, which the Commission could not do. 'Opportunity cost is just one of the factors that must be taken into consideration in determining whether abandonment is justified. Merely because a railroad could earn greater revenue by investing its assets elsewhere does not mean that public convenience and necessity requires abandonment.' *Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668, 675 (8th Cir. 1984) (quoting *Burlington N. R.R. Abandonment*, No. AB-6 (Sub-No. 104F) (ICC Jan. 29, 1982).

In addition to the *Burlington* case cited by the Court in the *Southern Pacific* case, abandonment has been denied in numerous additional cases despite the existence of significant opportunity costs where day-to-day operations would be profitable and harm to local interests would be significant. *See, e.g.*, *The Toledo Term R. Co. - Aband. - bet. Temperance and Gould in Lucas County, OH*, 1987 ICC LEXIS 37 at *14-15 (Docket No. AB-226 [Sub-No. 2], decision entered on Dec. 3, 1987); *Burlington Northern R. Co. - Aband. - in Morrison County, MN*, 1985 ICC LEXIS 37 at *11-12 (Docket No. AB-6 [Sub-No. 253], decision entered on Dec. 18, 1985); and *Burlington Northern R. Co. - Aband. - in Emmons and McIntosh Counties, ND and Campbell and McPherson Counties, SD*, 1985 ICC LEXIS 331 at *34-36 (Docket No. AB-6 [Sub-No. 236], decision entered on June 28, 1985).

Here, as demonstrated earlier, forecast year and continuing operations would be increasingly profitable, and, as next shown, abandonment would seriously harm West Fraser and rural and community development in the Henderson area of Rusk County, TX. In that circumstance, the decisions cited above establish that a temporary economic loss alone does not support a determination that public convenience and necessity permit or require abandonment.

F. Abandonment Would Have A Serious Adverse Impact On West Fraser And On Rural And Community Development In The Henderson Area Of Rusk County, Texas

As set out in the Verified Statement of Mr. Raymond Mitchell, Manager of West Fraser's Henderson sawmill, if West Fraser were to lose direct rail service as a result of abandonment, the shipments currently moving by rail for West Fraser would be transloaded from truck to rail at Longview, Texas. (Appendix 1 at 2). While the rail rate on that traffic from Longview would probably be the same as the rail rate from Henderson, there would be extra costs of $11.36 per ton for trucking the traffic approximately 40 miles from Henderson to Longview, and $4.97 per ton for handling the traffic at the Longview transloading facility, which would mean total extra costs of $16.33 per ton. Based on West Fraser's rail shipments of 124 carloads weighing 12,211 tons in the forecast year, truck-rail transportation of West Fraser's former rail shipments would result in additional costs for West Fraser of $199,406 per year. <u>That annual loss significantly exceeds the annual operating loss claimed but unproven by UP</u>.

In light of the well-known downturn in market conditions in the forest products industry, any attempt to pass those increased costs on to West Fraser's customers would be likely to result in loss of badly-needed sales. In view of the adverse effect that the downturn has had on West Fraser's profitability, a requirement that West Fraser absorb the increased costs resulting from abandonment would have a severe adverse effect on West Fraser. Either way, therefore, West Fraser would be seriously harmed by abandonment.

Alternative transportation is not an adequate substitute for direct rail service unless it is economically feasible. *Georgia Pub. Serv. Comm. v. United States*, 704 F.2d 538, 545 (11th Cir. 1983). It is shown that it is not economically feasible for West Fraser to use truck-rail transportation for its shipments currently being transported entirely by rail. The inadequacy of alternative transportation due to excessive costs is an important factor in a decision on the merits of abandonment. *Busboom Grain Co., Inc. v. ICC*, 856 F.2d 790, 796 (7th Cir. 1988).

As set out in the Verified Statements in behalf of Hedco and the Rail District, the absence of direct rail service would seriously impede the ability of the City of Henderson and Rusk County to attract industrial shippers to the area, and to thereby provide badly-needed broadening of the municipal and county tax base. (Appendices 2 and 3). Thus, abandonment of the rail line would have a serious adverse impact on rural and community development in Henderson and

Rusk County, which the Board is statutorily required to consider in determining whether public convenience and necessity permit abandonment of the rail line. *See* 49 U.S.C. § 10903(d).

