Special Project: Contesting the Burlington Northern's Proposed Rail Lane Abandonments: Advocacy on Behalf of the Shipper in the Staggers Rail Act Era

by

David C. Thompson

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SPECIAL PROJECT

CONTESTING THE BURLINGTON NORTHERN'S PROPOSED RAIL LINE ABANDONMENTS: ADVOCACY ON BEHALF OF THE SHIPPER IN THE STAGGERS RAIL ACT ERA

I. INTRODUCTION

Shippers of grain and other freight by railroad in North Dakota have become inescapably aware in recent years that the future of branch line service on many lines in the state is uncertain. Rail carriers have perceived a shift in federal regulatory policy in favor of the railroad industry and have become eager to rid their systems of branch lines on which deficit or marginally profitable operations are being maintained. A ripening of this trend by June of 1981 was shown with the announcement by North Dakota's largest rail carrier, the Burlington Northern, that some 1,200 miles of its branch lines were the subject of various stages of abandonment preparation.[1] Although imminent abandonment of some of these lines was postponed by the railroad in a conciliatory move on November 24, 1981,[2] the Burlington Northern continues to view these properties as having a marginal future. While some of this trackage unquestionably is in poor condition, is patronized

1 Burlington N.R.R., Press Release (June 26, 1981). The actual lines proposed for abandonment with the filing of the railroad's 1981 System Map Diagram were listed in explanatory material submitted with the press release. *Id. See infra* note 29 for a discussion of Burlington Northern's advertising campaign to promote support for rail abandonment plans.

2. Burlington N.R.R., Press Release (Nov. 24, 1981) (railroad announced plans to slightly scale back its immediate rail abandonment plans). *See infra* note 21.

lightly, and is substantially duplicated by other lines in the areas it serves, there are other routes proposed for abandonment for which there are no practical substitutes, rail or otherwise.

This project will examine the principles underpinning rail abandonment law and offer legal strategies with which to contest abandonments of lines that impose little proportionate burden on a carrier to keep in operation, but which are vital to the economic health of rural regions and communities in North Dakota.

II. THE PROPOSED RAIL LINE ABANDONMENTS

According to the 1980 State Rail Plan for North Dakota,[3] the state has approximately 5,000 miles of rail track traversing its surface; approximately sixty percent is branchline right-of-way.[4] Prior to 1976, shippers and other interested parties in North Dakota had not envisioned the possibility that a major rail line abandonment problem would soon confront the state.[5] From 1930 to 1974, the miles of operated railroad in North Dakota dropped only 3.3 percent, from 5,260 miles to 5,079 miles.[6] In August of 1976, however, the United States Secretary of Transportation, articulating a policy that was eventually to find its way into the offices of the Interstate Commerce Commission, declared that more than half the rail line in North Dakota was "light density in character" and as unprofitable trackage, was subject to eventual abandonment.[7] It was at this point that freight shippers and state officials became aware that up to 2,500 miles of rail line in North Dakota could be abandoned within the next several years.[8]

In succeeding years, a progressively greater number of rail miles have been made subject to abandonment. In 1979

3. NORTH DAKOTA STATE HIGHWAY DEP'T, [hereinafter cited as STATE RAIL PLAN OF 1980]. This plan was compiled by the Intermodel Planning and Rail Assistance Division of the North Dakota State Highway Department, the designated state agency for rail planning in North Dakota, and the Upper Great Plains Transportation Institute at North Dakota State University. The preparation of the plan was financed by the Federal Railroad Administration of the United States Department of Transportation with funds made available through the Railroad Revitalization and Regulatory Reform Act. Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified at 45 U.S.C.A. §§ 801-803, 821-837, 851-855 (West Supp. 1981)). By providing statistical data with respect to operating costs, capital needs, and traffic in North Dakota rail lines, the plan offers a factual basis upon which protestants to a particular rail abandonment can rely. The plan also discusses alternatives to rail freight service for each line which a carrier has either designated for imminent abandonment or those classified as being "under study" for possible future abandonment. *See* STATE RAIL PLAN OF 1980.

4. STATE RAIL PLAN OF 1980, at I-3.

5. *Id.* The introductory chapter of the 1980 North Dakota State Rail Plan states that "prior to 1976, North Dakota hadn't even envisioned the possibility of a major branchline abandonment problem facing the state." *Id.*

6. *Id.* As of September 1980 North Dakota had 4,900 miles of rail track, 60% of which was branchline. *Id.*

7. *Id.*

8. *Id.*

approximately 540 miles of track were subject to abandonment; that total increased to 840 miles in 1980.[9] When Burlington Nothern President Richard Grayson stated in March of 1981 that almost one-third of the state's branch lines might be identified in 1981 for abandonment within the following three years, it became evident that the carrier's policy of abandoning unprofitable or marginally profitable lines was being accelerated.[10]

The Burlington Northern's 1981 System Map[11] showed roughly 1,200 miles of branchline in North Dakota subject to abandonment.[12] Included in that total were 478 miles of line in the state that were classified by Burlington Northern in "Category One,"[13] meaning that the carrier intended to seek permission from the ICC to effect abandonment within three years of the system map's filing date.[14] Approximately 725 more miles of track were placed in "Category Two" by Burlington Northern,[15] indicating that the railroad had these lines "under study" for possible future filing of abandonment applications with the Commission.[16] Thus, the proposed abandonments in North Dakota were part of an overall corporate policy by the Burlington Northern to cut 4,166 miles of branch line trackage by 1983. The states most affected would be North Dakota, Minnesota, Nebraska, and Washington.[17]

On November 24, 1981, the Burlington Northern filed an amendment[18] to its 1981 System Map in which the carrier set forth a plan to scale back slightly some of its line abandonment proposals.[19] In letters sent on that date to the governors of North

9. *Id.*

10. *See* The Forum, June 4, 1981, at 9, col. 1-2; Grand Forks Herald, June 18, 1981, at 1, col. 1-3 (Farm and Home section).

11. Amendment of the System Diagram Map, 49 C.F.R. § 1121.23(c) (1980) (requirement for filing System Diagram Map).

12. *See* 1981 Burlington N.R.R. Amended System Diagram Map (filed with the ICC and the North Dakota Pub. Service Comm'n, June 26, 1981) (explanatory material). A formal listing of lines in various abandonment categories was made at the time that the system map was filed. *Id.*

13. 49 C.F.R. § 1121.20(b)(1) (1980). Section 1121.20(b)(1) defines "Category One" as "[a]ll lines or portions of lines which the carrier anticipates will be the subject of an abandonment or discontinuance application to be filed within the 3-year period following the date upon which the diagram, or any amended diagram, is filed with the Commission." *Id.*

14. *Id.* §§ 1121.20(b)(1), (c)(1). *See infra* notes 60-70.

15. *Id.* § 1121.20(b)(2). Section 1121.20(b)(2) "Category Two" lines include "[a]ll lines or portions of lines potentially subject to abandonment . . . those which the carrier has under study and believes may be the subject of future abandonment application because of either anticipated operating losses or excessive rehabilitation costs, as compared to potential revenues." *Id.*

16. *Id.*

17. 1981 Burlington N.R.R. Amended System Diagram Map (filed June 26, 1981) (explanatory material). *See BN Envisions Abandoning 4,000 Miles of Railroad,* TRAFFIC WORLD, June 15, 1981, at 25.

18. 49 C.F.R. § 1121.23(a) (1980). Section 1121.23 of the Code of Federal Regulations provides that "[e]ach carrier shall be responsible for maintaining the continuing accuracy of its system diagram map and the accompanying line descriptions. . . . Amendments may be filed at any time and will be subject to all carrier filing and publication requirements of § 1121.22 as they apply to the amendment and each individual line which has been amended." *Id.*

19. 1981 Burlington N.R.R. Amended Diagram Map (filed with the ICC, Nov. 24, 1981). *See* Official Statement of Burlington N.R.R., *BN to Scale Back Branch Line Plans* (Nov. 24, 1981). The text of the statement in its entirety is as follows:

Dakota, Nebraska, and Montana,[20] Burlington Northern President and Chief Executive Officer Richard B. Grayson said that branch line mileage projected for "Category One" would be reduced,[21] and that several lines placed in "Category Two," under study for possible future abandonment, had been placed in "Category Five," denoting their return to "normal operating status."[22] An official statement issued by the company on the day that the letters were sent explained the slight moderation of the railroad's abandonment policy from the June position:

> [S]ome of the lines after a thorough study and [examination] of future traffic projections with shippers appear to be financially viable for the foreseeable future .

Following months of meetings with shippers and state rail planners, Burlington Northern Railroad will scale back its plan to curtail operations on some branch lines in Nebraska, North Dakota and Montana.

In letters sent to the governors of each of the three states, BN Railroad President and Chief Executive Officer Richard C. Grayson said today that the branch line mileage projected for abandonment (Category 1) in the three states during the next three years will be reduced.

In addition, several branch lines placed in the "under study" category (Category 2) when BN filed its amended system diagram map with the Interstate Commerce Commission in June, will be returned to normal operating status (Category 5). Grayson said some of the lines, after a thorough study and analysis, and after looking at future traffic projections with shippers, appear to be financially viable for the forseeable future.

Grayson reminded the governors that the thrust of the company's branch line program was "to be open in our evaluation of the long-term viability of our branch lines" and to seek cooperation and communication from those along the affected lines.

"Many shippers and state rail planners took the time to sit down with us to discuss the future of specific branch lines," Grayson said. "As a result of these meetings, and the continuing analysis of our branch lines, the status of many of the lines will be changed."

Grayson said that in many cases shippers on a branch line made a commitment to increase their use of the line and disclosed plans for new grain elevators and subterminals.

The rail president emphasized that the analysis of branch lines is a continuing one. "The outlook for those lines remaining in the 'under study' category (Category 2) is marginal," he said. Many face a downward trend in traffic or substantial rehabilitation costs in the near future and Grayson said that commitments from shippers will be needed to save those lines.

Grayson also said, however, that when a line's future justifies the cost of upgrading the line to carry heavier loads, "we intend to proceed with that upgrading using Burlington Northern funds."

The governors were told that BN is committed to providing each state with "efficient, modern rail service in the years ahead."

BN continues to study and analyze branch lines in other states, Grayson said.

Id.

20. *See* Official Statement of Burlington N.R.R., *BN to Scale Back Branch Line Plans* (Nov. 24, 1982).

21. *See* 1981 Burlington N.R.R. Amended System Diagram Map (filed with the ICC and the North Dakota Pub. Service Comm'n, June 26, 1981). There were six branch lines or parts thereof which were transferred from Category One to other category stages in the abandonment process as a result of the November 24, 1981 amendment by Burlington Northern of its system diagram map. *Id.*

22. Rail branch lines in "Category Five" are those described as "[a]ll other lines or portions of lines which the carrier owns and operates. . . ." 49 C.F.R. § 1121.20(b)(5) (1980). Thus, lines in "Category Five" on a carrier's system diagram map are those for which there are no present plans for abandonment.

> . . .[I]n many cases, shippers on a branch line made a commitment to increase their use of the line and disclosed plans for new grain elevators and subterminals.[23]

Despite the November changes, however, Burlington Northern emphasized that it considered the economic outlook for those lines remaining in the "under study" category (Category Two) to be "marginal" at best.[24] In addition, two branch lines that had been classified in the June 1981 System Map filing as being under study for possible future abandonment were moved into "Category One" in the November system map changes.[25] Essentially, Burlington Northern had engaged in only slight moderation of its aggressive abandonment policy, since the November filing caused only six of the lines previously in "Category One" to be transferred out of that classification.[26] The marginal long-term significance of the November system map modifications made by Burlington Northern is illustrated by ICC regulations that allow a rail carrier to modify its system map at any time.[27] Consequently the railroad may at any time add as many branch lines as it wishes to "Category One," following the date of the submission of the amended system map.[28] The Burlington Northern has acknowledged that the great increase in its rail line abandonment applications last year was attributable to the fact that 1981 was the first year in which carriers had been able to take advantage of features of the Staggers Rail Act relating to abandonments.[29]

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23. Official Statement of Burlington N.R.R., *BN to Scale Back Branch Line Plans* (Nov. 24, 1981).

24. *Id.*

25. *See* 1981 Burlington N.R.R. Amended System Diagram Maps (filed with the ICC, June 26, Nov. 24, 1981). These lines were the segments from Linton, North Dakota to Eureka, South Dakota and that portion of the Grand Forks-Grafton line from Grand Forks to Honeyford, North Dakota. *See id.*

26. *See* 1981 Burlington N.R.R. Amended System Diagram Map (filed with the ICC, Nov. 24, 1981). These lines were the routes from Milnor to Oakes, North Dakota; Hannaford to Binford, North Dakota; Towner to Newburg, North Dakota; Devils Lake to Hansboro, North Dakota; Sanborn to Hannaford, North Dakota and Zap to Killdeer, North Dakota. *See id. See also supra* note 21.

27. *See* 49 C.F.R. § 1121.23(a) (1980). Section 1121.23(a) provides that "[a]mendments [to a system diagram map] may be filed at any time and will be subject to all carrier filing and publication requirements of § 1121.22 as they apply to the amendment and each individual line which has been amended." *Id.*

28. *Id.*

29. Burlington N.R.R., press release (June 26, 1981) (issued by Michael Wenninger, Regional Public Relations Mngr., Twin Cities Region of the Burlington N.R.R.) (Branch Line Fact Sheet).

