FINANCE DOCKET No. 23991

ERIE-LACKAWANNA RAILROAD CO. ABANDONMENT LACKAWANNA AND WAYNE COUNTIES, PA.

Decided August 15, 1968

On reconsideration, certificate issued permitting abandonment by Erie-Lackawanna Railroad Company of a portion of its Wyoming Branch line of railroad between Rock Junction and Gravity, Pa., in Lackawanna and Wayne Counties, Pa., and its entire Lake Ariel Branch in Wayne County, Pa. Conditions prescribed, decision and order by Review Board No. 5 reversed.

Wallace R. Steffen for applicant.

Albert D. Brandon, Norman Harris, Paul A. Barrett, George B. Quinlan, and *Harry J. Jordan* for protestants.

REPORT OF THE COMMISSION ON FURTHER HEARING

DIVISION 3, ACTING AS AN APPELLATE DIVISION.
COMMISSIONERS TUGGLE, BUSH, AND STAFFORD

BUSH, *Commissioner:*

By application filed January 26, 1966, the Erie-Lackawanna Railroad Company, hereinafter referred to as E-L or applicant, a common carrier by railroad subject to part I of the Interstate Commerce Act, seeks a certificate of public convenience and necessity under section 1(18)-(20) of the act authorizing it to abandon that portion of the Wyoming Branch of its Scranton Division between the village of Rock Junction (milepost 17.0) and the village of Gravity (milepost 35.4), a distance of approximately 18.4 miles; and its entire Lake Ariel Branch of said division, a distance of approximately 1.4 miles, in Lackawanna and Wayne Counties, Pa. Five protests were filed opposing the application.

A petition by the E-L for reconsideration of the decision and order on further hearing by Review Board No. 5 was granted on April 17, 1968, by Division 3, Acting as an Appellate Division. Our conclusions differ from those of the review board which affirmed the examiner's recommended report and order on further hearing, wherein the application for a certificate of public convenience and necessity to permit

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the abandonment of the portions of its line of railroad heretofore set forth was denied.

The Finance Review Board had reopened the proceeding for further hearing to permit applicant to submit evidence of the *actual* expenses incurred by it for the years 1963, 1964, 1965, and the first 3 months of 1966 for maintenance-of-way and structures of the branch lines proposed to be abandoned, the presentation by protestants of non-cumulative rebuttal evidence and cross-examination by the parties with respect thereto.

The evidence, the examiners' recommended reports and orders, and the pleadings have been considered. We find the examiners' statements of fact to be accurate in most material respects, and except as modified or supplemented herein, we adopt them as our own.

It was found in the recommended report and order on further hearing that the authorization of the abandonment over the involved railroad lines should be denied. This finding was predicated on applicant's failure to produce the *actual* expenses attributable to the lines in issue for the 3 1/4 years prior to the filing of its application. Thus, applicant was alleged to have failed to sustain its burden of proof that continued operations of the involved lines are not required by public convenience and necessity and would unduly burden interstate or foreign commerce.

The evidence is conclusive that applicant operated at a *deficit* totaling $68,480,000 during the period of 1961 through 1964, although in 1965 it had a net income of $3,290,000 and for the first 3 months of 1966 showed a net income of $745,000. Admittedly, however, applicant's operations have not been generally profitable and relief from any financially burdensome operation is in the public interest, particularly where the points served have a population too small to be reportable and net railway operating losses for the particular segment have steadily increased from $34,282 in 1963 to $45,323 in 1965 in these operations. The evidence further shows that while there had been a *substantial reduction* in traffic over the lines,[1] there had also been an increase in transportation expenses.

The evidence also shows that feed and ingredients received by two protestants were moved by motor carrier to their farms. Furthermore, under a corn program, corn is being moved by farmers from the distribution center with some of the farmers moving their feed from the plant in Binghamton, N. Y., by motor carriers. The foregoing facts indicate the reasons for a decreased volume in feed traffic by E-L and the corresponding decreases in revenue.

Petition for reconsideration and reply.—E-L's basic assignments of error as grounds for reconsideration are that (1) the recommended

[1]There were 597 carloads of traffic in 1963, as compared to 310 carloads in 1965 inbound and a total of 7 outbound in 3½ years.