G. Summary

Whereas the rail line is thus shown to be operationally profitable, and abandonment is thus shown to have a serious adverse effect on West Fraser and on rural and community development in Henderson and Rusk County, and whereas the sole element of burden on UP from continued operation is a temporary economic loss, the weighing process dictates denial of abandonment, as was the result in the cases cited at pages 15 and 16, *supra*.

Even if it were to be assumed that forecast year operations were unprofitable, the future public convenience and necessity would not permit abandonment. It would be most inappropriate to predicate a decision in favor of abandonment on the financial results of rail line operations during a period of severely depressed market conditions in the forest products industry. It is not at all speculative that those market conditions will improve dramatically in the foreseeable future. Historical experience is proof that they will. When they do, rail traffic on the line would increase correspondingly, and operations would return to profitability. The forecast year operating result is no more than a helpful decisional tool in the many cases in which an operating result in the short-term future is indicative of longer-term operating results. However, a forecast year operating result is not to be given talismanic effect where, as in the present case, operating results in the foreseeable future are highly likely to differ meaningfully from the forecast year experience.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the abandonment application should be denied.

Protestants so request.

Respectfully submitted,

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Protestants

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Attorney for Protestants

DUE DATE: July 10, 2009

Docket No. AB-33 (Sub-No. 275)

APPENDIX 1

VERIFIED STATEMENT OF RAYMOND MITCHELL

My name is Raymond Mitchell. I am Manager of West Fraser Timber Co., Ltd.'s (West Fraser) sawmill at Henderson, TX.

West Fraser is an integrated forest products company producing lumber, wood chips, fibreboard, plywood, pulp, liner board, kraft paper, and newsprint. In April, 2007, West Fraser acquired a sawmill at Henderson, Texas from International Paper Company. That sawmill is located on the Overton-Henderson rail line that is proposed to be abandoned by Union Pacific Railroad Company (UP).

I understand that in proposing to abandon that rail line, UP is relying on revenues and costs in a "forecast year" associated with the 124 carloads that West Fraser shipped from Henderson in 2008.

It seems to me that it is not at all fair to base a decision to abandon this rail line on West Fraser's rail traffic experience in 2008. It is common knowledge that market conditions in the forest products industry in 2008 were at a historic low point, primarily due to the radically depressed housing market. Those market conditions are only now beginning to show signs of future improvement. However, it is a certainty that those market conditions will improve. History leaves no doubt about that.

When those market conditions inevitably improve, West Fraser's rail shipments from Henderson will increase correspondingly. In normal market conditions, West Fraser ships 25 to 30 rail carloads of forest products per month (i.e., 300 to 360 rail carloads per year). As market conditions gradually improve, West Fraser's rail shipments would quickly reach the 167-carload level that was actually shipped from the rail line in 2007. Thus, West Fraser's rail shipments from Henderson are certain to increase appreciably from their depressed 2008 level. An abandonment decision should be based on the increased, more representative rail traffic level that will be achieved in the foreseeable future.

In the absence of rail service, traffic formerly shipped by rail would be transloaded from truck to rail at Longview, Texas. While the rail rate from Longview may be equal to the rail rate from Henderson, there would be significant extra costs of $11.36 per ton for the 40-mile truck haul from Henderson to Longview and $4.97 per ton for handling at the Longview transloading point, for total extra costs of $16.33 per ton. Based on West Fraser's rail shipment of 12,211 tons in 2008, those extra costs would total $199,405.63 per year. Extra costs of that magnitude would have a serious adverse effect on West Fraser.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing statement is true and correct.

Raymond Mitchell

RAYMOND MITCHELL

Docket No. AB-33 (Sub-No. 275)

APPENDIX 2

VERIFIED STATEMENT OF SUE HENDERSON

My name is Sue Henderson. I am Director of Henderson Economic Development Corporation (HEDCO). I have held that position for the past six years.

As its name indicates, HEDCO was created to further economic development in Henderson, Texas, and in the surrounding rural area of Rusk County, Texas. Economic development in those areas is especially important at the present time. Over the past 20 years, unemployment in Rusk County, Texas has averaged 4.5 percent. Currently, that unemployment rate is 6.9 percent and continuing to rise.

Rail service by means of the Overton-Henderson rail line is absolutely essential for economic development in the community of Henderson, Texas, and in the surrounding rural area of Rusk County, Texas. My experience as Director of HEDCO is that more than 75 percent of the companies contacted by HEDCO for potential location in Henderson or in rural Rusk County state that rail transportation is a requirement for any such location.