In succeeding months, the Burlington Northern engaged in a slick public relations campaign to promote support for its rail abandonment plans. The campaign was highlighted by large advertisements placed in North Dakota newspapers. In one such advertisement a picture of a decaying branch line appeared with a dilapidated grain elevator in the background. Grand Forks Herald, Aug. 27, 1981, at 7A, col. 2-5. The ad begins in large type and states the following: "In 1881, this track was worth its weight in gold. Today, every farmer in North Dakota is losing money because of it." *Id.* Under the picture, which features high prairie weeds growing over the right-of-way, the BN message continued:

The Staggers Rail Act, effective as of October 14, 1980, contains several provisions that serve to speed up the process through which rail carriers receive approval from the ICC to abandon lines.[30] The essence of the modifications is that the ICC is now required to render a final decision on an application within prescribed time periods, and opportunities for protestants to oppose and delay rail abandonments have been minimized.[31] Before discussing the Staggers Rail Act, it is important to briefly examine some of the developments that preceded its enactment.

In the official report issued by the House Interstate and Foreign Commerce Committee, the economic health of the American railroad industry was described at great length. With one finding in the report being that roughly thirty percent of the nation's rail business was being conducted by "financially weak carriers," the Committee asserted that various changes of operating climate were necessary for the industry to regain its strength.[32] Despite the classification of the remaining seventy percent of rail business as being conducted by healthy carriers, the Committee justified a substantial decrease in governmental regulation of the industry by finding that rail business conducted by weak carriers actually affects all rail carriers. That conclusion was made on the basis that approximately seventy percent of all rail traffic is at some point interchanged between two or more railroads.[33]

Viewing the evil of excessive rate and route regulation over rail carriers, the Staggers Rail Act restructured railroad rate regulation in general and accelerated the abandonment process for the stated purpose of permitting railroad corporations to realize a

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> When Burlington Northern's branch lines were built a century ago, they opened doors to new markets. And that meant better prices for farmers. Ironically, in order for farmers to get better prices today, we need to close some of these lines. The cost to rehabilitate track is about $100,000 per mile. If a line carries only a handful of cars a year, that's clearly inefficient and unprofitable. For us. And for you. By closing some of these little-used branch lines, we can consolidate out resources and energy to improve the single most efficient form of grain transportation today — the unit grain train. The lines we will be closing over the next few years account for only a small percentage of the grain shipped by Burlington Northern in North Dakota. Yet the savings will be millions of dollars. These funds are being redirected into unit train operations, resulting in improved services and lower shipping rates. And that's something every farmer in North Dakota can profit from.

Id.

30. The Staggers Rail Act of 1980, Pub. L. No. 96-448, tit. II, § 402(a), 94 Stat. 1928 (codified as amended in scattered sections of 49 U.S.C.A. §§ 10101-11917 (West 1981)).

31. 49 U.S.C.A. §§ 10903, 10904 (West 1981).

32. H.R. REP. No. 1035, 96th Cong., 2d Sess. 111-12, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 4055-56 (House Interstate and Foreign Commerce Committee discussed the economic health of the American railroad industry).

33. *Id.*

greater percentage rate of return on investment.[34] Pointing out that the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act)[35] had required the ICC to determine the adequate rate of return that should be realized by the industry, the House Committee report accompanying the Staggers Rail Act stated that over the preceding decade, American railroads had failed to reach the eleven percent rate of return established as the adequate rate by the Commission.[36] Asserting that "[t]here is no better measure of overall financial conditions than the rate of return on investment,"[37] the House report explained that the statutory changes needed to deregulate the industry and improve the business climate for railroads were contained in the legislative package.[38]

Most of the changes in rail abandonment procedures brought about by the Staggers Rail Act were changes that the industry lobbying organization, the American Association of Railroads (AAR), had been pushing for during the preceding several years.[39] A support document used by the AAR in its lobbying activities as Congress considered the legislation in 1979, provided that the industry should be allowed to quickly abandon lines that carry little traffic or operate at a loss.[40] The AAR had reasoned that if the rail industry was to continue as a viable business, it must be allowed to operate as a business, unconstrained by restrictive abandonment

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34. *Id.* at 101-19, CODE CONG. & AD. NEWS at 4045-63.

35. Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified at 45 U.S.C.A. §§ 801-803, 821-837, 851-855 (West Supp. 1981)).

36. H.R. REP. No. 1035, 96th Cong., 2d Sess. 96, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 4040.

37. *Id.* at 97, U.S. CODE CONG. & AD. NEWS at 4041.

38. *Id.* at 34-35, U.S. CODE CONG. & AD. NEWS at 3979-80. The House Committee on Interstate and Foreign Commerce stated the following:

> The Committee is concerned about the plight of the railroad industry. In 1978, the Department of Transportation in its report to Congress — "A Prospectus For Change In the Freight Railroad Industry" — concluded that the industry between 1976 and 1985 would have a capital shortfall of between 13.1 and 16.1 billion dollars. . . . Current earnings of the railroad industry are inadequate to meet existing or anticipated capital needs. There is no reason to believe that railroads operating in the present regulatory environment will improve their earnings.

Id.

39. *See id.* at 99-113, U.S. CODE CONG. & AD. NEWS at 4043-57. Most of the statistics with respect to questions of railroads' return on net investment, rate of return and cost of capital, and projected future investment requirements were supplied to Congress by the American Association of Railroads (AAR) in the course of its lobbying activities. In the supporting documents made part of the official legislative history of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, the AAR statistics were adopted by the House Interstate and Foreign Commerce Committee and the Senate Commerce, Science, and Transportation Committee in their official reports. *See* H.R. REP. No. 1035, 96th Cong., 2d Sess. 99-113, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 4043-57.

40. ASS'N OF AMERICAN RAILROADS, ECONOMIC REGULATION OF RAIL FREIGHT OPERATIONS (Feb. 5, 1979).

procedures and rate regulation.[41] The AAR contended that the cost and time necessary to pursue an abandonment were far too high to be sustained in the process of justifying the elimination of a marginal or unprofitable line.[42]

The contentions by the railroad industry won favor in Congress, as the House Committee majority report accompanying the Staggers Rail Act provided:

> The Committee has observed the deteriorating conditions of America's branch lines. An enormous amount of time, effort, and expense has been expended contesting abandonments.
>
> . . .
>
> This program [under the Act] has the advantage of avoiding expensive protracted litigation. It provides the carrier desiring to abandon a line a vehicle for prompt abandonment.[43]

This general policy in favor of a streamlined abandonment procedure, however, was not intended to create for the railroads the facility of ICC "rubber-stamping" of abandonment applications. Certificates of public convenience and necessity issued by the ICC are still required as a condition precedent to permissible abandonment of a rail line.[44] In addition, there was no deletion of the express statutory direction that the ICC, in considering abandonment applications, be required to consider whether the proposal would have a serious adverse impact on "rural or community development."[45] This was despite a Carter Administration effort to have the language removed from the statute.[46] Nevertheless, the majority of members of the ICC appear to have interpreted these legislative developments as a policy mandate that virtually any abandonment application filed by a

41. *Id.* Note, *Proposed Regulatory Reform in the Area of Railroad Abandonment,* 11 TRANSP. L. J. 213, 221 (1979).

42. ASS'N OF AMERICAN RAILROADS, ECONOMIC REGULATION OF RAIL FREIGHT OPERATIONS 2 (Feb. 5, 1979).

43. H.R. REP. No. 1035, 96th Cong., 2d Sess. 43, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3988.

44. 49 U.S.C.A. § 10903(a) (West 1981). Section 10903(a) provides the following: "A rail carrier providing transportation . . . may . . . abandon any part of its railroad lines . . . only if the Commission [the ICC] finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance." *Id.*

45. *Id.*

46. *See* Note, *Proposed Regulatory Reform in the Area of Railroad Abandonment,* 11 TRANSP. L. J. 213 (1979). The author discusses the Carter Administration's support for a bill which would have removed the requirement that the Interstate Commerce Commission, when finding that public convenience and necessity require or permit a rail line abandonment, must consider whether the abandonment will have a serious, adverse impact in rural and community development. *Id.* at 219.

carrier should be granted.[47]

Congress had reasoned that since thirty percent of the nation's railroads were "financially weak," drastic deregulatory action had to be taken in order to protect profitable railroads from the bankruptcy that befell the seven Northeastern railroads and prompted the creation of the deficit-ridden Consolidated Rail Corporation.[48] Expressing fear that the remainder of the nation's rail system eventually could rest in the hands of bankrupt carriers, section III of the House Conference Report[49] provides that one of the specific goals of the legislation was to reform federal regulation "to preserve a safe, adequate, economical, efficient, and financially stable rail system" and "assist the rail system to remain in the private sector of the economy."[50] In the House Committee report accompanying the Staggers Rail Act, the example of the seven bankrupt Northeastern railroads was cited as justification for the changes affected by the Act.[51]

This rationale has been applied in abandonment proceedings by the majority of current ICC members, even in situations in which the proposed abandonment involved relatively minor losses in revenue for a profitable carrier such as the Burlington Northern.[52] Appropriate circumstances are now necessary to convince the ICC not to allow a particular abandonment. Such a profile would exist where the proposed abandonment would cause great proportionate hardship to shippers and communities, but would in turn be minimally burdensome to the carrier and to interstate commerce in general, the ICC may be persuaded not to allow the abandonment.

While some lines proposed by the Burlington Northern for abandonment or future abandonment are redundant or are presently little-used, there are others whose abandonment will cause significant economic hardship.[53] Discussing the serious

47. *See infra* note 212.

48. H.R. REP. No. 1035, 96th Cong., 2d Sess. 99, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 4043.

49. H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 79-80, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4110.

50. *Id.*

51. H.R. REP. No 1035, 96th Cong., 2d Sess. 36-37, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 3981-82.

52. The rail operations of Burlington Northern Inc. are indeed profitable. *See* BURLINGTON N.R.R., ANNUAL REPORT (1980). In the report the company acknowledged that a major development that will enhance the profit of its railroad was the enactment by Congress of the Staggers Rail Act of 1980. According to the report, the Act affords the company "streamlined procedures for line abandonments" and "greater freedom to set freight rates." *Id.* But even the 1980 figures, which do not begin to reflect the bonanzas of the Staggers Act for BN, are impressive profit statistics. The pre-tax income of the railroad rose 319% from $39,000,000 in 1979 to $165,000,000 in 1980. *Id.* Revenue in dollars increased 23% from $2,636,000,000 in 1979 to $3,254,000,000 in 1980, and revenue ton miles rose 15% from 135 miles in 1979 to 155 in 1980. *Id.*

53. *Id. See* NORTH DAKOTA HIGHWAY DEP'T, STATE RAIL PLAN UPDATE app. (1981) [hereinafter

effects which will accrue from the abandonment of lines in North Dakota, the 1980 North Dakota State Rail Plan provides:

> North Dakota is particularly dependent on rail transportation. The state is the nation's largest producer of spring wheat, durum wheat, barley, rye, and flaxseed, typically shipping to market in the area of 350 million to 400 million bushels of grain. North Dakota produces this grain in the center of the North American continent requiring long hauls to reach its major markets. North Dakota with no navigable waterways has only one other alternative to market its grain, trucks capable of carrying approximately 800 bushels of wheat. However, due to the long haul advantage of railroads and marketing factors railroad transportation is the preferred mode.[54]

Shippers in North Dakota maintain that shipping grain long distances by truck simply is not economically feasible. This fact was recognized by the Burlington Northern in the press release it issued with its notification of those lines that were to be subject to abandonment as of June 1981.[55] The company stated flatly that "rail is the best for the long haul of grain."[56]

It is ironic to consider the words of then U.S. Deputy Under Secretary of Transportation, John W. Snow, as he promoted railroad deregulation in June of 1975:

> A fourth myth is that one result of our reforms will be denial of transportation services to thousands of smaller communities. Chairman Stafford told a House committee that among the costs of our rail bill was loss of service to remote areas. This argument is bottomed on the premise that it is unprofitable for carriers to serve smaller communities or small shippers and that such service is presently subsidized by more profitable routes . . . . In fact, we have seen little evidence that there is a geographic cross-subsidy in the rail and motor carrier industries. Far from promoting the interest of rural areas or small

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cited as 1981 STATE RAIL PLAN UPDATE]. The 1980 North Dakota State Rail Plan and the North Dakota State Rail Plan Update provide a line-by-line description of the effects projected to accrue in the event that a particular rail line in the state is in fact abandoned by the Burlington Northern.

54. STATE RAIL PLAN OF 1980, *supra* note 3, at III-2.

55. Burlington N.R.R., Press Release (June 26, 1981) (issued by Michael Wenninger, Regional Public Relations Mngr., Twin Cities Region).

56. *Id.* (Branch Line Fact Sheet).

> shippers, the present system provides an incentive for carriers to skimp on service.[57]

Although the previous regulatory constraints might have provided an incentive for carriers to minimize their losses "either by discouraging service or by providing poor service,"[58] the alternative of an almost automatic rail abandonment approval under the present ICC practice is of no service at all for many small and rural communities.

