

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

-----)
In the Matter of)
Boston & Maine Corporation,)
Debtor)
-----)
In Proceedings for the
Reorganization of a
Railroad
No. 70-250 M

~~DRAFT~~ REPORT OF MASTER ON HEARINGS
CONCERNING PETITION FOR ORDER NO. 159.

Statement of Past Proceedings.

1. In 1973, the Debtor's Trustee¹ filed this petition for authority to apply to the Interstate Commerce Commission for leave to abandon a line of railroad (running approximately east and west) between a point about three miles east of Manchester, New Hampshire, and a point in Newfields, New Hampshire, a little west of Rockingham Junction. The position of this line (hereinafter called the Epping branch) is indicated in red on Exhibit No. 2, reproduced as page 1A of this report. A larger territory is shown on page 1B, based on Exhibit No. 11, prepared (at my request) to show the whole Boston & Maine system and its principal

¹ When abandonment was originally proposed in late 1972, there were apparently two Trustees of the debtor. When the petition first was approved in 1973 there was only one Trustee, Mr. Meserve. In 1976, when the petition was reviewed (see Ex. 12), there were again two Trustees.

external interchange points with other systems. Included in the proposed abandonment is a branch line leading south from Epping to Fremont (the Fremont branch). All the rail lines covered by this petition lie within the State of New Hampshire.

2. The petition for abandonment was originally authorized by the then sole Trustee, Mr. Robert Meserve, at a trustee's meeting on March 28, 1973, confirming an earlier vote of the then two Trustees (see Tr. 6) on December 19, 1972. See Ex. 1, pp. 1 to 3, 10 to 14. At these meetings (as the exhibit shows) there was consideration by the Trustees or Trustee of then available data concerning the alleged unprofitability and lack of usefulness of the Epping and Fremont branches, and their effect on the Boston & Maine (B & M) system's earnings. These data (so far as they involved predictions and projections) were based on then existing conditions and possible developments in the area served by the branches. Tr. 5 to 6, 8 to 18, 19 to 29.

3. For reasons, not apparent from the record, the petition for Order No. 159 was not immediately pressed by the Trustees. Tr. 142. In any event, during the period 1973 to 1976, there occurred a railroad decision (1) to attempt to reduce losses attributable to the Epping and Fremont

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branches by cutting down the level of maintenance of these branches from Level II to Level I and (2) by transferring "bridge" traffic (Tr. 140-144, 147) over the branch to somewhat longer routes where there was already a concentration of freight traffic, moving at higher speeds and with more frequent service than on the Epping branch. Tr. 159-162. See Tr. 38-39, and par. 15, infra.

4. The railroad Trustees, after a lapse of some three years, began to press the petition. The matter was referred to me as master on May 27, 1976, by Order No. 334. An order of notice of hearings to begin on July 12, 1976, was issued on June 22, 1976. A certificate of service of the petition (upon persons listed in two schedules attached to the certificate) appears at the end of the first volume of the transcript.

5. (A) The first set of hearings consumed a day and a half. The railroad debtor was represented by counsel (Mr. Weinberg). Counsel for the State of New Hampshire (Mr. Collins) appeared in opposition to the petition and participated actively by cross-examination of witnesses called by the railroad and by the presentation of evidence in behalf of the State. A member of the New Hampshire House of Representatives who represents in the Legislature two towns (Raymond and Epping) crossed by the Epping branch, appeared in opposition and testified. Tr. 2-7 et seq. This representative (Representative John Hoar, Jr.)

is not a member of the bar, and inquiry of Mr. Hoar, as a witness at the first hearings, was made by counsel for the State of New Hampshire, as a matter of courtesy and for my assistance. Tr. 47 et seq., 2-6 et seq. Mr. Hoar produced no witness other than himself, although he purported to voice opposition to the proposed abandonment for a number of persons with businesses along the Epping and Fremont branches. A number of letters from Mr. Hoar's constituents and others were marked for identification only (Ex. 10, iden.) as indicating only the fact that objections were made but not as bearing upon the truth of statements in the letters. Tr. 2-25. I have considered these letters only as unsworn statements of position and opposition.