One such company is Knife River of Waco, Texas and Bryan, Texas. HEDCO is working with that company to locate a terminal in the Henderson area for rail transportation of pipe, frac sand, and other items. The availability of rail transportation is an absolute requirement of Knife River. Without rail transportation, the Henderson area would surely lose Knife River as an economic development prospect. Attached to my statement as Appendix SH-1 is a copy of a letter to me dated June 25, 2009 from Mr. Rod Hammer of Knife River attesting to Knife River's interest in locating a rail facility in the Henderson area, and providing a range of potential volumes of rail traffic upon locating in the area.

Knife River is one of more than a dozen new businesses contacted by HEDCO that have expressed a sincere and tangible interest in locating in the Henderson area. That kind of industrial development would provide badly-needed jobs for the citizenry served by HEDCO. All of those businesses require rail service. I am convinced that HEDCO would be unable to convince most businesses to locate in the Henderson area if we were to lose rail service. Therefore, abandonment of the Overton-Henderson rail line would have a serious adverse impact on rural and community development in Henderson and the surrounding rural area of Rusk County, Texas.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing statement is true and correct.

Sue Henderson

SUE HENDERSON

Appendix SH-1

KNIFE RIVER
AN MDU RESOURCES COMPANY

8320 Central Park Drive Suite A
Waco, Texas 76712
Mailing Address:
PO Box 1800
Waco, Texas 76703

Bus: (254) 761-2600
Fax: (254) 761-2695

6310 Highway 21 West
Bryan, Texas 77807
Mailing Address:
PO Box 874
Bryan, Texas 77806

Bus: (979) 361-2800
Fax: (979) 361-2920

June 25, 2009

Dear Sue,

We are very pleased and encouraged to be working with you on possible opportunities in the area. We are certainly very interested in the opportunity to operate a rail facility or large rail spur in Henderson.

We believe the aggregate volumes in any year will be between 60,000 tons – 330,000 tons. We have also seen these volumes in other facilities we operate spike to over 1,000,000 tons in a year because of large projects. However, we are not able to guarantee volumes.

Knife River has also completed the movement of pipe, frac sand and other items through our current rail facilities and we will certainly look to broker any possible train movements through the facility.

Once again, we appreciate the opportunity to work with you on setting up a successful terminal in Henderson.

Thank you,

Rod Hammer
Knife River – South Region
Region Vice President

cc: Bill Thomas
Larry Garland
Josh Keller

Docket No. AB-33 (Sub-No. 275)

APPENDIX 3

VERIFIED STATEMENT OF JOHN CLOUTIER

My name is John Cloutier. I am President of the Rusk County Rural Rail District (the Rail District). The business address of the Rail District is 209 Carthage Highway, Suite B, Henderson, Texas 75654.

The Rail District was formed in 2008 as a means of securing the future of commercial and industrial rail service for Rusk County.

The Overton-Henderson rail line proposed for abandonment is essential to rural and community development in the Henderson area of Rusk County. West Fraser Timber Co., Ltd., which operates a sawmill at Henderson, Texas makes substantial use of that rail line, and will make even greater use of it when market conditions in the forest products industry inevitably return to normal. West Fraser would be faced with greatly increased costs if it were to lose the rail service provided by the line. The local economy cannot afford the loss of West Fraser, who is a major employer in the community of Henderson and in the surrounding rural area of Rusk County.

Of equal or greater importance, loss of rail service would materially impede the ability of Henderson and the surrounding rural area to develop industrially. Industries such as West Fraser will not locate in an area that does not have rail service. Accordingly, rail service is required to attract the substantial number of businesses that require rail service. That kind of industry is essential for a badly-needed broadening of the tax base of Henderson and Rusk County.

In sum, loss of the Overton-Henderson rail line would have a serious adverse effect on rural and community development in Henderson and the surrounding rural area of Rusk County.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing statement is true and correct.