Despite the legislative history of the Act,[59] rail abandonment proceedings were not intended by Congress to become meaningless exercises in which the ICC approves an application without seriously holding the petitioning carrier to its burden of proving that necessity and public convenience require or permit such abandonment. Thus, even within the context of the broad policy articulated by Congress to facilitate an economically viable railroad industry in the private sector, effective and legitimate opposition still may be mounted to proposed abandonments in cases in which the effects to the area served are great and the burdens of keeping the line in operation are correspondingly minor for the carrier to sustain.

III. THE PROCEDURAL PROCESS FOR RAIL ABANDONMENT APPLICATIONS

Under the provisions of 49 U.S.C.A. § 10903 (a), a rail carrier may abandon a line only if the ICC determines that release of a line and cessation of the operations on it will be consistent with "present and future public convenience and necessity."[60] The

57. 42 I.C.C. PRACT. J. 731, 742 (1975) (remarks of John W. Snow, then Deputy Under Sec. of Transp., at the 46th Annual Meeting of the Ass'n of ICC Practitioners, Atlanta, Georgia, on June 18, 1975).

58. *Id.*

59. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified at scattered sections of 49 U.S.C.A. §§ 10101-11917 (West 1981)).

60. 49 U.S.C.A. § 10903(a)(2) (West 1981). With respect to railroads that are subject to reorganization and bankruptcy proceedings, the authority of the ICC to review rail line abandonment applications is advisory only. *See* 11 U.S.C.A. § 1170 (West 1979 & Supp. 1981). The bankruptcy court, after notice and hearing, may authorize the abandonment of a particular rail line. *Id.* § 1170(a) (West 1979). Although the statute provides that notice be provided to the ICC that the line has been proposed for abandonment, the bankruptcy trustee makes its proposal to the court, and the court in turn may approve the abandonment even if the commission should oppose it. *Id.* § 1170(c). All the court must find is that the abandonment is in the best interest of the debtor railroad's estate, is essential to the reorganization plan, and is consistent with public interest. *Id.* § 1170(a). Actual abandonment, however, may not take place until the time for filing appeals has been exhausted. *Id.* § 1170(d)(1). The rationale for this latter requirement is that railroad abandonments by their nature are drastic developments in that once a rail line has been abandoned, it is gone. For a further discussion of the statutory and regulatory framework applicable to bankrupt rail carriers, see Thoms, *New Rules for Bankrupt Rails*, TRAINS MAGAZINE, May 1980, at 28.

burden of proof of establishing public convenience and necessity rests with the party applying to the Commission for permission to effect the abandonment.[61]

The ICC may approve the carrier's application as filed or it may modify the terms under which abandonment will be permitted.[62] Once the ICC finds that the abandonment of a line satisfies this standard, it issues the carrier a certificate formally approving the application.[63]

The first indication that a carrier is considering a line for abandonment is when that carrier files a complete and current rail system diagram with the ICC in a procedure mandated by statute.[64] Under regulations of the Commission that accompany the statute, every carrier must include in this diagram a map of its entire rail system, designating each line in one of four color-coded categories.[65] In the first classification, lines or portions thereof that the carrier anticipates will be subjects of abandonment applications to be filed within the following three-year period appear on the diagram in red ink.[66] The second category of routes, designated in green ink, includes those that the carrier "has under study and believes may be the subject of a future abandonment application because of either anticipated operating losses or excessive rehabilitation costs, as compared to potential revenues."[67] Rail lines of the third type are those for which an abandonment application is pending before the ICC on the date upon which the diagram is filed with the agency.[68] These lines are denoted by yellow ink.[69] All other lines that the carrier owns and operates, either directly or through a designee, are shown on the system map in black ink.[70]

Compliance by a carrier with these regulations relating to the system diagram can be significant in determining whether an abandonment will be allowed. If an abandonment application is opposed by state or local government officials, shippers, or others making "significant use" of the line, the ICC may not approve the application unless the particular rail line has been identified properly on a diagram map filed with the Commission at least four

61. 49 U.S.C.A. § 10904(d)(1) (West 1981).
62. *Id.* § 10903(b)(1)(A)(i)(ii).
63. *Id.* § 10903(b)(2).
64. *Id.* § 10904(a).
65. 49 C.F.R. § 1121.20(c)(1)-(5).
66. *Id.* § 1121.20(b)(1)(c)(1).
67. *Id.* § 1121.20(b)(2).
68. *Id.* § 1121.20(b)(3).
69. *Id.* § 1121.20(c)(3).
70. *Id.* § 1121.20(b)(5), (c)(5).

months prior to the filing date of the application.[71] Under an amendment to the statute made by the Staggers Rail Act,[72] however, a carrier's compliance with the system map requirements may be waived by the ICC if the carrier making an abandonment application is in bankruptcy.[73] While ICC regulations provide that each carrier is responsible for maintaining the continuing accuracy of its system diagram map,[74] any carrier that has submitted a diagram listing one or more lines under study for possible future abandonment must revise its diagram annually, filing the updated map with the Commission no later than June 30th of each year.[75]

Once a carrier decides to seek abandonment of a line, its first step in the administrative process is to serve notice of its intent to file an abandonment application.[76] Service is accomplished by means of certified letter to the ICC or by personal service to those freight shippers who are "significant users"[77] of the line proposed for abandonment.[78] Notification must also be given to the Federal Railroad Administration, the Department of Defense, the Department of Interior, the Railroad Retirement Board, the Railroad Labor Executives Association, and the Governor and public utility agency of each state in which all or part of the railroad proposed for abandonment is situated.[79] Additional notice is required in the form of a legal notice published at least once during each of three consecutive weeks in a newspaper of general circulation in each county in which any part of the line proposed to be abandoned is located.[80] The form of the notice is set forth in detail by ICC regulations and must be completed within thirty

71. 49 U.S.C.A. § 10904(e)(3) (West 1981). Section 10904(e)(3) provides that determination of whether a shipper or other person has made "significant use" of a rail line is left to the ICC for administrative rulemaking. *Id.* The term "significant user" is deemed to include each of the 10 rail patrons who originated and/or received the largest number of carloads (or each patron if there are less than 10). 49 C.F.R. § 1121.11(M) (1980). Furthermore, any other rail patron is deemed a "significant user" if that patron received 50 or more carloads, on the line proposed for abandonment, during the 12-month period preceding the month in which notice is given of the abandonment application. *Id.*

72. Pub. L. No. 96-448, tit. IV, § 402(b), 94 Stat. 1941-42, (1980) (codified at 49 U.S.C.A. § 10904(e)(3)(B) (West 1981)).

73. *Id.*

74. 49 C.F.R. § 1121.23(a) (1980). Section 1121.23(a) provides the following:

> Each carrier shall be responsible for maintaining the continuing accuracy of its system diagram map and the accompanying line descriptions. Each carrier shall also prepare and submit to the Commission a black-and-white version of the system diagram map and accompanying line descriptions which clearly identify each of these categories of line and are suitable for publication in the FEDERAL REGISTER.

Id.

75. *Id.* § 1121.23(a), (c).

76. *Id.* § 1121.30.

77. *Id.* § 1121.30(a)(1).

78. *Id.*

79. *Id.* § 1121.30(a)(2).

80. *Id.* § 1121.30(a)(3).

days.[81]

Once the notice requirements are satisfied, the carrier may proceed to file its application for a certificate of abandonment with the ICC while simultaneously filing a "notice of intent to abandon."[82] This latter action should be distinguished from the carrier's earlier notice of intent to file the application for abandonment.

In filing the application for a certificate of abandonment, the carrier is required by statute to include four things: an accurate summary of the petition; an explanation of the reasons for the proposed abandonment;[83] a statement indicating that each interested person is entitled to recommend to the ICC that it approve, deny, or take other action concerning the application;[84] and a statement that the line is available for subsidy or sale and could therefore remain in service.[85] The notice requirements for a carrier actually applying for the certificate to abandon include the following: Certified mail notice to the Governor of each state that would be directly affected by the proposed abandonment;[86] posting of a copy of the notice in each terminal or station along the line proposed for abandonment;[87] and newspaper publication for three consecutive weeks in each county in which a portion of the line is located.[88] As for shippers, the statute directs the carrier merely to "mail a copy of the notice, to the extent practicable, to all shippers that have made significant use . . . of the railroad line during the 12 months preceding the filing of the application."[89]

Involvement in administrative proceedings by opponents of a proposed abandonment is limited by statutory amendments made by the Staggers Rail Act.[90] Under prior law, any "interested person"[91] could oppose a proposed abandonment by filing a petition with the ICC requesting that the application be investigated by the Commission, and the agency was thereby required to undertake an investigation.[92] With the change effected

81. *Id.* §§ 1121.30(b), .31.
82. *Id.* § 1121.30(b). *See* 49 U.S.C.A. § 10904 (a)(1), (2)(A), (B), (C) (West 1981).
83. 49 U.S.C.A. § 10904(a)(2)(A) (West 1981).
84. *Id.* § 10904(a)(2)(B).
85. *Id.* § 10904(a)(2)(C)(i).
86. *Id.* § 10904(a)(3)(A).
87. *Id.* § 10904(a)(3)(B).
88. *Id.* § 10904(a)(3)(C).
89. *Id.* § 10904(a)(3)(D).
90. Pub. L. No. 96-448, tit. IV, § 402(b), 94 Stat. 1941 (1980). *See* 46 Fed. Reg. 45348 (1981) (to be codified at 49 C.F.R. § 1121.36) (defining role of "interested person").
91. 49 U.S.C.S. § 10904(c)(1) (Law. Co-op. 1979), *amended by* 49 U.S.C.A. § 10904(c)(1) (West 1981). That section read in part: "[T]he Commission shall, on petition, and may, on its own initiative, begin an investigation to assist it in determining what disposition to make of the application." *Id.*
92. *Id.*

by the Staggers Rail Act, however, the ICC is no longer required to undertake an investigation of the application for abandonment of a railroad line even if it has been petitioned to do so by an interested party.[93]

In another change made by the Staggers Rail Act, if a protest is received within thirty days after the application is filed, the ICC must determine within forty-five days of that filing date whether an investigation is needed to assist in determining what disposition to make of the application.[94] The current statute also provides that if the Commission decides that no investigation is to be undertaken, the agency must make a decision on the abandonment application itself within seventy-five days of the application's filing date.[95] If the ICC concludes that the application should be granted, the certificate permitting the abandonment must be issued within ninety days from the date that the application was originally filed.[96] The statute further provides that if the Commission does conduct an investigation, the process should be completed within 135 days of the application's filing date with a decision to be rendered within 165 days.[97]

One of the most significant changes made in the statute by the Staggers Rail Act was the abolition of the hearing stage in the Commission's consideration of abandonment applications.[98] The previous statutory language provided that the ICC investigation could include "public hearings at any location reasonably adjacent to the railroad line involved in the abandonment [proceedings]."[99] The current language, however, states that the ICC shall merely take into consideration the application of the rail carrier and "any materials submitted by protestants."[100] Parties opposing a

93. 49 U.S.C.A. § 10904(c)(1), (2), (3) (West 1981). The ICC has within its own discretion the power to determine whether to undertake an investigation to assist in ascertaining what disposition to make of the rail abandonment application. *Id.* This is in direct contrast to the language which was contained in the former section, under which the ICC was mandated to conduct such an investigation if a petition for it to do so had been received from an interested person. *See* 49 U.S.C.S. § 10904(c)(1) (Law Co-op. 1979), *amended by* 49 U.S.C.A. § 10904(c)(1) (West 1981).

94. 49 U.S.C.A. § 10904(c)(1) (West 1981).

95. *Id.* § 10904(c)(2).

96. *Id.*

97. *Id.* § 10904(c)(3).

98. *Id.* § 10904(c)(1). This section provides that "[i]f a protest is received within 30 days after the application [for abandonment] is filed, the Commission shall, within 45 days after the application if filed, determine whether an investigation is needed to assist in determining what disposition to make of the application." *Id.*

99. 49 U.S.C.S. § 10904(c)(1) (Law. Co-op. 1979), *amended by* 49 U.S.C.A. § 10904(c)(1) (West 1981). Prior to the enactment of the Staggers Rail Act of 1980, the language read as follows: "An investigation may include public hearings at any location reasonably adjacent to the railroad line involved in the abandonment [proceeding]. The hearing may be held on the request of an interested party or on the initiative of the Commission." *Id.* The present statutory language provides only that the ICC must take into consideration in determining whether a proposed rail line abandonment will be consistent with the public convenience and necessity, "the application of the rail carrier and any material submitted by protestants." 49 U.S.C.A. § 10904(c)(2) (West 1981).

100. *Id.*

proposed abandonment of a rail line must advance their arguments in the form of submitted documents, generally without the prospect of accompanying oral presentations at a hearing forum.[101] This change from prior procedure effectively reduces the public visibility of the abandonment application process with the prospect of less press coverage and the maintenance of opponents to the abandonment in less personal and less effective capacities. Therefore, because of the ICC's ability to now bypass the hearing phase in the Commission's administrative process with respect to rail abandonment applications,[102] the importance of effective written and documented submissions in opposition to such proposals has been heightened significantly.

IV. ICC EVALUATION AND DISPOSITION OF ABANDONMENT APPLICATIONS

The ICC has exclusive and plenary authority over rail abandonments.[103] Therefore, parties desiring to block such carrier proposals may look for relief only to the Commission and to courts reviewing the ICC decisions.