(B) After the first set of hearings had been completed, briefs were filed. After examining these briefs, I concluded (1) that the original authorization of the petition by the Trustees in 1973 preceded significant changes in the operations of the two branches, which made it desirable (although not necessary) that the Trustees reconsider the matter in the light of the new conditions, and (2) that the railroad should prepare a new exhibit which would comply somewhat more closely with proposed regulations to govern abandonment proceedings published

by the Interstate Commerce Commission in the spring and summer of 1976. It seemed to me that the District Judge should have the benefit of such renewed Trustee consideration of the situation and of any exhibits and data which could be collected by the railroad to reflect operations of the two branches in general compliance with the proposed new regulations. See 41 Federal Register 13691 (March 31, 1976); 16782 (April 21, 1976); 23172 (June 8, 1976); 31878 (July 30, 1976). See discussion par. 8, infra.²

(C) Accordingly, on my own motion, I reopened the hearings, (1) so that the data submitted in evidence at the first set of hearings could be made available for examination by the Trustees, and (2) so that additional exhibits and evidence could be presented by the Trustees and the State of New Hampshire (in the latter instance, particularly from allegedly affected shippers with places of business along the two branches). A reopened hearing was held (after due notice) on November 1, 1976, at which additional exhibits were received and additional testimony was offered in behalf of the Trustees and the State. In the discussion of the evidence in the paragraphs which follow, I have treated all evidence in the record made before me essentially as a unit. It should be mentioned, however, that the exhibits at the first hearing (July, 1976) were based, in part, upon operating data for the first three months only of 1976, whereas by the second

² See also I.C.C. order of October 29, 1976, served November 5, 1976. Vol. 41 Federal Register 48520 et seq., 48972 et seq. and 49 C.F.R. Part 1121, section 1121.42.

hearing (November) results for the first six months of 1976 had become available.

(D) Supplemental briefs were filed about December 6, 1976. This report takes into account contentions advanced in those briefs as well as arguments found in the first set of briefs.

Description of the Exhibits and References
to Certain Relevant Testimony.

6. The railroad's affirmative case is found, not only in the testimony of various witnesses called as experts, but also in the exhibits received in evidence as described in this and succeeding paragraphs of this report:

Ex. 1 - (14 sheets) Extracts from minutes of the Trustee (Trustees) of the Debtor, held on December 19, 1972, and on March 28, 1973, received as showing the official record of the Trustee(s) (in pertinent respects) of those meetings, and certain documents there presented, but not of the truth of statements of fact therein set forth. See Tr. 32. [In this connection there should be considered Exhibit 12, the record of pertinent parts of the Trustees' record of a meeting on September 21, 1976, at which the 1973 action discussed in Exhibit 1 was again considered. Exhibit 12, I have considered only as establishing the facts (a) that the matter was again considered by the Trustees, (b) that

documents referred to in Exhibit 12 had been furnished to the Trustees, and (c) that the vote quoted in Exhibit 12 had been adopted. See Tr. 3-4 to 3-17.]

Ex. 2 - (Sketch) Map of the Epping and Fremont branches and certain adjacent railroad lines in southern New Hampshire and northeastern Massachusetts. See. Tr. 33.

Ex. 3 - (2 sheets) Statement of estimated net salvage (7/12/76) from rails, structures, and land, if proposed abandonment should take place. Tr. 34, 164.

Ex. 4 - (3 sheets) Detailed listing (for the two branches) of operating expenses (maintenance of way and structures; maintenance of equipment; transportation) for the calendar years 1974, 1975, the first three months of 1976, and an extension (by multiplying by four the first quarter 1976 figures) of estimated results for the "ensuing annual period." See Tr. 35-39, 146.