JOHN CLOUTIER

Docket No. AB-33 (Sub-No. 275)

PROTESTANT'S APPENDIX 4

124-Car Traffic Level

Costs of Second Locomotive Eliminated - 5 Locomotive Hours Per Trip

	Revenue for:	
1	Freight Originated and/or Terminated On-Branch	$531,080
2	Bridge Traffic	0
3	All other Revenue and Income	0
4	Total Revenue Attributable (L1+L2+L3)	$531,080
	Avoidable Costs for:	
5	On-Branch Costs (Lines 5a-5k)	
a	Maintenance of Way & Structure Costs	$100,892
b	Maintenance of Equipment	1,285
c	Transportation	63,730
d	General Administrative	0
e	Deadheading, Taxi and Hotel	0
f	Overhead Movement/Other	0
g	Freight Car Cost - Non ROI	9,856
h	ROI Expense Freight Cars	7,091
i	ROI Expense Locomotives	1,544
j	Revenue Taxes	0
k	Property Taxes	0
		$184,398
6 a	Off-Branch Costs Excluding Freight Car ROI	$236,239
b	Off-Branch Freight Car ROI Costs	45,783
c	Off-Branch URCS Multiple Car Adjustment	0
d	Make Whole Adjustment Off Branch	55,494
	Total Off-Branch Costs (L6a+6b+6c+6d)	$337,516
7	Total On & Off-Branch Avoidable Costs (L5+L6)	$521,914
	Avoidable Gain or (Loss) from Operations (L4-L7)	$9,166

PROTESTANT'S APPENDIX 5

124-Car Traffic Level

Costs of Second Locomotive Eliminated - 3 Locomotive Hours Per Trip

	Revenue for:	
1	Freight Originated and/or Terminated On-Branch	$531,080
2	Bridge Traffic	0
3	All other Revenue and Income	0
4	Total Revenue Attributable (L1+L2+L3)	$531,080
	Avoidable Costs for:	
5	On-Branch Costs (Lines 5a-5k)	
a	Maintenance of Way & Structure Costs	$100,892
b	Maintenance of Equipment	909
c	Transportation	43,964
d	General Administrative	0
e	Deadheading, Taxi and Hotel	0
f	Overhead Movement/Other	0
g	Freight Car Cost - Non ROI	9,856
h	ROI Expense Freight Cars	7,091
i	ROI Expense Locomotives	926
j	Revenue Taxes	0
k	Property Taxes	0
		$163,638
6 a	Off-Branch Costs Excluding Freight Car ROI	$236,239
b	Off-Branch Freight Car ROI Costs	45,783
c	Off-Branch URCS Multiple Car Adjustment	0
d	Make Whole Adjustment Off Branch	55,494
	Total Off-Branch Costs (L6a+6b+6c+6d)	$337,516
7	Total On & Off-Branch Avoidable Costs (L5+L6)	$501,154
	Avoidable Gain or (Loss) from Operations (L4-L7)	$29,926

PROTESTANT'S APPENDIX 6

167-Car Traffic Level

Costs of Second Locomotive Eliminated - 3 Locomotive Hours Per Trip

	Revenue for:	
1	Freight Originated and/or Terminated On-Branch	$715,249
2	Bridge Traffic	0
3	All other Revenue and Income	0
4	Total Revenue Attributable (L1+L2+L3)	$715,249
	Avoidable Costs for:	
5	On-Branch Costs (Lines 5a-5k)	
a	Maintenance of Way & Structure Costs	$100,892
b	Maintenance of Equipment	1,224
c	Transportation	59,220
d	General Administrative	0
e	Deadheading, Taxi and Hotel	0
f	Overhead Movement/Other	0
g	Freight Car Cost - Non ROI	13,276
h	ROI Expense Freight Cars	9,552
i	ROI Expense Locomotives	1,247
j	Revenue Taxes	0
k	Property Taxes	0
		$185,411
6 a	Off-Branch Costs Excluding Freight Car ROI	$318,214
b	Off-Branch Freight Car ROI Costs	61,670
c	Off-Branch URCS Multiple Car Adjustment	0
d	Make Whole Adjustment Off Branch	74,750
	Total Off-Branch Costs (L6a+6b+6c+6d)	$454,634
7	Total On & Off-Branch Avoidable Costs (L5+L6)	$640,045
	Avoidable Gain or (Loss) from Operations (L4-L7)	$75,204

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2009, the foregoing document, Protest, was served by UPS overnight mail and e-mail on Mack H. Shumate, Esq., *mackshumate@up.com*, Union Pacific Railroad Company, 101 N. Wacker Dr., Suite 1920, Chicago, IL 60606-1718.

Thomas F. McFarland

Thomas F. McFarland