A. PUBLIC CONVENIENCE AND NECESSITY: BALANCING THE INTERESTS

One concern for opponents of a proposed rail abandonment is that they structure their administrative presentation to show that such an abandonment would not meet the flexible standard of "public convenience and necessity." Some assistance in determining the meaning of this standard is provided by judicial interpretation. The adaptable nature of the phrase in its application

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101. *See id.* This section provides as follows:

> If the Commission decides that no investigation is to be undertaken, the Commission shall, within 75 days after the application is filed, decide whether the present or future public convenience and necessity require or permit the abandonment or discontinuance, taking into consideration the application of the rail carrier and any materials submitted by protestants.

Id. Under section 1121.36(a)(1) of the Code of Federal Regulations, it is provided that "[i]nterested persons may become parties to an abandonment or discontinuance proceeding by filing with the Commission . . . written comments or protests." 49 C.F.R. § 1121.36(a)(1) (1980). Such protestants may request an oral hearing under the terms of section 1121.36(a)(1)(v), but it is within the discretion of the ICC whether such a request will be granted, or whether particular protestants' efforts in opposition to a rail line abandonment will be limited to written submissions. *Id.* § 1121.36(a)(1)(v).

102. 49 C.F.R. § 1121.36(a)(1)(v).

103. *See* Colorado v. United States, 271 U.S. 153 (1926) (ICC endowed by Congress with exclusive jurisdiction in rail abandonment applications). *See also* Chicago & N.W. Transp. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (ICC has power to authorize abandonment of railroad located wholly within one state).

was referred to by the United States Supreme Court in a 1942 rail abandonment case, *ICC v. Railway Labor Association,*[104] in which the Court said the following: "'The phrase 'public convenience and necessity' no less than the phrase 'public interest' must be given a scope consistent with the broad purpose of the Transportation Act of 1920: to provide the public with an efficient and nationally integrated railroad system.'"[105]

Acknowledging the broad and flexible nature of the "'public convenience and necessity'" standard, the United States Supreme Court in *Colorado v. United States*[106] developed the test to be employed by the ICC. The Court emphasized that in deciding if a proposed abandonment would satisfy public convenience and necessity, the Commission must consider the needs of both intrastate and interstate commerce, because it was the purpose of the Transportation Act of 1920 to establish and maintain adequate service for both.[107] Referring in more specific terms to the test to be used by the ICC in dealing with abandonment applications, the Court in *Colorado* asserted:

> The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities of continued operation must be weighed against the burden thereby imposed upon other commerce. . . . The result of this weighing — the judgment of the Commission — is expressed by its order granting or denying the certificate.[108]

The test, therefore, is one of balancing the interests of the rail carrier against those of the freight shippers and state and local governments.

Public policy favoring abandonment of a particular rail line is the desire for an efficient interstate rail system, free from the burdens of unprofitable rail lines.[109] On the side of the shipper, and the intervenor state and local governments, is the public interest

104. 315 U.S. 373 (1942).

105. ICC v. Railway Labor Ass'n, 315 U.S. at 376 (quoting The New England Divisions Case, 261 U.S. 184, 189-91 (1923)).

106. 271 U.S. 153 (1926).

107. *Id.* at 166-69 (construing Transportation Act of 1920 ch. 91, 41 Stat. 456).

108. *Id.* at 168 (citations omitted).

109. *Id.* at 169. The Court addressed the economic interest of a rail carrier seeking to maximize profits stating that "the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the Act does not make issuance of the certificate dependent upon a specific finding to that effect." *Id.*

served when rail service is available for the furtherance of regional economic development and sustenance of business operations, which effectively could not survive without rail transportation.[110] Referring to these policy considerations, the Court in *Colorado* said that the use of the balancing test shapes the Commission's determination as "to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered."[111]

1. Costs vs. Revenues and Reasonable Return on Investment

In making use of this flexible approach in its balancing process, the ICC relies upon specific criteria set forth in regulations it has promulgated. Virtually all of these regulations relate to standards for determining costs, revenues, and rates of return on investment for rail lines proposed for abandonment by carriers. Traditionally, railroads have asserted the unprofitability of rail lines as the primary justification for ceasing to operate them.[112] When shippers and others have challenged such abandonment applications, they have often challenged the carriers' characterizations of the lines' profitability.[113]

The ICC did not adopt regulations for determining costs, revenues, and investment return on rail lines until the Regional Rail Reorganization Act of 1973.[114] That Act created the Consolidated Rail Corporation (Conrail) and set forth a mechanism for continuation of "[e]ssential rail service in the midwest and northeast region[s] of the United States . . . provided by railroads which are today insolvent . . . ."[115] Thus, the Commission began to maintain regulations to determine whether the costs and revenues that are attributable to such service equal or exceed the sum of the avoidable costs of providing the service plus a "reasonable [rate of] return on the value of such rail properties. . . ."[116]

Although the mandate for the ICC to adopt regulations for the

110. *Id.* at 168-69. Referring to the adverse effects which would accrue to regions as a result of rail line abandonments, the Court in *Colorado* provided that "[i]n some cases, although the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively slight burden upon a prosperous carrier." *Id.*

111. *Id.* at 166.

112. *See, e.g.*, Norfolk & W. Ry. Abandonment, 363 I.C.C. 115, 119 (1980). The ICC stated, "Having concluded that the involved lines are being operated at a loss, we believe that the overall financial strength of a railroad should not bar approving abandonment." *Id.*

113. *See, e.g.*, Saint Louis-San Francisco Ry. Abandonment, 328 I.C.C. 34, 40 (1965).

114. 45 U.S.C.A. §§ 701-726 (West Supp. 1981).

115. *Id.* § 701(a)(1).

116. *Id.* § 744(a)(2)(B).

determination of costs, revenues, and rates of return arose from a situation in which Congress was referring specifically to bankrupt railroads, the resulting regulations have been made applicable by the Commission in all of its evaluations of rail line abandonment proposals, whether the carrier is insolvent or earning a significant profit overall.[117] Pursuant to these regulations,[118] carriers applying to the Commission for certificates permitting abandonment of rail lines provide a detailed accounting of the costs, revenues, and return on investment attributable to the route proposed for abandonment.[119] The reporting of costs sustained by the carrier provide the basis upon which the ICC determines the "avoidable costs" of the line — those costs the carrier definitely would not incur if the line were taken out of operation.[120]

a. Liquidation Value

In the further calculation of what would constitute a "reasonable return"[121] on the carrier's capital investment in the particular line, ICC regulations provide that the profit gained through operation of the property as a railroad is to be compared with the "net liquidation value"[122] for the "highest and best use"[123] of the property for nonrail purposes. This net liquidation value is determined by computing the current appraised market value of the property for other than rail transportation purposes, less all costs of dismantling and disposition of improvements necessary to make the remaining properties available for their highest and best use while complying with applicable zoning, land use, and environmental regulations.[124] The return on investment factor is discussed in the text of the North Dakota Rail Abandonment Handbook:

> In making a determination of an adequate return on investment, the ICC does not consider the depreciated

117. *See* 49 C.F.R. § 1121.40 (1980). The ICC in its regulations makes the standard used in the Regional Rail Reorganization Act of 1973 applicable in the review of revenue and rate of return analyses for all rail carriers in the United States, regardless of the relative financial health of those carriers. *Id.*

118. 49 C.F.R. §§ 1121.40-.47 (1980). These regulations are those within Subpart D of part 1121 — "Abandonment of Railroad Lines and Discontinuance of Service." Subpart D, entitled "Standards for Determining Costs, Revenues, and Return on Value," sets forth the revenue and costs which are attributable to particular branch lines. *Id.*

119. *Id.* § 1121.40.

120. *Id.* § 1121.40(a)(1). *See also id.* § 1121.42.

121. *Id.* § 1121.45.

122. *Id.* § 1121.44(c).

123. *Id.*

124. *Id.*

> book value of the line but rather the liquidation value of the line. In many cases, the railroads have placed extremely high values on the liquidation value of the line, particularly the right-of-way. Because of the exaggerated values placed on the investment, it is extremely difficult for some branchlines to show even a nominal return on investment.[125]

As referred to in the above passage, a natural result of the carrier determining the value of its property is inflation of the value of a line.

b. Opportunity Costs

Also influencing whether a particular rail line provides a reasonable rate of return on investment for the carrier has been the ICC's use since December 26, 1979, of "opportunity costs"[126] in reaching a decision on abandonment applications. The Commission has decided whether "opportunity costs" incurred by a railroad corporation in keeping rail assets tied up in less profitable rail operations are proper criteria to consider in approving rail abandonment applications.[127] Agencies from the states of Illinois, Ohio, Minnesota, and South Dakota, as well as the National Grain and Feed Association, expressed total opposition to the use of opportunity costs as factors in abandonment proceedings.[128] These

125. NORTH DAKOTA HIGHWAY DEP'T & NORTH DAKOTA PUBLIC SERVICE COMM'N, NORTH DAKOTA RAIL ABANDONMENT HANDBOOK 12 (1981) [hereinafter cited as RAIL ABANDONMENT HANDBOOK].

126. *Abandonment of Railroad Lines — Use of Opportunity Costs*, 360 I.C.C. 571 (1979). This was a comprehensive statement of policy change issued by the Commission on December 26, 1979. The ICC concluded in this document that opportunity costs were to be used in all future rail abandonment proceedings as a factor to partially determine whether the public convenience and necessity permit a proposed abandonment. *Id.*

127. 360 I.C.C. at 577.

128. *Id.* at 573. The Commission in its "Statement of Policy Change" acknowledged that the State of Illinois, joined by the Illinois Commerce Commission, the Illinois Legislative Director for United Transportation Union, the Illinois Department of Transportation (IDOT), and the Minnesota Department of Transportation, the Ohio Rail Transportation Authority, the South Dakota Public Utilities Commission and the National Grain and Feed Association all expressed "total opposition to the use of opportunity costs as a factor in abandonment proceedings." *Id.* The ICC added:

> These parties are concerned that if opportunity costs are made a factor the result will be wholesale abandonment of profitable lines.
>
> They stress the fact that railroads, as common carriers, occupy a unique place in the corporate world. They believe that common carriers are not free to make decisions regarding how and where to commit their resources based solely on the principle of profit maximization.
>
> Assuming an unfettered use of opportunity costs as a factor, it is argued that carriers would be able to abandon operations if they could get a higher return by investing assets elsewhere. Thus, a carrier receiving a 7-percent return on investment on a branch line could argue that it should be able to abandon that line since it could get a 10-percent return by investing in municipal bonds.

agencies asserted that if the ICC began considering opportunity costs, the result would be "wholesale abandonment of profitable lines."[129] These protestants argued that under the ICC proposal, even if a line was making a return on investment, the railroad might be allowed to abandon the line if the railroad could obtain a higher rate of return by investing its money elsewhere.[130]

Despite this opposition the ICC found that "opportunity costs must be a factor in determining whether the public convenience and necessity permits abandonment."[131] The Commission explained: "This finding reflects our belief that opportunity costs are a real, and, in some cases, very significant factor in determining whether the line at issue is imposing a burden on interstate commerce."[132] The ICC declined to state how determinative opportunity costs would be in influencing the outcome of rail abandonment proceedings.[133] A few months after this ICC decision, the Court of Appeals for the Eighth Circuit ruled in *Missouri Pacific Railroad v. United States*[134] that opportunity costs should be considered by the ICC in its review of an abandonment application.[135]

c. Reasonable Rate of Return on Investment: Is the Presence or Lack of It Conclusive in the ICC's Determination?

One problem with the lines in North Dakota that have been proposed for abandonment recently by the Burlington Northern Railroad is that even if opportunity costs and the railroad's own property value appraisal are used by the ICC, these lines in all probability will not be shown to provide a "reasonable return" on

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The statutory test in abandonment proceedings is whether the public convenience and necessity permit abandonment. By focusing on maximizing carrier profits, these parties argue, the Commission would be disregarding the needs of the public.

Id.

129. *Id.*
130. *Id.*
131. 360 I.C.C. at 577.
132. *Id.*
133. *Id.*
134. 625 F.2d 178 (8th Cir. 1980).
135. Missouri Pac. R.R. v. United States, 625 F.2d 178, 182 (8th Cir. 1980). In March of 1981, the Court of Appeals for the Seventh Circuit also found that the ICC acted within its statutory power when it issued its policy statement (360 I.C.C. 571) announcing its intention to consider opportunity costs in future abandonment cases. *See* Farmland Industries, Inc. v. United States, 642 F.2d 208, 211 (7th Cir. 1981). In *Farmland Industries, Inc.* the court stated that the balancing approach long approved in the line of cases extending from *Colorado v. United States* was not altered by the use by the ICC of opportunity costs in the consideration of whether a particular branch line is profitable. *Id.* The court in *Farmland Industries* concluded, "We find that this change in policy does not violate the statutory mandate to authorize abandonment only when consistent with public convenience and necessity." *Id.*

the carrier's investment.[136] If a rail line is shown to return less than a carrier would receive by abandoning service and liquidating or transferring the assets of that line, does the ICC inquiry end there? The answer is no. In its decision to permit consideration of opportunity costs in abandonment proceedings, the ICC cautioned that the question of opportunity costs is just one that will be taken into account as the Commission balances the competing interests.[137] Similarly, the Eighth Circuit in *Missouri Pacific* acknowledged that the consideration of opportunity costs directed by the Commission did not mean that there was any less obligation on the ICC "to balance the relative weight of many factors in determining whether or not to grant an abandonment."[138] Therefore, even if a railroad could make a greater rate of return by abandoning a particular line, that is only one consideration among many that are weighed by the ICC in determining the merits of an abandonment application.

