

## FINANCE DOCKET No. 24886

**ERIE-LACKAWANNA RAILROAD COMPANY<sup>1</sup> DISCONTINUANCE OF TRAINS NOS. 10 AND 15 BETWEEN HOBOKEN, N. J., AND BUFFALO, N. Y.**

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*Decided May 20, 1969*

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Upon further hearing and investigation, found that continued operation of its passenger trains Nos. 10 and 15 by Erie-Lackawanna Railway Company, between Buffalo, N. Y., and Hoboken, N. J., is not required by the public convenience and necessity, and that such continued operation will unduly burden interstate commerce. Investigation discontinued. Prior report, 333 I.C.C. 208.

*Wallace R. Steffen* for respondent.

*Walter J. Myskowski, Frank J. Ondrusek, T. P. Shearer, Alan M. Zalowitz, and Walter E. Zullig* for protestants.

REPORT OF THE COMMISSION ON FURTHER HEARING

APPELLATE DIVISION 3, COMMISSIONERS TUGGLE, BUSH, AND DEASON

*BUSH, Commissioner:*

In the prior report and order herein decided May 23, 1968, 333 I.C.C. 208, it was found after investigation under section 13a(1) of the Interstate Commerce Act, as amended, that continued operation by the Erie-Lackawanna Railroad Company or its successor, a common carrier by railroad subject to the provisions of part I of the act, of its passenger trains Nos. 10 (New York Mail), eastbound, and 15 (The Owl), westbound, between Buffalo, N. Y., and Hoboken, N. J., approximately 402 miles, was required by the public convenience and necessity, and that continued operation thereof would not unduly burden interstate or foreign commerce. Operation was ordered continued for 1 year from the date of service thereof and the investigation was discontinued. Upon consideration of a timely filed petition for further hearing by the respondent on June 19, 1968, Division 3, Acting as an Appellate Division, by order of August 21, 1968, reopened the proceeding for

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<sup>1</sup>The present respondent is Erie Lackawanna Railway Company, successor of the title respondent and, since April 1, 1968, a part of the Norfolk & Western Railway system.

further hearing. By order dated January 16, 1969, Division 3, Acting as an Appellate Division, denied respondent's petition for omission of a report and recommended order by the hearing examiner upon the grounds that the proceeding's history and issues involved were such as to warrant an examiner's report "\*\*\* and at least one protestant has proceeded, in the content of its brief, filed prior to the petition, in reliance upon the procedure established \*\*\*" by the order of September 13, 1968.

Further hearing has been held, evidence introduced, and briefs were filed by the parties participating therein.<sup>2</sup> The hearing examiner found in his report and recommended order on further hearing that it was "\*\*\* not shown that continued operation of \*\*\* the trains \*\*\* [involved] is required by the public convenience and necessity, nor that such operation will not unduly burden interstate or foreign commerce," and discontinued the investigation. Exceptions to the hearing examiner's recommendations have been filed by the State of New York (NYS), the Public Service Commission of the State of New York (PSC), United Transportation Union and the Brotherhood of Railway and Airline Clerks (Brotherhoods), and the Parents Association for the Hearing Impaired, Inc. (PAHI), to which respondent has replied.

The salient facts are substantially as described in the prior report and the examiner's report and will be restated herein only to the extent necessary for a clear discussion of the issues now before us.

NYS, in its exceptions, moved that the proceeding be dismissed for lack of jurisdiction. This motion was disposed of in the prior report and substantially the same ground for dismissal is now presented. The issue is whether notice was posted at all stations in accordance with the provisions of section 13a(1) of the act and in particular whether it should have been posted at respondent's Attica station. It is argued that although the Commission may consider Attica only a freight station our rules require notice to be posted "in a conspicuous place in each station, depot, or facility involved \*\*\*." However, as pointed out in the prior report Attica is not a station "served" by the involved trains which is required by the provisions of the act. Any service rendered to and from the Attica freight station is solely for the convenience of a nearby school at Batavia, and only pursuant to previous arrangements made by school authorities with respondent's chief dispatcher at Buffalo. Attica is thus not served by the trains in their normal operation and thus is not a point "served" by them within the meaning of the statute. The motion is therefore denied and the proceeding will be decided on its merits.

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<sup>2</sup>Respondent, the State of New York, the Public Service Commission of the State of New York, the Parents Association for the Hearing Impaired, Inc., certain labor representatives, and the Broome County, N. Y., Chamber of Commerce.