Ex. 5 Projected annual loss in operating the Epping and Fremont branches for five years (plus five year average). This exhibit shows a projected (estimated) loss from operating the two branches of \$36,928 for the first year and an average (five-year) projected annual loss of \$48,176. Tr. 39.

Ex. 6 - (2 sheets) Projected annual loss in operating only that portion of the Epping branch, east of Epping and west of Newfields, for the annual period, April 1, 1976, to March 31, 1977. This indicates a projected loss of \$20,687. Tr. 40-41, 44-45, 146. See, however, par. 20 below.

Ex. 7 - (one sheet) Projected annual loss in operating the Epping and Fremont branches for the calendar years 1974 and 1975, the first three months of 1976, and the "ensuing annual period" (i.e. the twelve months ended March 31, 1977, Tr. 40-41, 44-45). This exhibit computes operating revenues for past periods by an examination of waybills for those periods for cars originating or terminating on the two branches. Revenue and expenses for the "ensuing annual period" were computed by multiplying by four the revenues and expenses (as shown on the exhibit) for the first quarter of 1976. Expenses for the Epping and Fremont branches were taken for past periods (1974, 1975, and first quarter 1976) from Exhibit 4. "Beyond the line costs" (that is, an estimate of the burden or cost of carrying, on other parts of the debtor's system, freight originating or terminating on the Epping and Fremont branches) were computed by a formula which had at least the acquiescence of the United States Court of Appeals for the First Circuit in an earlier appeal in this reorganization. See Boston & Maine Corp. v. State of New Hampshire, 455 F. 2d 1205, 1209 (1st Cir. 1972). See also discussion below, par. 8.

Ex. 8 - (one sheet) is an analysis (see Tr. 87 to 90), for the calendar years 1966 to 1975, of the carloads of freight "received" and "forwarded" by each community on the Epping and Fremont branches. It shows for totals (all stations) a 97.4% decline (1966-1975).

<u>1966</u>	<u>1971</u>	<u>1975</u>
Received 194 cars	129 cars	81 cars
Forwarded 2950 cars	350 cars	none

There is no less-than-carload (LCL) traffic on the Epping and Fremont branches. See Tr. 90 to 91. Occasionally a shipper or consignee uses a so called "stop-off" car service. See Tr. 3-53 to 3-55.

Ex. 9 - (one sheet) is a comparative income statement for the debtor's whole system for the five calendar years 1971 through 1975. In 1975, the net loss was \$13,536,869.

[Ex. 10 (iden.), see par. 5, supra, is a group of letters marked for identification offered by State Representative John Hoar, Jr.]

Ex. 11 (prepared at my request after the first hearings) is a sketch map of the debtor's whole rail system for convenient reference in understanding testimony about traffic routings. See. Tr. 3-2, and p. 1B, supra.

Ex. 12 (2 sheets) is a certified extract from the minutes of a meeting of the Trustees of the Debtor on September 21, 1976, used by me, as indicating only that a resolution was adopted by the Trustees on that date after the submission to them of certain data, exhibits and documents referred to in the exhibit. See Tr. 3-6 et seq. and discussion above, par. 6, concerning Ex. 1.

Ex. 13 - (6 sheets, originally introduced for identification, Tr. 3-18, until verified by all the Debtor's employees who contributed to its compilation, see Tr. 3-16, 3-104, 3-124, 3-163, and 3-165) and finally (Tr. 3-170) received

in evidence, is an attempt to restate the operating results of the two branches for the first six months of 1976 (by I.C.C. standard accounts) on a basis reflecting ((so far as the Debtor's accounting records permit) the "avoidable costs" of providing service. This attempt more closely complies with the new I.C.C. proposed and interim regulations than do the exhibits introduced at the first hearings, but absolute compliance with those proposed regulations is not possible until the Debtor maintains Rail Form A data, compiled from its Form R-1 Annual Reports to the Commission. See Ex. 13, p. 6, note 1. The exhibit does not satisfactorily reflect many of the Debtor's costs for carrying, on other parts of the B & M system, freight originating or terminating on the two branches, abandonment of which is now sought. See Tr. 3-163. See also discussion below, par. 8. The exhibit, in other respects, may be subject to criticism.