2. *Operating at a Loss vs. The Lack of an Alternative for Transporting Freight*

Another important question in the ICC's balancing test is whether the ICC would conclusively abandon a line if it found that the line was operating at a loss. The peculiar circumstances surrounding each rail abandonment application placed before the Commission are greatly determinative in the disposition of that application.

Perhaps the Commission's justification for this practice is founded upon the statement contained in *Colorado,* in which the Court remarked that the Commission's determination in a rail abandonment proceeding "involves an exercise of judgment upon the facts of the particular case."[139] As the ICC itself maintained in *St. Louis — San Francisco Railway Abandonment,*[140] "[t]he point at which abandonment shall be considered justifiable is a matter of sound judgment and must be determined by the circumstances of each case."[141] To the extent that the text of ICC reported decisions have precedential value, however, there is administrative authority for the position that under some circumstances a railroad can

136. *See* RAIL ABANDONMENT HANDBOOK, *supra* note 125, at 12.
137. *See* Colorado v. United States, 271 U.S. at 153.
138. 625 F.2d at 180-81.
139. 271 U.S. at 166.
140. 328 I.C.C. 34 (1973).
141. Saint Louis-San Francisco Ry. Abandonment, 328 I.C.C. 34, 40 (1973).

properly be required to maintain operations on an unprofitable line.

In *Gulf, Mobile & Ohio Railroad Abandonment*[142] a carrier proposed to abandon a line because it had suffered continuing deficits in its operation.[143] The railroad argued that continued operation of the line would lead only to increased maintenance expenses with no prospect of increasing the volume of traffic moving on the line to the extent necessary to operate profitably.[144] The branch ran through a predominantly rural area where the bulk of the commodities handled were agricultural.[145] Rail service in the areas served by the line was necessary to enable shippers to remain competitive, to handle the types of commodities involved, and to avoid the use of inadequate roads.[146] Although the carrier's financial condition was good, it asserted that continued operation of the line would constitute a drain on its financial resources and be detrimental to its system operations.[147] Responding to these contentions by the railroad company, the ICC stated as follows:

> [B]efore an abandonment of a line may be authorized, it must be shown by the applicant that the losses to be sustained from the continued operation of the line are so large, when balanced against the extent of the traffic and the public need for the continued operation of the line, that the applicant may not justly be required to continue to bear the financial loss necessarily entailed by the operation.[148]

The Commission denied the carrier's application to abandon the line, maintaining that although the incurrence of losses was

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142. 354 I.C.C. 422 (1973).

143. Gulf, Mobile & O.R.R. Abandonment, 354 I.C.C. 422, 430 (1973).

144. *Id.* The Commission incorporates its hearing examiner's findings into the official ICC decision. As the hearing examiner stated and the ICC concurred, "Applicant here seeks to abandon the involved branch primarily because of the comparatively small gross revenue derived from it, the little use of it by shippers, the losses attributable to its continued operation and the adequacy of rail and motor carrier service." *Id.*

145. 354 I.C.C. at 431. The Commission, adopting its hearing examiners' findings, stated:

> It (the line) traverses an area where a number of shippers, principally in the agricultural and building-materials business, depend on the service. The volume of business of a number of these concerns is increasing and a number directly depend on rail service to the extent that corn-cob-shipping operations, a fertilizer-mixing plant and lumber yards would be forced to cease doing business if they did not have available the type of service provided by the applicant.

Id.

146. *Id.*

147. *Id.* at 430.

148. *Id.*

significant, the magnitude of those losses had to be considered in relation to the need for rail service and the carrier's ability to continue adequate and efficient service.[149] The Commission focused particularly upon the absence of a practical alternative to the rail transportation provided by the line. As the opinion noted, "the ability of a number of shippers to do business would be seriously impaired because the cost of transportation by other means would be considerably higher so as to render them noncompetitive and would not be an adequate substitute for the branch."[150]

The rationale of the ICC in preserving rail service because of the absence of a commercially feasible alternative mode of freight transporation is particularly applicable to North Dakota's situation. In the North Dakota State Rail Plan of 1980, thorough study has been made of the possible effects that would result from abandonment by railroads of lines identified as possible candidates for an application to the ICC. The plan sought to measure the impact of such abandonments on twenty line segments representing almost 825 miles of track.[151] A general policy set forth in the plan provided that "North Dakota is heavily dependent upon the railroads for its economic and social survival. Dependable and adequate rail service is vital for the shipment of commodities and natural resources."[152]

The ICC has long recognized that sparsely populated states, whose economies are centered primarily around agriculture, are particularly dependent upon freight transportation by railroad. In *Missouri Pacific* the Commission discussed the hardships under which grain elevators would operate if they had no rail service.[153] The Commission asserted that continued operation of elevators on branch lines that were abandoned would be impracticable.[154] On another occasion the Northern Pacific Railway, a corporate predecessor of the Burlington Northern, sought to abandon a line in North Dakota. The Commission stated:

> The record is clear that extreme hardships will be imposed upon the elevator owners if the South Branch were eliminated. Its importance to the grain producers

149. *Id.* at 431.
150. *Id.*
151. *See Preface to* STATE RAIL PLAN OF 1980, *supra* note 3.
152. *Id.* at I-7.
153. Missouri Pac. R.R. Abandonment, 307 I.C.C. at 203-04.
154. *Id.*

> and the economy of the area cannot be disputed. We have recognized in prior decisions that grain elevators operate under severe hardship without rail service . . . and we cannot find from the record that there is an adequate substitute service to meet the transportation needs of the area.[155]

In *Gulf* one reason for the Commission's denying the application for abandonment, even though the line was being operated at a deficit, was that the shippers along its right-of-way were without a practical freight transportation alternative.[156] Thus, the absence of any reasonable options for transporting freight should be significant as the Commission engages in its balancing of interests in considering rail abandonment applications for North Dakota lines.[157]

The argument might be raised that provisions of the Staggers Rail Act provide for public purchase or subsidy of rail lines proposed for abandonment,[158] and that this represents a workable means of keeping rail service on an unprofitable line. This argument loses much of its credibility, however, within the contemporary context of governmental budget cuts. In budget cuts proposed by the Reagan Administration, the future of federal participation in operating subsidies for light density freight lines is dim.[159] The administration has taken the position that the government should not encourage the retention of marginal rail service, and officials have criticized subsidies to rail lines that are likely to be abandoned at some future time.[160] Within this governmental climate the absence of an alternative, as it applies to North Dakota grain shippers, should be greatly determinative in the disposition by the ICC of rail abandonment applications in this state.

Besides the absence of a feasible transportation alternative, the ICC in denying permission for abandonment in *Gulf* also placed great weight on the relatively good overall financial condition of the

155. Northern Pac. Ry. Abandonment, 324 I.C.C. 750, 761-62 (1964).

156. Gulf, Mobile & O.R.R. Abandonment, 354 I.C.C at 431.

157. *See* STATE RAIL PLAN OF 1980, *supra* note 3, at 1. The 1980 North Dakota State Rail Plan and its 1981 Update and Appendices provide line-by-line assessments of the expected impacts on shippers along certain Burlington Northern branch lines if the railroad is granted a certificate of public convenience and necessity to cease operations on them. *See* 1981 RAIL PLAN UPDATE, *supra* note 53. The projections contained in the State Rail Plan as amended in 1981 show that some lines targeted for eventual abandonment by the Burlington Northern will cause relatively significant adverse effects in the areas they service, while the impact from the loss of rail operations on some others would be comparatively minor. *See* STATE RAIL PLAN OF 1980, *supra* note 3, at III-2, 3.

158. 49 U.S.C.A. § 10905 (West 1981).

159. TRAFFIC WORLD, FEB. 16, 1981, at 16.

160. *Id.*

carrier.[161] The Commission declared that the line being operated at a loss was not conclusive because the magnitude of the loss should be viewed together with the need for the rail service and the ability of the carrier, based on its fiscal condition, otherwise adequately to provide quality service for its entire system.[162]

Since the decision in *Gulf,* however, the ICC has been inconsistent in determining whether the overall financial condition of a particular rail carrier is dispositive in the balancing process. In *Georgia Northern Railway Abandonment*[163] the Commission maintained that even though the petitioning carrier was an "immensely successful and profitable enterprise,"[164] it would be "wasteful of applicant's resources for it to continue to operate this line of railroad."[165] In two subsequent abandonment decisions the ICC did attach great importance to the carriers' financial conditions in permitting them to abandon lines.[166] In 1980, in *Baltimore and Ohio Railroad Abandonment,*[167] the ICC declared that the carrier's financial condition was significant, but in *Norfolk and Western Railway Abandonment*[168] it asserted that the carrier's fiscal status was of no consequence. In both cases the ICC permitted the carrier to abandon the rail line.[169]

3. Operating at a Loss as a Taking Without Just Compensation

A further question relating to the permissibility of requiring a carrier to continue deficit operations on a particular line is whether such a requirement would be prohibited under the fifth amendment guarantee that private property shall not be taken for public use

161. 354 I.C.C. at 431.
162. *Id.*
163. 354 I.C.C. 436 (1976).
164. Georgia N. Ry. Abandonment, 354 I.C.C. 436, 444 (1976).
165. *Id.*
166. *See* Chicago & N.W. Transp. Abandonment, 354 I.C.C. 1 (1977). The Commission stated, "We do not believe . . . considering . . . the changed circumstances of C & NW's (Chicago & N.W.) financial position, that the applicant may justly be required to continue to bear the loss necessarily sustained by operation of the lines." *Id.* at 8. In Chicago & N.W. Transp. Abandonment, 354 I.C.C. 121 (1977), the Commission stated, "Considering . . . the poor financial condition of the C & NW system . . . we do not believe that the applicant should be required to continue to bear the loss." *Id.* at 126. *See also* Baltimore & O. R.R. Abandonment, 360 I.C.C. 681 (1980). The Commission permitted a proposed rail line abandonment citing the "bleak financial picture forecast for B & O operations." *Id.* at 683. *But see* Illinois-Central Gulf R.R. Abandonment, 360 I.C.C. 1 (1978). The Commission stated that the mere fact that the line proposed for abandonment made a profit in the preceding fiscal year "did not mandate denial of the application." *Id.*
167. 360 I.C.C. 681 (1980). The Commission stated in justifying approval of the abandoment application that "[t]he proposed abandonment will significantly reduce the drain on the B & O's net operating income" and that this was important given "the bleak financial picture forecast for B & O's operations." *Id.* at 683.
168. 363 I.C.C. 115, 119 (1980). The Commission asserted that they "believe that the overall financial strength of a railroad should not bar approving abandonment." *Id.*
169. *See* Illinois-Central Gulf R.R. Abandonment, 360 I.C.C. 681 (1980); Norfolk & W. Ry. Abandonment, 363 I.C.C. 115 (1980).

without just compensation.[170]

Since the enactment by Congress of the Transportation Act of 1920,[171] federal power to regulate commerce has been used to limit the freedom of carriers to abandon rail lines in interstate commerce. In the first related case decided by the United States Supreme Court after the enactment of the Transportation Act, *Brooks-Scanlon Co. v. Railroad Commission,*[172] a Louisiana logging railroad, which was losing approximately $1,500 a month, had been compelled by the Railroad Commission of Louisiana to continue operations despite this loss.[173] The *Brooks-Scanlon* Court held that the Act preempted state authority in the entire field of rail abandonment,[174] and that a carrier "cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage."[175] *Brooks-Scanlon* involved a proposal by the carrier to end all service rather than that on only one line, however, and the above-cited passage has been criticized by commentators as being more sweeping than was warranted by the facts of the case or indeed as the Court itself intended.[176]

Less than five years after *Brooks-Scanlon* was decided, the Court modified the broad contention that a carrier could not be compelled to carry on operations when to do so would cause it to incur a financial loss.[177] In *Fort Smith Light & Traction Co. v. Bourland*[178] the Court proclaimed that "[a] railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss. . . . This is true even where the system as a whole fails to earn a fair return upon the value of the property."[179] Essential to the underlying rationale in *Fort Smith Traction Co.* was that railroads by their nature were corporate entities imbued with the public interest and their owners at times had to make sacrifices because of that fact.[180]

This concept was also expressly recognized in railroad rate cases decided by the Supreme Court following *Brooks-Scanlon.*[181] In

170. U.S. CONST. amend. V.
171. Pub. L. No. 91-152, ch. 91, §§ 400-405, 41 Stat. 456, 474-79.
172. 251 U.S. 396 (1920).
173. Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396, 397 (1920).
174. 251 U.S. at 400.
175. *Id.* at 399.
176. *See* Note, *Conrail and Liquidation Value,* 85 YALE L. J. 371, 383 n.43 (1976).
177. Fort Smith Light & Traction Co. v. Bourland, 267 U.S. 330 (1925).
178. 267 U.S. 330 (1925).
179. *Id.* at 332-33.
180. *Id.* at 332.
181. *See* Dayton-Goose Creek Ry. v. United States, 263 U.S. 456 (1924) (a railroad is not entitled as of constitutional right to more than a fair operating income upon the value of its properties); The New England Divisions Case, 261 U.S. 184 (1923) (ICC may require some carriers to change lower freight rates, thus limiting their profits, when other carriers permitted to charge higher rates had higher operating costs).