At the prior hearings respondent attempted to show that these trains were primarily mail trains, and with the anticipated loss of mail revenue there was no justification to require the continued losses in their operation. In April 1967, prior to the filing of the notice of the proposed discontinuance, the post office discontinued use of train No. 15, from Hoboken to Buffalo for the sealed-car mail destined to Cleveland via New York Central. Later, in July, New York-Binghamton-Elmira-Jamestown storage mail was moved to highway service and in October railway post office cars were moved to highway service. After notice of the discontinuance of the trains was received, the post office stated it intended to remove all mail from these trains, but later reversed its position because of Erie's action and institution of this investigation by us. The remaining mail was removed from these trains on May 18, 1968, prior to the report and order requiring continued operation of these trains for a 1-year period and was never regained by Erie thereon.

It was further shown at the initial hearing that a very small part of the total population of the area used these trains, but they were used to a limited extent by a small but handicapped portion of the population. These passengers were 20 deaf students at St. Mary's School in Buffalo. As part of their prescribed treatment, these students must generally travel to their homes, principally in the Binghamton-Elmira area, every 2 weeks. The school prefers that these students use the trains, but representatives of the school indicated that bus transportation would be quite satisfactory. The airlines, however, will *not* assume full responsibility for children unless they can land at scheduled airports.

After the report and order of division 3 on May 23, 1968, respondent petitioned and was granted further hearing for the purpose of introducing evidence of losses from the long-lost mail service and further to demonstrate that deaf children were not really so reliant on the trains.

After the hearings in the original proceeding respondent realized there was a strong probability that it would lose much, or all, of its mail traffic on these trains. In an attempt to avoid such an eventuality the railroad diverted the remaining mail traffic to piggyback service. Respondent estimates that it retains in trailer-on-flatcar service approximately 20 percent, or \$100,000 annually, of *gross* mail revenues heretofore derived by movement on trains Nos. 10 and 15 from the remaining mail transported. However, this mail traffic previously received has been lost because of diversion to the Penn Central to be handled at a new metropolitan truck facility built by that railroad to handle piggyback service.

While the respondent has not altered its practice to encourage greater use of these trains by passengers, service has not been downgraded to

any material degree. Although no extensive advertising was conducted such decision was within the discretion of management. Protestants allege that Erie did not even inform them that continued operation was ordered and no news release was made to such effect. However, being parties in the proceeding, they were notified of all Commission action and had adequate and complete information with respect thereto. Further, it was stated in timetables and the Official Railway Guide in regard to these trains that "\*\*\*the discontinuance of this train is the subject of a pending proceeding before the Interstate Commerce Commission. Consult ticket agent prior to date of travel." Timetables with such notification are frequently issued by railroads, but such has little bearing upon the proceeding before us. If anything, it appraises passengers of what is proposed and affords them an opportunity to protest and be heard. Railroad personnel stated, however, that this was done because it was anticipated that a petition for reconsideration would be filed and there was a strong possibility that this matter would be pending before the Commission for some time.

Although a new timetable was issued approximately 3 weeks after removal of the mail, train No. 10 was still listed as primarily a mail train. Respondent's witness testified that this was an oversight due to the fact that the railroad wanted to get out a table informing the public its train No. 17 would no longer be carrying passengers. The railroad did admit, however, that publication of such a notice might make it clear to the public that they would not be receiving the best service available by using the trains and thus might possibly discourage them from riding the trains if an alternative mode of service was available.

Since the first hearing in this proceeding, the respondent in conjunction with the Chesapeake and Ohio Ry. Co., the Baltimore and Ohio R. Co., as well as the Penn Central discontinued the sale of round trip incentive tickets. A witness for Erie testified that first class fares were raised 4.61 percent and approximately 5 percent on coach fares on August 15, 1968, in an attempt to reduce the losses incurred in the operation of these trains. It is admitted, however, that a mid-week round trip fare to Binghamton was raised from approximately \$11.25 to \$18, but there is no evidence of record to prove that this fare increase caused a decline in the small number of passengers using the trains.

On July 16, 1968, a meeting with two nuns from St. Mary's School for the Deaf, counsel for the Erie and a representative of Greyhound Bus Lines was held for the purpose of considering use of alternative bus transportation if the involved trains were discontinued. One of the nuns indicated that she was in favor of the use of Greyhound as outlined by the Greyhound representative.

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The examiner summarized his adjustments to the carrier's pro forma statement of revenues and expenses for 1968, which is located in appendix 1 of his report. The carrier claimed a pro forma annual net out-of-pocket loss of \$388,502, but the examiner's adjustments would result in a reduction of loss to \$233,061.