Ex. 14 - (one sheet) reveals rail mileages from Portsmouth, New Hampshire, to certain major points of interchange with other railroads. In one column (Routing via Manchester) is shown the mileage to each interchange point via the Epping branch and in the next column ("Routing via Lowell") is shown the mileage covered by such traffic if handled (without any use of the two branches) via Lowell. The final two columns show in miles the parts of each routing which are maintained to Class I, Class II,

and Class III standards, respectively. See discussion below in par. 15. See Tr. 3-154.

FINDINGS

On all the evidence and exhibits, I make the findings set out below. These are in addition to certain findings already made (pars. 1-4, supra) concerning prior proceedings and the hearings on the present petition, and concerning the exhibits (par. 6, supra), and related facts.

7. The statistical material prepared for the 1976 hearings before me (Exs. 3-9, inclusive, and Exs. 13 and 14) are reasonable efforts to present data compiled, so far as practicable, in accordance with standard or permissible I.C.C. accounting and statistical rules and practices. So far as they purport to reflect records of revenues received during actual past periods of operation, they are highly accurate. Less accuracy is possible with respect to records of expenses as some of these are necessarily based on accounting allocations. Projections, in the exhibits, of results for future periods are made on a basis carefully explained in testimony or in exhibits. These necessarily are less accurate than figures reflecting actual operations for completed periods. At best, these are approximations only and provide only a rough guide to judgment in matters to be based on expected operating results. For example, the comparable estimates prepared in 1973 and presented to

the Debtor's Trustees at meetings in 1972 and 1973 (see Ex. 1) included confused and erroneous guesses about future events and set out excessively high estimates of the burden on system results attributable to the Epping and Fremont branches. See fn. 6, below and Appendix 2.

8. (A) In computing "beyond-the-line costs" the exhibits (except Ex. 13) state that element of cost only on the basis of a computation formula recognized in earlier I.C.C. decisions, discussed in Re Boston & Maine Corp., Appeal of State of New Hampshire, 455 F. 2d 1205, 1209 (1st Cir. 1972). "Such 'beyond the line costs,'" said the First Circuit opinion at p. 1209, "although not susceptible to precise calculation are properly includable in determinations of the line's profitability" (see fn. 11, at 455 F. 2d 1205, 1209). The I.C.C. in past cases has given this formula application to some extent. In proposed regulations, however, the Commission has indicated that, in the future, it is likely to require more refined methods of calculating "beyond-the-line costs" for various purposes. See Commonwealth of Pennsylvania v. Interstate Commerce Commission, 535 F. 2d 91, 93-97 (D.C. Cir. 1976) and 41 Federal Register 31892 (July 30, 1976). See also discussion in par. 6, supra, of Exhibit 7. The Commission's present effort appears to be to obtain data which will give a more precise indication of "avoidable costs," i.e. the costs which the

Debtor (or another railroad) will no longer have to incur if a proposed abandonment is permitted.

(B) The computation used in the exhibits (except parts of Ex. 13) involves ascertaining from waybills, see e.g. Ex. 7, the Debtor's total revenue from carrying each car-load of freight on the whole of the Debtor's lines,^{2A} so far as the freight originates or terminates at points on the Epping and Fremont branches. From that total revenue is deducted the proportion of the total which (a) the mileage on the Epping and Fremont branches traversed by each car, bears to (b) the total mileage traversed by the car on the Debtor's lines. Of the balance (of revenue), one half is somewhat arbitrarily treated as representing the expense of "the railroad operation [with respect to the pertinent car] on that balance of the line . . . not under consideration for abandonment" over which the car actually moves.

Tr. 93. This makes the allowance for "beyond-the-line costs" a percentage of "beyond-the-line revenues" which does not necessarily (but may) approximate the expense of carrying freight (originating or terminating on the two branches proposed for abandonment) on the balance of the system.