one line of rate cases a "net loss" standard was accepted by the Court in situations in which there was no confiscation for fifth amendment purposes. In *Baltimore & Ohio Railroad v. United States*[182] the court held that "[s]o long as a railroad is not caused by such regulations to lose money on its over-all business, it is hard to think that it could successfully charge that its property was being taken for public use 'without just compensation.' "[183]

The "net loss" test for confiscation was deemed applicable to abandonment proceedings in *Northwestern Pacific Railroad v. United States*.[184] The railroad challenged an ICC order denying its request to abandon a portion of rail line.[185] The court ruled per curiam and said the following:

> [W]e hold that no confiscation results from an order of the Interstate Commerce Commission denying the abandonment of rail services which are shown to be unprofitable, *as long as there is no net loss* to the over-all system. . . . [T]he question is actually one of degree . . . of profits as opposed to over-all net loss.[186]

The determination of which deficit rail operations are by their nature so vital as to justify their continuation on branch lines is to be made within the balancing test enunciated in *Colorado v. United States*.[187] A United States District Court described this weighing process again in *Brooklyn Eastern District Terminal v. United States*.[188] The *Brooklyn Eastern* court found that no "taking" within the meaning of the fifth amendment had occurred with an ICC mandate that a carrier continue deficit operations over a particular line.[189] The court explained:

> The decision of whether an order to continue a service or a facility is unreasonable requires consideration of the loss as one factor, but also requires taking account of the relation of the particular service or facility to the whole service that the carrier has undertaken or is bound to

182. 345 U.S. 146 (1953).
183. Baltimore & O. R.R. v. United States, 345 U.S. 146, 148 (1953) (footnote omitted).
184. 228 F. Supp. 690 (N.D. Cal. 1964).
185. Northwestern Pac R.R. v. United States, 228 F. Supp. 690 (N.D. Cal.) (three-judge court) (per curiam), *aff'd per curiam sub nom.* Northwestern Pac. R.R. v. ICC, 379 U.S. 132, *reh'g denied*, 379 U.S. 984 (1964).
186. 228 F. Supp. at 694 (emphasis added).
187. 271 U.S. 153 (1926).
188. 302 F. Supp. 1095 (E.D.N.Y. 1969) (three-judge court).
189. Brooklyn E. Dist. Terminal v. United States, 302 F. Supp. 1095, 1104 (E.D.N.Y. 1969).

> render, the public service value of continuance of the service or facility, and any other factors that contribute to a determination of whether the service or facility and its losses can be considered in isolation from the rest of the public service involved. . . .[190]

It seems clear, therefore, that the ICC may compel a railroad to engage in deficit operations over a particular branch line without violating the fifth amendment as long as the carrier's enterprise as a whole is profitable.

The United States Supreme Court has even sustained the validity of compelled rail operations on the part of rail carriers who have been in the midst of bankruptcy and reorganization proceedings. In the case of the New Haven Railroad, a large carrier of passengers and freight in Southern New England, the Court forced the trustee of the company to continue operations from the commencement of reorganization proceedings in the middle of 1961 until the railroad's inclusion in the Penn Central Transportation Company in 1969.[191] The justification for this compelled operation of the debtor railroad was that the public interest, including the needs of freight shippers and rail commuters, and the corresponding effects on the region's economy required it.[192] During that seven-year period, losses attributable to these deficit rail operations eroded the debtor's estate in excess of sixty million dollars.[193] In the *Penn Central Merger Cases*[194] the Court acknowledged the losses that had been suffered by the corporate entity, but stressed the extent to which rail service is vital in terms of public need:

> "[i]t is a fundamental aspect of our free enterprise economy that private persons assume the risks attached to their investments, and the NH creditors can expect no less because NH's properties are devoted to a public use."
>
> . . . While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dicate that rail operations vital to the nation be jettisoned *despite the availability of a feasible*

190. *Id.* at 1101.

191. *See* New Haven Inclusion Cases, 399 U.S. 392, 490 (1970) (discussion of the compelled continued operations of the New Haven Railroad).

192. *See* Penn-Central Merger Cases, 389 U.S. 486, 510-11 (1968) (discussion of the public interest rationale behind the compelled operation of the New Haven Railroad).

193. 399 U.S. at 490.

194. 389 U.S. 486 (1968).

> *alternative.* The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders whose interest may or may not be served by the destructive move.[195]

From this statement, it appears that the Supreme Court linked the absence of a practical alternative for rail service to confiscation of property under the fifth amendment. In discussing this policy the Court asserted that the absence of an alternative was a crucial factor in its determination that a taking under the fifth amendment guarantee had not occurred. The Court cautioned, however, that continuing deficit operations of a bankrupt railroad may not be carried on indefinitely without constituting an erosion and impermissible taking of a debtor railroad's estate.[196]

Considering the Court's policy in this area, compelled operation of small branchlines of a large and profitable carrier, such as the Burlington Northern, in no way raises a valid confiscation argument. The ICC could still indicate, however, that as a matter of policy it does not favor any rail line that is not paying for itself. But this rationale would ignore the emphasis placed upon the need for continuing rail service in circumstances in which proportionately significant segments of the regional business community have no alternative to rail service for shipping and receiving materials vital to their operations.

4. Failure to Maintain Lines: Cutting Costs or Strengthening the Case for Abandonment

As the ICC engages in its general balancing process under the standards enunciated in *Colorado,* the Commission often hears the argument from protestants of proposed abandonments that the petitioning carrier has disregarded maintenance to the extent that operations over the right-of-way are either greatly hindered or are impossible altogether.[197] Many opponents of abandonment applications have claimed that a carrier, eager to rid itself of a line showing little or no profit, has conspired to defer maintenance on the line in order to use the line's poor condition as further evidence for abandoning the route. Certainly some of the lines in North Dakota most recently proposed for abandonment by the Burlington

195. *Id.* at 510-11 (quoting Pennsylvania R.R. — Merger — New York Cent. R.R., 331 I.C.C. 643, 704 (1967) (emphasis added).

196. *See* New Haven Inclusion Cases, 399 U.S. 392 (1970).

197. *See, e.g.*, Southern Pac. Transp. Co. Abandonment, 363 I.C.C. 105 (1980).

Northern are lines that have fallen into a degree of disrepair. The railroad will undoubtedly use this as partial justification for proposing that the lines be abandoned.[198] According to the North Dakota State Highway Department, the Burlington Northern has indicated that in addition to the criterion that a particular line produce a rate of investment return comparable to other properties of the company, a line must be capable of carrying loaded 100-ton hopper cars at speeds of at least twenty-five miles per hour.[199]

The deliberate downgrading argument, however, is difficult for a protestant to prove in a rail abandonment proceeding before the ICC. In *Southern Pacific Transportation Abandonment*[200] the opponents of a proposed line abandonment accused the carrier of deliberately downgrading service on the line in order to strengthen its case for abandonment. The ICC found that the evidence on the administrative record did not support the "serious allegation" of deliberate downgrading: "We do not equate the use of minimum expenditure because of light use of the line with deliberate downgrading. . . . In sum, we are of the view that the line's continued losses and minimal traffic impelled SP to minimize on maintenance and we see nothing wrong with that effort."[201] The ICC provided a similar analysis in another 1980 decision, *Norfolk & Western Railway Abandonment,*[202] and declared as follows:

> The losses resulting from the operation of the lines offer a logical and justifiable explanation of N & W's policy of deferred maintenance over these lines, rather than any alleged deliberate downgrading of the line. A lack of profitability on a line is a valid reason for deferring maintenance on a line.[203]

In *Chicago North Western Transportation Abandonment*[204] the Commission stated that evaluation of a deliberate downgrading allegation should include consideration of four factors: the nature of the service and the public need shown in the past for the service; the effect of the carrier act; the need demonstrated by a carrier to economize under the implied intent test; and any evidence as to a specific intent to deliberately downgrade for the purpose of turning

198. *See* STATE RAIL PLAN OF 1980, *supra* note 3; 1981 STATE RAIL PLAN UPDATE, *supra* note 53.
199. *See* RAIL ABANDONMENT HANDBOOK, *supra* note 125, at 3.
200. 363 I.C.C. 105 (1980).
201. Southern Pac. Transp. Abandonment, 363 I.C.C. 105, 109-10 (1980).
202. 363 I.C.C. 115 (1980).
203. Norfolk & W. Ry. Abandonment, 363 I.C.C. 115, 119 (1980).
204. 354 I.C.C. 292 (1977).

what would be a profitable operation into a deficit operation in perfecting a case for abandonment.[205] Given these standards by the ICC it is almost impossible for a protestant to show deliberate downgrading of a line by a carrier. Thus, the deliberate downgrading issue, insofar as it might be used by opponents to Burlington Northern's forthcoming rail abandonments in North Dakota, is virtually a dead one.

Perhaps the deliberate downgrading question could be raised with the ICC by shippers and state and local governments in opposition to an anticipated abandonment before an abandonment application for a particular line is actually filed. The Commission hinted at this possibility in *Southern Pacific Transportation* when it remarked as follows in the 1980 decision: "Moreover, we are impressed by the fact that charges of [deliberate] downgrading only come at a time when abandonment is being considered."[206]

Thus, for shippers along a route which is under study for possible future abandonment,[207] a potential strategy in opposition might be to raise the question of deliberate downgrading at a relatively early date prior to the making of the actual application by the carrier. The increased credibility that would possibly be gained for a future contest of an abandonment application might be significant enough to cause members of the ICC to consider the deliberate downgrading issue with more attention.

C. THE ICC'S RECENT RECORD IN ABANDONMENT CASES

The ICC within the past few years has seemingly adopted a policy of declining to deny any abandonment application submitted by a carrier.[208] Nevertheless, rail carriers are still required by statute to obtain certificates of public convenience and necessity in order to abandon any rail line,[209] and the ICC under the rule set forth in *Colorado* is obligated to balance the respective interests and base its determination upon what "fairness to all concerned demands."[210] By failing to seriously balance these opposing

205. Chicago & N.W. Transp. Abandonment, 354 I.C.C. 292, 302 (1977).
206. 363 I.C.C. at 109.
207. 49 C.F.R. § 1121.20(c)(3)(1980).
208. *See, e.g.*, Chicago & N.W. Transp. Abandonment, 354 I.C.C. 1 (1977); Baltimore & O. R.R. Abandonment, 360 I.C.C. 681 (1980); Illinois Cent. Gulf R.R. Abandonment, 360 I.C.C. 1 (1978); Norfolk & W. Ry. Abandonment, 363 I.C.C. 115 (1980).
209. 49 U.S.C.A. § 10903 (West 1981).
210. 271 U.S. at 169.

interests, the Commission provides the basis for possible reversal by a circuit court of appeals.[211]

V. JUDICIAL REVIEW OF THE ICC DECISION

The prospects of success for those contesting proposed rail line abandonments are anything but bright at the administrative level, in view of the decisional record of the ICC over the past two years. From August 1, 1979, through August 31, 1981, the Commission approved every abandonment application that was filed.[212] The granting of these certificates of public convenience and necessity involved 330 different cases encompassing the abandonment of 8,726 miles of track nationally.[213] The North Dakota State Highway Department described the "attitude of the present ICC members"[214] to be such that ICC treatment of abandonment proposals had evolved into a tremendously pro-industry process.[215] The Commission has adopted the position that if the rail industry is to better its profit picture and generate a greater return on investment dollars, railroads must be permitted to abandon any line that returns little or no profit.[216] A result of this ICC policy has been that carriers petitioning to abandon lines have been granted certificates after merely showing that such lines were operating at a loss,[217] even though by statute the burden of proving public convenience and necessity is placed squarely on the shoulders of the

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211. *See* City of Cherokee v. ICC, 641 F.2d 1220, 1220-30 (8th Cir. 1981).

212. The recent decisional record of the ICC in abandonment cases was cited by the appellees in their reply brief filed with the United States Supreme Court. *See* Brief for Respondent at 10, ICC v. City of Cherokee, 102 S.Ct. 387-88 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.). In the respondent's brief, the following reference was made to the ICC's recent treatment of abandonment applications:

> The I.C.C. during the 25-months period August 1, 1979 through August 31, 1981, has approved every abandonment application, and has reversed every ALJ that dared deny an application. This has embraced 330 cases involving 8,726 miles of line. This is a record of unblemished support for the railroad industry, and is inconsistent with prior practice, when abandonments on occasion were denied. Cherington, Charles, *The Regulation of Railroad Abandonments,* 100-101 (Harvard, 1948); Conant, Michael, *Railroad Mergers and Abandonments,* 114 (Univ. of Calif., 1964). An occasional court remand should come as no surprise in view of the I.C.C.'s current handling of abandonment matters.

Id.

213. *Id.*

214. RAIL ABANDONMENT HANDBOOK, *supra* note 125, at 13.

215. RAIL ABANDONMENT HANDBOOK, *supra* note 125, at 13.

216. *See* Brief of Petitioner at 10-12, ICC v. City of Cherokee, 102 S.Ct. 388 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.).