Included in the examiner's adjustments is the elimination of 50 percent of car repairs, or \$3,962, which was considered to be unsupported labor costs attributable thereto. The carrier's cost witness indicated at both hearings that the amounts shown for car repairs on the financial exhibits represent expense for materials only. Since there is no labor included therein, the reversal of the examiner's \$3,962 adjustment would result in an adjusted net out-of-pocket loss of \$237,023. Except for the aforementioned incorrect adjustment, which we have now corrected, we concur in the examiner's adjustments to appendix 1 of his report and find that the net out-of-pocket loss is approximately as aforesaid. A certain amount of overhead included in repairs and servicing would still be incurred by the carrier after discontinuance, such as light, heat, and power costs for repair and enginehouse shops. Since we cannot determine from the evidence in the entire record the actual amount of this overhead expense, a specific adjustment cannot be made. The savings claimed in connection with repairs and servicing of the subject trains are thus overstated to the extent of this nonsavable overhead expense. Cf. *Southern Pac. Co. Discontinuance of Trains*, 334 I.C.C. 159, 174. However, while any savings to the carrier as a result of discontinuing the subject trains would increase the carrier's income, the record contains sufficient evidence for us to determine the amount of said loss within the realm of reasonableness. Actual loss for the first 7 months of 1968 in the operation of these trains amounted to \$114,889 and the passenger revenue was only \$20,051 with the number of passengers ranging from 7.3 to 12.9 per trip. Thus, it is apparent that the public need for continuation of the involved trains is *de minimis*, being far outweighed by mounting carrier losses, and we so conclude.

*Financial Data.*—The carrier's general balance sheet as of December 30, 1968, shows total assets of \$475,601,877, including current assets \$51,889,472, special funds \$4,536,825, investments \$34,573,122, total properties less recorded depreciation and amortization of \$379,472,498, and other assets and deferred charges \$5,129,960.

Total liabilities as of that date were \$415,401,844, consisting of current liabilities of \$38,232,509, long-term debt due within 1 year \$22,133,101, long-term debt due after 1 year \$327,136,966, reserves \$8,446,390, and other liabilities and deferred credits \$19,452,878. Its shareholders' equity was \$60,200,033, consisting of common stock \$1,000,000, capital surplus \$54,666,995 and retained income \$4,533,038.

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After the New Erie became a part of the Norfolk and Western Railway system, its income statement for the period from April 1, 1968, to December 31, 1968, shows net railway operating income of \$10,864,305, other income \$3,423,734, and ordinary income after fixed charges and other deductions \$4,533,038. The income statements of Erie before its inclusion into the Norfolk and Western system, for 1966, 1967, and the period January 1, 1968, to March 31, 1968, show, respectively, net railway operating income or (loss) \$16,981,596, (\$207,778), and (\$3,084,392); other income \$3,633,778, \$5,050,832, and \$1,036,035; and ordinary income or (loss) after fixed charges and other deductions \$6,668,269, (\$8,765,325), and (\$5,834,764).

*Examiner's report.*—The examiner found that it was not shown that operation by the Erie of its passenger trains Nos. 10 and 15 between the involved points was required by the public convenience and necessity, nor that continued operation thereof would not unduly burden interstate or foreign commerce. This conclusion was predicated upon Erie's losses in the operation of these trains and an adequacy of alternate bus service.

The determination of whether or not these two passenger trains will be required to be kept in service or discontinuance authorized is dependent upon no single factor, but such is subject to many variables. The average number of passengers is not the sole criteria. Population of the area served, the distance involved, the number of trains under consideration, the nature of the service, the reasonability, existence, and quality of alternate service available, and the financial condition of the carrier, among other factors, must be considered in determining the public convenience and necessity of a carrier's service.

*Exceptions.*—Both NYS and the Brotherhoods take exception to the examiner's finding "it was not shown" that continued operation was required by interstate commerce. It is alleged such a finding places the burden of proof on protestants to show continued operation was required and this is contrary to the provisions of section 13a(1), since it is silent as to which party has the burden, citing *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59. NYS also takes exception to the finding that operation of the trains was not required by the public convenience and necessity. In support of this, it points to the finding by the division in the prior report that the trains were needed by a *small* but handicapped portion of the public and asserts that it was in no way shown at the later hearing that the need for such service had lessened. Further exception is taken to the finding that the trains are a burden on interstate commerce. In support of its exception NYS cites *Southern Pac. Co. Discontinuance of Trains*, 328 I.C.C. 360, alleging respondents have *discouraged use* of the trains involved. It is therefore contended that any burden on interstate commerce will not be

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undue because voluntarily created in order to obtain a favorable decision from this Commission.

PSC also takes exception to the finding that continued operation is not required by the public convenience and necessity. It argues that the purpose of the further hearing was solely to determine the "undue burden" issue and any finding by the examiner as to public convenience and necessity was completely improper. It argues that even if such a finding were proper, there was no support for it since it was shown that those previously using the trains, the handicapped children, are using them even more than before. PSC further alleges there was no undue burden on interstate commerce shown since respondent made no effort to retain any type of mail traffic on the trains, and an undue burden should not have been found in view of the fact that no attempt was made to encourage passenger use of these trains, such as an improved schedule. It argues that the facts are similar to those in *Union Pac. R. Co. Discontinuance of Trains*, 333 I.C.C. 413, in that the railroad has not had experience in operating the trains under conditions attractive to the public after termination of their operation as mail trains, and therefore discontinuance is not warranted.