Tr. 93-98.

^{2A} Exhibit 13, Sheet 6, describes the freight revenues listed in Account 101, Sheet 1 of that exhibit as "Freight-All revenue assigned to this account are actual revenues for the six months period and are gross Boston and Maine revenues. There is no bridge traffic on the line."

(C) I do not accept testimony (Tr. 97-98) that the formula used by the Debtor results in "conservative estimates of beyond the line costs." The Debtor does not maintain accounts which really permit such a judgment. Tr. 3-19, 3-125 et seq., 3-166 et seq. Certain costs (first six months, 1976) were identified by a railroad witness (Mr. Culliford) as "beyond the line" costs (for the first six months of 1976) definitely caused by cars originating or terminating on the two branches:- viz. yard costs of \$2,557 and per diem costs of \$875, a total of \$3,432. Tr. 3-126. Obviously, other costs also were thus caused. Tr. 3-125 to 3-128. There is no certainty on this record that such other costs would raise the "beyond the line" costs to \$5,011 (computed for the same six-months period by use of the old formula). See Ex 13, sheet 5, note 1. Taking into account all relevant evidence, I find that additional "beyond the line costs" would bring the total of such costs for the six-months period at least to \$3,700 (or \$7,400 on an annual basis by projection). Accordingly, in appraising the various exhibits relating to the 1976 annual period or the twelve months ending March 31, 1977, I compute the probable annual loss from the two branches using \$7,400 as the annual "beyond the line" expense.

9. Portions of Exhibit 13 (as revised after the hearing on November 1, 1976, see Tr. 3-101 to 3-110, 3-170) in my judgment, give the most accurate picture now available con-

cerning the current results (on an "avoidable cost" basis) of operations on the two branches. The figures for the first six months of 1976 may be summarized.

	<u>1st 6 months 1976</u>
FREIGHT REVENUES AND RENTS (Sheet 1)	\$13,537 (see fn. 2A, supra)
less Maintenance of Way (Sheets 1-2)	\$13,077.
Equipment maintenance (Sheet 3)	1,525.
Transportation expense (Sheet 4)	7,363.
Fringe benefits (Sheet 4)	871.
Freight car costs (Sheet 4)	<u>1,110.</u>
	<u>\$23,946.</u>
Net <u>loss</u> before "beyond the line" expense	(\$10,409.)
Add \$3,700 minimum half year allowance for "beyond the line" costs	(3,700.)
Estimated <u>loss</u> from operating the two branches for the first six months of 1976	<u>(\$14,109.)</u>
Multiply by 2 for 12 months	(\$28,218.)

The loss may well be greater but only to this extent can I conclude (as I do) that it has been adequately established.

10. I have considered the testimony that some signal expense now incurred could be avoided by adopting highway crossing protection of the "stop and protect" type, that is by stopping the few slow moving trains and then stopping vehicular traffic before crossing the highway. See Tr. 3-119 et seq., 3-135 to 3-140. Although there are no signal devices on these two branches to regulate the movement of trains; flashers are maintained at highway crossings. Tr. 65.

There is heavy traffic at some grade crossings. Tr. 3-135 et seq. I conclude that, with abandonment proceedings pending, the Debtor reasonably continues providing the highway protection hitherto provided, without having resort (Tr. 3-117 to 3-119) to the New Hampshire regulatory commission for permission to substitute a possibly less adequate (and from the public standpoint, more dangerous) form of protection. I accept as reasonable also other operating expenses shown on Ex. 13. ³

11. On all the evidence, I find and conclude that the Debtor will lose from operations on the two branches at least about \$28,200 for the twelve months of 1976, before any consideration is given to the costs of rehabilitating the lines. ^{3A} On Sheet 2 of Ex. 13, the Debtor estimates that to restore the branches to a condition meeting F.R.A. standards (for a line operating on a Class I basis) would mean spending \$279,030. That may be the case, as in essence witnesses called by the Debtor testified. There was testimony, however, that the two branches (as of July, 1976) met Class I standards

³ There is no evidence that the Trustees have considered reduction in this signal expense as a possible alternative to abandonment. [Elimination of the whole signal expense would reduce the loss (see par. 9, supra) from the branches by \$14,094. Ex. 13, Account No. 249.]