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report and order on further hearing arbitrarily disallowed the consideration of any maintenance expense as a cost factor; (2) the "premise that burden of proof can be satisfied *only* by actual maintenance expense" is fallacious; and (3) it was "erroneously concluded that information was available concerning the actual wages, the cost of materials, and the time spent in working on the segment of the lines in question," and therefore applicant failed to furnish *actual* expenses. The protestants contend that E-L has failed to meet its required burden of proof, and has "produced no new evidence" at the further limited hearing. Based upon these assertions protestants allege they have "no desire to reargue" the matter and further *feel* that a determination should be made upon the present record.

Discussion and Conclusions

The pivotal issue in this proceeding involves the provisions as set forth in 49 C.F.R. 42.9 (14)(d). This requires applicants to provide:

> The expense of operating the line proposed to be abandoned, stated by appropriate primary accounts, *actual so far as possible and otherwise approximated,* with a full statement of the method used. [Emphasis added.]

E-L acknowledges that it does have a breakdown of the various so-called section 7 maintenance expenses for this *entire* section of track. E-L does not, however, maintain records to show what portion of wages and cost of materials should be allocated to a *part* of this section for which authority to abandon is sought. The evidence establishes that the records of E-L do not show labor costs broken down to milepost location or material used at a specific location. Therefore, it is practically impossible for E-L to develop actual expenditures for a specific part of a section of trackage. Moreover, the methods of accounting that have been prescribed by the Commission do not require a separation of cost and revenue figures to be maintained for each individual segment of trackage.

At the first hearing, E-L introduced its best approximation of the maintenance expense by using the average system costs. This method of annual normalized maintenance is one generally accepted by the Commission when actual costs cannot be computed. In its preparation for the limited further hearing E-L prepared an approximation by another method. This was based on the average maintenance costs of the entire section 7. These computations consisted of taking the mileage of the segment sought to be discontinued and comparing it to the total mileage of section 7. The percentage thus arrived at was the approximated maintenance expense.

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On the basis of deliveries to either of the two receiving protestants, who allegedly have an interest in the continued existence of the involved segments, E-L loses an average of $146 per car, or a total loss of $45,323 for the 310 cars handled in 1965. The evidence establishes, however, that even if all the maintenance-of-way expenses were excluded from the calculation of expenses, the operation of the service in issue would still result in a deficit of $82 per car based upon 1965 revenues.

Therefore, we find that E-L has fulfilled the requirements of 49 C.F.R. 42.9(14)(d) by presenting actual expenditures as far as was practicable and otherwise approximated the expenses using two separate methods. Moreover, there was no probative evidence presented by protestants to rebut that of E-L. Thus, it is patently clear that E-L has presented at least, if not more than, a prima facie case to justify the relief sought.

E-L has agreed to the imposition of employee protective conditions as were prescribed by the Commission in *Chicago, B. & Q. R. Co. Abandonment,* 257 I.C.C. 700. While there are no mandatory provisions in section 1(18) of the act requiring that we compel a carrier to remain in business merely for the purpose of furnishing employment, we do possess discretionary authority to impose such conditions in abandonment proceedings, if justified. *Interstate Commerce Commission* v. *Railway Labor Executives' Assn.,* 315 U. S. 373. Under the circumstances presented in this proceeding and in view of the agreement by E-L to accept imposition of the aforesaid conditions, we find and conclude that such conditions shall be imposed.

Subject to the foregoing conditions for the protection of railway employees, upon consideration of the record herein, we find that present and future public convenience and necessity permit the abandonment, as to interstate and foreign commerce, by the Erie-Lackawanna Railroad Company of that portion of the Wyoming Branch line of railroad of its Scranton Division between the village of Rock Junction (milepost 17.0) and the village of Gravity (milepost 25.4), a distance of approximately 18.4 miles and its entire Lake Ariel Branch of said division, a distance of approximately 1.4 miles, in Lackawanna and Wayne Counties, Pa.

An appropriate certificate and order will be issued.

COMMISSIONER STAFFORD, dissenting:

I would affirm the decision and order of the review board.

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