217. *See, e.g.,* Louisville & Nashville R.R. Abandonment, 366 I.C.C. 1 (1981); Baltimore & O. R.R. Abandonment, 360 I.C.C. 681 (1980); Illinois Cent. Gulf R.R., 363 I.C.C. 690 (1980); Norfolk & W. Ry. Abandonment, 363 I.C.C. 115 (1980); Texas & Pac. Ry. Abandoment, 363 I.C.C. 666 (1980); Illinois Cent. Gulf R.R. Abandonment, 360 I.C.C. 1 (1978); Chicago & N.W. Transp. Co. Abandonment, 354 I.C.C. 1 (1977).

carrier.[218] Since ICC policy greatly favors granting virtually any abandonment application, the most logical source of relief for shippers and others opposing line abandonments is the judicial review provided by an appellate court.

Under United States Code provisions[219] a party adversely affected by an order of the ICC may seek an injunction or a setting aside of that order by petitioning either the federal court of appeals in the circuit in which the petitioner has its principal office, or in the Court of Appeals for the District of Columbia.[220] The court of appeals to which the petition is filed has exclusive jurisdiction over the process of either enjoining, setting aside, or affirming an ICC order.[221] Direct appeal of a final ICC decision to a circuit court of appeals was provided for in a 1975 amendment to the United States Code,[222] whereby three-judge federal district courts were eliminated as review panels for ICC decisions.[223]

A petitioner from an ICC decision may also apply to the circuit court, prior to the hearing of the case on its merits, for injunctive relief to postpone ICC action pending completion of the judicial review.[224] Obtaining such injunctions may be particularly important now that the procedural modifications in the Staggers Rail Act[225] require the Commission to render a decision on an abandonment application within 165 days of the date of its filing.[226]

The most important consideration for those challenging ICC approval of a carrier's abandonment application is the substantive judicial review to which the Commission's decision will be subjected. Like most federal agencies, the ICC is governed by the Administrative Procedure Act,[227] and the reviewing circuit court

218. 49 U.S.C.A. § 10904(d) (1) (West 1981).

219. 28 U.S.C.A. § 2321(a) (West 1978). This section provides that "a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals. . . ." *Id.* Under section 2343, the venue for such a proceeding is "the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." *Id.* § 2343.

220. *Id.* §§ 2321(a), 2343.

221. *Id.* § 2342. This section provides that with respect to all rules, regulations, or final orders of the ICC, the court of appeals "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of " such rules, regulations, or orders. *Id.*

222. Pub. L. No. 93-584, §§ 5, 7, 88 Stat. 1917, 1918 (1975) (eliminating three-judge district court procedure for review of orders of the Interstate Commerce Commission). *See* 28 U.S.C.A. § 2342 (West 1978). *See also* Chemical Leaman Tank Lines v. United States, 446 F. Supp. 721 (D. Del. 1978). In *Leaman Tank Lines* the court stated that the overriding purpose of the 1975 change in the statute was to eliminate the three-judge district courts as administrative review panels over ICC decisions. *Id.* at 724.

223. 28 U.S.C.A. § 2342 (West 1978).

224. 5 U.S.C.A. § 705 (West 1977). *See, e.g.,* Illinois v. ICC, No. 81-2520, slip op. at 1 (7th Cir. Nov. 27, 1981) (order denying application for interlocutory injunction), *cert. denied,* 50 U.S.L.W. 3716 (U.S. Mar. 8, 1982) (No. 81-1299).

225. Pub. L. No. 96-448, 94 Stat. 1895 (1980).

226. 49 U.S.C.A. § 10904(c) (3) (West 1981).

227. The Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (current version at 5 U.S.C.A. §§ 551-559, 701-706 (West 1977)).

must therefore comply with the restricted judicial review set forth by statute.[228] Pursuant to general statutory description, the court may set aside decisions rendered by administrative agencies which are "arbitrary, capricious, an abuse of discretion"[229] or "in excess of statutory jurisdiction, authority"[230] or "unsupported by substantial evidence."[231]

The Court of Appeals for the Eighth Circuit recently ruled against a proposed rail abandonment, which had been approved by the ICC in *City of Cherokee v. ICC*[232] In *Cherokee* an application was submitted by the Illinois Central Gulf Railroad Company for permission to abandon its ninety-six mile line from Cherokee, Iowa through Minnesota to Sioux Falls, South Dakota.[233] The railroad's application was initially heard by an ICC administrative law judge, who denied the abandonment for two reasons: train crew wages were not costs that were avoidable upon abandonment when a collective bargaining agreement required that wages be paid even if the line was abandoned; and, most importantly, in balancing the benefit of the service to the public against the burden upon the railroad, the scale tipped in favor of the public.[234] The railroad appealed the decision to the Commission itself, however, and the ICC, while essentially adopting the judge's factual findings, reversed her order and granted the abandonment.[235]

The Eighth Circuit acknowledged at the outset that the scope of its review of an order of the ICC, although narrow, was sufficiently flexible to enable the court to "review the entire record and carefully examine the Commission's conclusions to determine whether its findings are supported by substantial evidence in the record as a whole, and whether proper legal standards were correctly applied."[236]

In effecting this review of the ICC decision the court found that one dispositive issue was whether the Commission properly balanced the interests of the carrier against the competing interests of the affected communities before it authorized abandonment of the rail line.[237] The court cited the relevant portion of the Interstate

228. 5 U.S.C.A. § 706 (West 1977).
229. *Id.* § 706(2)(A).
230. *Id.* § 706(2)(C).
231. *Id.* § 706(2)(E).
232. 641 F.2d 1220 (8th Cir.), *cert. denied,* 102 S. Ct. 387-88 (1981).
233. City of Cherokee v. ICC, 641 F.2d 1220, 1223 (8th Cir.), *cert. denied,* 102 S. Ct. 387-88 (1981).
234. *Id.* at 1223-25.
235. *Id.* at 1225-26.
236. *Id.* at 1226-27.
237. *Id.* at 1227. The court stated that the two issues presented were "whether the Commission correctly included train and engine crew wages as 'avoidable costs' in granting ICG's application for

Commerce Act, which provides that a rail carrier maintaining transportation subject to ICC jurisdiction may abandon a line only if the Commission finds that present or future public convenience and necessity require or permit the abandonment and discontinuance.[238] The court also cited the provision in the abandonment statute that directs the ICC, in making this finding of public convenience and necessity, to "consider whether the abandonment or discontinuance will have a serious adverse impact on rural and community development."[239] The court emphasized that under this provision of the Act the Commission must balance the benefits and burdens of abandonment that are "ultimately distributed between the carrier, the protestant communities and shippers, and interstate commerce generally."[240] Employing the directives of *Colorado v. United States*[241] and the language of the abandonment statute itself,[242] the *City of Cherokee* court held that maximization of resources and profits should not be the sole determinative factor relied upon by the ICC in determining whether to grant the abandonment.[243]

The Court criticized the ICC for stating in substance that if a carrier could not operate the branch line profitably, and it could increase profits by abandoning the line and selling its property holdings, the abandonment would be permissible.[244] The Court asserted:

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abandonment, and whether the Commission properly balanced the interests of the carrier and the affected communities before it authorized abandonment." *Id.*

238. *Id.* (citing 49 U.S.C.A. § 10903(a) (West 1981)).

239. *Id.* (citing 49 U.S.C.A. § 10903(a) (West 1981)).

240. *Id.* at 1227-28.

241. 271 U.S. 153 (1926).

242. 49 U.S.C.A. § 10903(a) (West 1981).

243. 641 F.2d at 1229-30. The court in *City of Cherokee* stated the following:

> The ALJ [ICC administrative law judge] recognized that if the line were abandoned and all the properties sold, the money thereby realized could be invested in a more lucrative market, and the ICG would realize a significant return on its capital investment in the Sioux Falls District Line. She did not believe, however, that this factor should necessarily be determinative of the entire case. She correctly reasoned that Congress intended this factor to be measured against the burden that abandonment would impose on the affected communities and shippers. 49 U.S.C. §§ 10903-10905. The Commission stated in substance that if the carrier could not operate the branch line as a profitable going concern (and if it could turn a greater profit through abandoning the line and selling its property holdings), then abandonment would be permissible.
>
> The ALJ was right and the Commission was wrong. Congress did not intend for the Commission to authorize abandonment of particular rail lines solely because the carrier's capital investment in the line could be more profitably put to work elsewhere. Congress intended that the Commission determine the degree and severity of the benefits and burdens which abandonment would occasion to all affected parties. The Commission does not have the authority to modify the measuring mechanism mandated by Congress.

Id.

244. *Id.* at 1229.

> Congress did not intend for the Commission to authorize abandonment of particular rail lines solely because the carrier's capital investment in the line could be more profitably put to work elsewhere. Congress intended that the Commission determine the degree and severity of the benefits and burdens which abandonment would occasion to all affected parties. The Commission does not have the authority to modify the measuring mechanism mandated by Congress.[245]

Remanding the case to the ICC, the court directed the Commission to "properly balance the benefits and burdens that would inure to *both* the carrier and the communities"[246] in the event of either the abandonment or continuation of operations over the line in question.

Instead of acquiescing to continued ICC proceedings as a result of the reversal and remand by the Eighth Circuit, the railroad petitioned the United States Supreme Court for a writ of certiorari.[247] The ICC then petitioned independently[248] to the Supreme Court for review of the Eighth Circuit decision in *City of Cherokee,* and the railroad lobbying group, the Association of American Railroads (AAR),[249] filed an amicus curiae brief in support of the ICC and Illinois Central Gulf Railroad petitions for certiorari. Treating the independent petitions by the railroad and the ICC as a singular case, the Supreme Court denied certiorari on October 13, 1981.[250]

The attempts by Illinois Central Gulf and the ICC to have the Eighth Circuit decision in *City of Cherokee* reversed are significant for two reasons: the unwillingness of the railroad to participate in futher ICC proceedings consistent with the Eighth Circuit decision; and the impact that the railroad and the AAR in its amicus brief claimed would stem from the *City of Cherokee* decision.[251] Both the

245. *Id.* at 1229-30.

246. *Id.* at 1230 (emphasis in original).

247. Illinois Cent. Gulf R.R. v. City of Cherokee, 102 S. Ct. 387 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.).

248. ICC v. City of Cherokee, 102 S. Ct. 388 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.).

249. Amicus Curiae Brief of the Association of American Railroads at 2, Illinois Cent. Gulf R.R. v. City of Cherokee, 102 S. Ct. 387-88 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.). The Association describes itself in its amicus curiae brief as, "a voluntary, unincorporated, non-profit organization composed of member railroad companies operating in the United States, Canada, and Mexico." *Id.* The AAR described its activities as including, "research, operations, car service, public relations, accounting, statistics, law, and federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public." *Id.*

250. 102 S. Ct. at 387-88.

251. Brief for Petitioner, 102 S. Ct. 387-88 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.). In its brief the railroad stated the following:

Illinois Central Gulf and the AAR asserted in their briefs that the holding in *City of Cherokee* would make it far more difficult in the future for railroads to be granted permission by the ICC to abandon rail lines.[252] The petitioners also attacked what they perceived to be the Eighth Circuit's impermissible limitation on the ICC's exercise of administrative expertise and discretion in determining whether a particular rail abandonment should be granted.[253]

The respondents, in arguing for a denial of certiorari, concluded that the Eighth Circuit properly found that the ICC had erred in weighing only the *burden* to Illinois Central Gulf of continued operation of the line, the *benefit* to the railroad of abandonment, and the *burden* to the public of discontinuance.[254] The respondents argued that the ICC, in failing to also include in this balancing the *benefit* to the public of continued operation of the line, did not sufficiently balance all benefits and burdens of the proposed abandonments.[255] The respondents cited *Colorado v. United States,*[256] in which the court declared that "[t]he benefit to one of abandonment must be weighted against the inconvenience and loss to which the other will thereby be subjected."[257]

In approving 330 straight rail abandonment cases the ICC has not undertaken such a thorough balancing but instead has looked to what it perceived to be a national transportation policy set by Congress as the determinative factor in abandonment dispositions.[258] In *City of Cherokee* the ICC asserted that

> Review by this Court of the decision below is particularly important in light of the serious adverse impact which this decision would have on the nation's railroads and on rail service to the public. Studies show that in 1976 railroads lost more than $150 million annually (not considering opportunity costs) in operating uneconomical light-density lines outside the Northeast. Railroads which have received permission to abandon lines have realized substantial savings. Yet, if the decision of the majority of the panel of the Court of Appeals is allowed to stand, abandonments will be far more difficult for railroads to obtain — despite the clear intent of Congress to the contrary when it enacted new abandonment provisions in 1973 and 1976 and, most recently, in the Staggers Rail Act of 1980. . . . If railroads are forced to maintain uneconomical branch lines, service to the public on existing lines will deteriorate and shippers will turn to other modes of transportation — thus frustrating the national goal of energy self-sufficiency. The decision below jeopardizes not only other Commission decisions in abandonment cases pending in the courts of appeals on review, but also other abandonment applications presently pending before the Commission.

Id. at 21-23.

252. *Id.* at 21-23; Amicus Curiae Brief of the Ass'n of American Railroads at 9, 102 S. Ct. 387-88 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.).

253. Brief of Petitioner at 26, 102 S. Ct. 387-88 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.).

254. Brief of Respondent at 13-14, 102 S. Ct. 387-88 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.).

255. *Id.* at 14.