^{3A} Because of I.C.C. accounting requirements, roadbed rehabilitation expenses are charged off in the year in which they are incurred. This, unless understood, may distort results in the year in which such expenditures (e.g. for tie replacements) are made. Tr. 3-168 to 3-169.

(Tr. 1-38), although (Tr. 3-144 to 3-149) whether it now does so, may be "close." Upon past indications about the Debtor's expenditures on rehabilitation, I conclude that all major expenditures (while possible abandonment is pending, Tr. 3-148) in fact will be postponed as long as possible without assuming undue risks of accidents. There have been no roadbed-caused derailments or other major accidents. Tr. 3-149. Undoubtedly the roadbed of the two branches has deteriorated and some rehabilitation must be done with promptness, if operations are long to continue. I would not expect these to reach the figures for such rehabilitation shown on Ex. 5 and on Sheet 5 of Ex. 13 (projected).

12. On Exhibits 5, 6, and 7, accordingly, I conclude that "beyond the line" expense and projected maintenance expenses are overstated. In other respects, I conclude that the figures shown on Exhibits 5, 6, and 7⁴ are reasonably consistent with those for similar items on Ex. 13. The

⁴ See Tr. 113-114 and Tr. 136 for certain known prospective increases in revenues and expenses taken into account in computing these exhibits. Any computations based on projections (by extending by multiplication the results for a brief known period) may result in some distortion. See Tr. 113, 115-117, 136-137.

latter figures seem to me more adequately substantiated. On these exhibits and related testimony, I base my conclusion that operation of the two branches in the present period will be a burden upon system earnings to the extent of at least \$28,000 a year, plus any absolutely necessary and non-postponeable rehabilitation expense.

13. I find that Exhibit 8 (see par. 6, supra) correctly shows for the period 1966 to 1975, the startling decrease in carloads of freight originating and terminating on the two branches. In 1975 only 81 cars terminated on the branches (five at Manchester, six at Candia, and 70 at Epping). Total cars dropped from 3,153 in 1966 to 81 in 1975, largely because no cars of freight originated on the two branches in 1974 and 1975, and few cars after 1971. The decline in cars originating on the two lines is largely because movement of gravel from a source in Raymond has ceased entirely. Tr. 88-89. See Tr. 70-71, 120.

14. (A) There was some testimony (see Appendix 1) about prospects for future business. None of this testimony has convinced me that shipments to and from the branch are likely to increase within the foreseeable future. Just prior to 1973, there had been some effort by communities on the Epping branch to obtain industrial development in the area and to set aside land for "industrial parks." Tr. 105-106, 165-166, 2-23 to 2-24 (Epping), and Tr. 2-28 (Raymond). This

effort may unduly have encouraged some of the Debtor's officials in 1973 then to be optimistic. See e.g. Tr. 165; Ex. 1, Sheets 3, 12-13. In the period since 1973, there has been no industrial development along the two branches by rail users, and I find that there is no prospect of rail user development which can be predicted with any confidence. Tr. 104-106, 166, 173-174, 2-32 to 2-36, 3-35 et seq.

(B) In Appendix 1, there is a summary of (a) rail users on or near the two branches whose freight traffic has disappeared or been greatly reduced in recent years, and (b) of possible freight shippers whose business prospects are at best a matter of conjecture. Companies selecting sites in New Hampshire and wishing to have rail service, will be likely to select a new location from the available sites near main lines (not likely to be abandoned) rather than places on these thinly patronized two branches, where lack of freight business has necessarily led to reductions in service and the present abandonment petition. Tr. 90, 2-30, 2-33 to 2-36. I have taken into consideration the circumstance that reduced service and the pendency of abandonment proceedings may have discouraged industrial development along the two branches to some extent.