The Brotherhoods, in addition to the exception mentioned above, took exception, as did the other protestants, to the finding that public convenience and necessity did not require continued operation. They base their exception on the argument that no evidence was presented at the second hearing showing that the public need was any less than that found by the division in the prior report, and, if anything, the need was even greater. As do the other protestants, they argue that any burden on interstate commerce may not be regarded undue when it was brought about by respondent deliberately downgrading its service.

PAHI contends that the trains are required by the public convenience and necessity since the St. Mary's students are using the trains more than ever and there is no other method available for transporting these children. It further takes exception to the finding that continued operation will unduly burden interstate commerce to the extent that it is based on respondent's allegation that it is losing \$1,000 to \$1,200 per day in the operation of these trains. It believes that since the merger of respondent with Dereco the overall financial situation has improved and more time must elapse before it will be certain that respondent is really suffering the losses contended.

In reply to the exceptions, respondent argues use of the trains has been rapidly declining and that it is losing approximately \$1,000 per day.

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## DISCUSSION AND CONCLUSIONS

As heretofore indicated, some of the circumstances to be considered in proceedings under section 13a(1) of the act to ascertain whether operation of passenger trains is required by the public convenience and necessity and will not *unduly* burden interstate commerce are the population served, the mileage involved, the effect on the communities on their route, the number of trains involved, the extent of the use made by the public of the service sought to be discontinued, the nature of the service, the existence and quality of alternate transportation available in the area, the costs incurred and financial losses sustained by the carriers in providing the service under consideration, and the financial condition of the carrier. Not one of such factors by itself is conclusive or controlling, and each case must stand or fall on its own facts as they are brought out at the hearing. The burden imposed upon the carriers and upon interstate commerce must be weighed against the need for the service. It is possible that the need for the service under certain circumstances may be so great as to warrant its continuation, even at a loss to the carrier, for the particular segments of its operation. The facts of this case, however, show there is no such need for continuance of the involved trains.

While respondent's overall operations were profitable for 1968, the out-of-pocket losses from trains Nos. 10 and 15, even adjusted downward as heretofore indicated, are an undue burden on interstate or foreign commerce. Even more important, it was shown at the prior hearing that these trains were being operated at a profit, whereas, subsequent thereto, operation thereof was at reasonably substantial losses due, not through the fault of Erie, but solely through the action by the Post Office Department in diverting the mail from Erie. The public in general has made little use of these trains except for some of the 20 children traveling to and from St. Mary's School. Although it was previously demonstrated at the prior hearing that these trains were then important to these children and their parents in that it was the only transportation service available on which they may receive proper care and attention, the circumstances have now changed and Greyhound stands ready and willing to provide adequate bus service for these children, which is readily acceptable by the nuns at St. Mary's School. Testimony at the hearing proved that whereas the children had previously gone home only once a month in the past, commencing in September 1968, the school for the deaf changed its policy so the children travel home every 2 weeks. The Greyhound representative will cooperate with the school in making special provisions for transporting these children as it has done with other schools for the deaf and blind in the Ithaca and Rochester, N. Y., areas.

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It is true that discontinuance of any train may cause a certain amount of inconvenience to its patrons, but this alone is not a valid ground for ordering operations continued if such inconvenience does not substantially outweigh the financial burden which continued operation of the trains would impose on the carrier. However, in this case it can only be found that the burden upon respondent and interstate and foreign commerce is undue. Erie has made a bona fide attempt to provide as a minimum an adequacy of service, so that the financial results of its operation of the involved trains will be controlling. We cannot conclude that the publication of notices of discontinuance was intended to discourage passengers from using these trains, particularly when such notice is required by law and the number of passengers using the trains is so small. Nor is it of material significance that train No. 10 was continued to be listed as a mail train in Erie's timetable, in view of the lack of use by the public prior to the loss of the mail.

Certain protestants contend Erie has the burden of proof in this section 13a(1) proceeding which it has not met. Resolution of this contention is unnecessary in this proceeding, since there is substantial evidence of actual losses sustained by Erie and a showing of a lack of patronage or public support. Such affords us a sufficient basis for rendition of a just decision.

Contentions of the parties as to fact or law not specifically discussed herein have been given due consideration and found to be without material significance or not justified.

We find that continued operation by the Erie Lackawanna Railway Company of its passenger trains Nos. 10 and 15 between Buffalo, N. Y., and Hoboken, N. J., is not required by the public convenience and necessity, and that continued operation thereof will unduly burden interstate or foreign commerce.

An appropriate order will be entered.

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