256. *Id.* at 14 (citing 271 U.S. 153 (1926)).

257. 271 U.S. at 168.

258. *See* Brief of Petitioner at 9-12, 102 S. Ct. 387-88 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.).

congressional intent was to ensure that as an overriding consideration, rail operations which would "weaken the system as a whole" should not be compelled.[259] This assertion by the ICC parallels the position of the railroad industry, as the AAR stated in its amicus curiae brief in *City of Cherokee,* that the Eight Circuit decision "seriously impairs the discretion and powers of the Commission in abandonment cases and poses a serious threat to the financial viability of the Nation's railroads, which as a whole are already in anemic financial condition."[260]

Although the profitability of a line is to be included in the ICC's balancing of interests under the *Colorado v. United States* test, it was never intended by Congress to be the governing factor. As the House Committee on Interstate and Foreign Commerce began holding hearings on what initially was referred to as the Railroad Deregulation Act of 1979[261] and eventually was enacted as the Staggers Rail Act of 1980, Committee Chairman James J. Florio stated at the outset that "deregulation poses many dangers. In a headlong rush to save the railroads, we cannot prescribe disaster for any particular region or any . . . particular industry."[262]

The initial bill, H.R. 4570, was also introduced by Representative Harley O. Staggers. This bill proposed deleting from the rail abandonment statute the requirement that in considering an abandonment application the ICC consider whether the abandonment or discontinuance shall have a serious, adverse impact on rural and community development.[263] H.R. 4570 proposed much weaker language providing that the ICC could permit abandonment if it determined that the benefit to an applicant carrier from abandonment, including liquidation of a line's assets, exceeds the detriment to opponents "taking into account any impact the abandonment or discontinuance *may* have on rural and community development."[264] In addition, H.R. 4570 included a provision

259. *Id.* at 9.

260. Amicus Curiae Brief of the Ass'n of American Railroads at 4, 102 S. Ct. 387-88 (1981), *denying cert. to* 641 F.2d 1220 (8th Cir.).

261. *The Railroad Deregulation Act of 1979: Hearings on H.R. 4570 Before the Subcomm. on Transp. and Commerce of the Comm. on Interstate and Foreign Commerce,* 96th Cong., 1st Sess. (1979).

262. *Id.* at 1 (comments of Rep. Comm. Chairman James J. Florio).

263. H.R. 4570, 96th Cong., 1st Sess. § 132(a)(1)(1979).

264. *Id.* § 132(a)(2)(C). This bill proposed the weaker language in H.R. 4570 Section 132(a)(2)(C), whereby the ICC would have been required to permit a rail line abandonment if it determined that "the benefit to the applicant carrier from abandonment or discontinuance, including any benefit arising from the ability to put capital used on the line or service to other railroad use, exceeds the detriment to the objecting party and others similarly situated from loss of service, *taking into account any impact the abandonment may have on rural and community development.*" *Id.* (emphasis added).

whereby approval for a proposed abandonment would be automatic if the carrier could demonstrate that revenues attributable to a particular line "do not meet or exceed the full cost of operating the line or service."[265] The changes proposed by H.R. 4570 that would have altered the standards under which the ICC would evaluate rail abandonment applications were never enacted.[266] During the hearings which followed the introduction of the Railroad Deregulation Act of 1979 in the form of identical House and Senate bills, H.R. 4570 and S. 796, opposition was expressed with respect to the proposed changes in the abandonment statute.[267] Shippers and state governmental agencies criticized the proposals in H.R. 4570 and S. 796 as going too far in accommodating the interests of the railroad industry in maximizing profits while leaving shippers and communities virtually powerless to contest abandonment applications.[268] The Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce held hearings on H.R. 4570 from April 24, 1979, through November 1, 1979,[269] with the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science and Transportation conducting hearings on the identical bill, S. 796, during the same time period.[270] After much opposition was registered to various aspects of the bills, which also provided for extensive deregulation in other subject areas, the bills were kept from general vote in both Houses of Congress.[271] In late November of 1979, modified railroad deregulation bills, H.R. 7235 and S. 1946,[272] were introduced. These contained substantial changes from H.R. 4570 and S. 796,

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265. *Id.* § 132(a)(2)(B).

266. *See Railroad Deregulation Act of 1979: Hearings on S. 795 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transp.*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *Senate Hearings on S. 795*].

267. *See* S. REP. No. 470, 96th Cong., 1st Sess. 1 (1979).

268. *See Senate Hearings on S. 795, supra* note 266, at 1208-09. Donald L. Jacka Jr., Assistant Secretary of Agriculture for the State of Kansas, described S. 796 as follows:

> The bill attempts to further ease the railroads' ability to abandon lines. The tranditional "public convenience and necessity" test for abandonment cases will be retained under this bill; however, if the railroads can prove a financial difficulty on the line, then the Interstate Commerce Commission must approve the abandonment. The bill has allowed in this profit/loss calculation an opportunity cost or profit to be derived by the railroads. By formally including opportunity costs in the determination of profit/loss the railroads will be able in the future to abandon not only losing lines but also marginally profitable lines.

Id. at 1301.

269. *Hearings on H.R. 4570 Before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. (1979).

270. *Senate Hearings on S. 795, supra* note 266.

271. *See* H.R. REP. No. 1430, 96th Cong., 2d Sess. (1980); S. REP. No. 470, 96th Cong., 1st Sess. (1979).

272. S. REP. No. 470, 96th Cong., 1st Sess. (1979).

which had died in committee.

The provisions of S. 1946 relating to rail line abandonments were eventually incorporated into H.R. 7235, which initially had not proposed any changes in the abandonment section of the Interstate Commerce Act.[273] The final committee report accompanying S. 1946 explained that although the abandonment provisions of the bill were designed to accelerate the time frame for ICC processing of abandonment applications, "[n]o changes are made in the standards under which the ICC decides whether or not to grant the abandonment of railroad lines."[274] Therefore, although Congress clearly had ample opportunity to delete the requirement that the ICC consider "whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development,"[275] it chose not to.[276] This is the only requirement that the ICC is expressly mandated to consider in its balancing of competing interests as it considers an abandonment application.

Given the clearly demonstrated intent of Congress to have the ICC consider specifically rural and community adverse effects from a proposed abandonment, the Commission must be able to find that the corresponding burden on interstate commerce in keeping the line in operation must outweigh the detriment to rural and community development. It must be noted that the Supreme Court in *Colorado* emphasized that the ICC issues a certificate of public convenience and necessity permitting an abandonment "not primarily to protect the railroad, but to protect interstate commerce from undue burdens. . . ."[277] Referring to the massive body of

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273. H.R. REP. No. 1430, 96th Cong., 2d Sess. 50-52 (1980).

274. S. REP. No. 470, 96th Cong., 1st Sess. 39 (1979). The committee report stated:

> The abandonment provisions of this bill are designed to accomplish two major objectives: significantly reducing the time spent processing such cases at the Commission and improving the process by which abandoned lines can be subsidized. *No changes are made in the standards under which the ICC descides whether or not to grant the abandonment of railroad lines.*

Id. (emphasis added). The committee report then elaborated:

> As noted above, while section 202(b) will provide much faster processing of abandonment cases, the standards under which the ICC decides whether or not to approve an abandonment would remain unchanged. Along these same lines, the Committee adopted an amendment during its consideration of S. 1946 to delete language which was viewed by some as limiting the right to protest abandonments. *This reflects the Committee's intent to significantly speed up the decision process without changing the standards involved or the standing of the parties in abandonment cases.*

Id. at 40 (emphasis added).

275. 49 U.S.C.A. § 10903(a) (West 1981).

276. *See* S. REP. No. 470, 96th Cong., 1st Sess. 39-40 (1979).

277. 271 U.S. at 162.

statistical data that the AAR bombarded Congress with as it considered railroad deregulation,[278] the committee report accompanying S. 1946 on its way to passage recognized that the well-publicized plight of the bankrupt eastern railroads absorbed into Conrail[279] was not shared by all carriers, particularly those in western states. The report stated as follows "In reciting such facts, the temptation is to run up the danger flag over the entire railroad industry. It should be pointed out that the railroads . . . are not in uniformly desperate financial straits."[280]

With a 1981 consolidated net income of 272.2 million dollars, up twenty-two percent over the 1980 figure, Burlington Northern is truly a prosperous railroad.[281] As such, the burden on the Burlington Northern of maintaining service on a particular branch line is insignificant in comparison with the pervasive adverse effect that abandonment of such a route would have on a rural region with small communities dependent upon rail transportation for the economical transportation of agricultural commodities. Perhaps not every one of the line abandonments proposed by the Burlington Northern would cause rural and community effects of sufficient severity so as to justify the compelled deficit rail operation by a carrier. Nevertheless, other branch lines in danger of being abandoned are vital to rural communities and elevators in North Dakota because of remote location, poor access to major highways, and distance from other rail lines to be continued in operation.[282] When a particular line proposed for abandonment does have this profile, however, it should be argued that because of the great need by the communities and region and the corresponding minimal revenue drain on a large and prosperous carrier such as the Burlington Northern, the railroad should be denied permission to abandon the route, even when continuation of operations can only be carried on at a loss.

With the Eighth Circuit's 1981 decision in *City of Cherokee,* the Commission's recent policy of routinely approving abandonment applications has been shown to be vulnerable when the ICC has failed to legitimately balance adverse effects to rural and community development against the revenue-cost consideration of

278. S. REP. No. 470, 96th Cong., 1st Sess. 1-3 (1979).

279. *Id.* at 3. The railroads forming Conrail are the Penn Central, Erie Lackawanna, Reading, Jersey Central, Lehigh Valley, and the Lehigh and Hudson. *Id.*

280. *Id.*

281. *See* TRAFFIC WORLD, Feb. 1, 1982, at 79.

282. *See* STATE RAIL PLAN OF 1980, *supra* note 3; 1981 STATE RAIL PLAN UPDATE, *supra* note 53. While cessation of service on some of these lines would bring minimal adverse impact, the opposite would be true in the event of abandonment of other routes.

the carrier.[283] ICC administrative law judges have already begun to cite *City of Cherokee* as authority for placing greater weight on factors other than the carrier's revenues and costs on a particular line.[284] Perhaps most significantly, *City of Cherokee* now provides a sound foundation upon which protestants may base their arguments in seeking judicial review of ICC decisions granting rail abandonments.

VI. CONCLUSION

The Burlington Northern Railroad, and indeed other rail carriers in the nation, can be expected to pursue aggressive line abandonment policies for the foreseeable future. This course will in turn place great pressure upon communities and shippers dependent on such threatened freight transportation. The procedural changes in the abandonment application process brought by the Staggers Rail Act of 1980 also make it necessary for protestants to move quickly in effecting their opposition.

It is now clear, however, that in considering abandonment applications, the Interstate Commerce Commission must specifically include in its balancing the adverse effects which an abandonment would bring to rural and community development. Without legitimate consideration of this factor in the weighing process, the ICC fails to adhere to the true intent of Congress, and causes such a defective abandonment disposition to be vulnerable upon judicial review.

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283. *See* City of Cherokee v. ICC, 641 F.2d 1220 (8th Cir.), *cert. denied*, 102 S. Ct. 387-88 (1981).

284. *See, e.g.*, Illinois Cent. Gulf R.R. Abandonment, ICC No. AB-431 (Sub.-No. 58) (April 15, 1981); Chesapeake & O. Ry. Abandonment, ICC No. AB-18 (Sub.-No. 35F) (May 4, 1981); Illinois Cent. Gulf R.R. Abandonment, ICC No. AB-43 (Sub.-No. 71F) (June 4, 1981).

In the first rail abandonment decision rendered by the ICC on one of the current generation of Burlington Northern applications in North Dakota, the Commission on January 29, 1982, partially denied the carrier's petition. In Burlington Northern R.R. Abandonment, No. AB-6 (Sub.-No. 104F), Jan. 29, 1982, the Commission denied Burlington Northern permission to abandon 14 miles of its York to Dunseith line extending from York to Wolford, N.D. *Id.* at 11-13. While the ICC did allow the railroad to abandon the remaining portion of the 41-mile line, *id.* at 1, the Commission cited *City of Cherokee v. I.C.C.* in its decision as it ordered continuation of operations over the 14-mile segment. *Id.* at 3 (citing City of Cherokee v. I.C.C., 641 F.2d 1220 (8th Cir. 1981)). In this decision, the ICC stated that it must strike a balance "between the potential harm to affected shippers and communities which would result from abandonment and the present and future burden which continued operations would impose on the carrier and interstate commerce. . . ." *Id.* at 11.

With respect to the question of opportunity costs, the Commission acknowledged that if this factor was included, operation of the 14-mile segment from York to Wolford, N.D. would be carried on at a loss. *Id.* at 13. The ICC added that "[t]he Commission has stated that opportunity cost is just one of many factors that must be taken into consideration in determining whether abandonment is justified. Merely because a railroad could earn greater revenues by investing its assets elsewhere does not mean that the public convenience and necessity requires abandonment." *Id.* The I.C.C. explained its decision to require Burlington Northern to continue operations over the 14-mile segment, stating the following: "[W]e believe that the protestants have met their burden in demonstrating that retention of the York to Wolford segment is in the public interest. Any burden on the railroad from continued operation is outweighed by the harm of abandonment on shippers and the community." *Id.*