(C) The record indicates that some businesses in the area served by the two branches largely rely on the greater flexibility of truck service. Truck service enables them

to keep inventories at a minimum. Tr. 114-115. Many businesses rely upon manufacturers "to warehouse for" them. They will pay a higher truck rate to get such warehouse service and to get, when it is needed, quicker delivery from the manufacturers than can be had by rail. The truck competition plainly is a factor to be considered in appraising the possibilities of increasing future rail business in this area.

15. In 1972-1973 there was some "bridge" or "overhead" traffic on the Epping branch going from Portsmouth to the north-south main line through Manchester. Tr. 142-143. In 1973, the Debtor's officials decided that overall economies could be achieved (a) by concentrating this former "bridge" traffic on other lines of the Debtor, necessarily maintained for frequent use and higher speeds because of greater traffic volume, (b) by cutting the maintenance level on the two branches from a grade II (permitted speed 20 miles an hour) to a grade I level (maximum speed 10 miles an hour), and (c) by reducing freight service on the two branches to once only each week. The former "bridge" traffic is now being handled over other lines of the Debtor⁵ without causing any very significant

⁵ Concentration of the former "bridge" traffic on the Debtor's main lines fits in with the Debtor's natural desire to get as long a haul on its own lines as possible, e.g. to Rotterdam Junction and Mechanicville as interchange points rather than to White River Junction. Tr. 109-110. Exhibit 14 shows that (except to White River Junction) the distances from

increase of costs on these other lines. See Tr. 3-43, 3-127 et seq. Any longer mileage (by using the Debtor's main lines for the former "bridge" traffic) is shown by Exhibit 14 to be of slight significance, in view of the higher speeds and more frequent service on the Debtor's main lines. The shift of the "bridge" traffic was prudent and permitted material economies on the two branches, especially by cutting maintenance of way expenditures. The reduction of the roadbed from Class II to Class I, of course, continued (and may have accentuated) the physical deterioration of the roadbed⁶ on

Portsmouth to the major interchange points are shorter by the main-line routes than by way of the Epping branch. Even to White River Junction, the main line routes permit higher speeds and afford more frequent service than by way of the Epping branch. Portsmouth is a city appropriate for use in testing the propriety of the shift of "bridge" traffic from these two branches.

⁶ When the 1973 exhibits (see Ex. 1) were prepared there had been fairly heavy use of the Epping branch for gravel traffic which ended in 1971. This traffic may have contributed to the deterioration of the roadbed and caused, in part, the 1973 (Ex. 1, Sheets 8 and 9) projections of heavy maintenance expenses, if it should thereafter be decided to continue to maintain the branches for grade II operations as had been the case prior to 1973. Because of the current (1976) failure to maintain the roadbed on the two branches even up to wholly satisfactory level I operating standards, the 1972-1973 projections are now wholly irrelevant. Counsel for the State of New Hampshire has requested that I make findings about the considerable discrepancy between (1) the 1973 predictions of 1975 and 1976 expenditures for maintenance of way; and (2) the expenditures actually made in those years. Such findings appear in Appendix C, pars. A and B.

the two branches, in that it was no longer necessary even to attempt to keep the two branches up to Class II operating standards. The frequency of service has been cut to the lowest level which can handle the remaining traffic.

16. As already noted, Exhibit 3 contains estimates of salvage which will follow an abandonment of the two branches. Some rail can then be relaid elsewhere on the Debtor's lines (Tr. 53 to 56). Some rail is suitable for use only as scrap. The dollar value of possible salvage of rail, bridges, and other items to be salvaged has risen in the past three years. Tr. 58 to 59. The values in Ex. 3 are based on exploration by the Debtor's purchasing department of the current market for "relay" rail and scrap. Tr. 56. I find that, if abandonment is authorized (and if clear title to the rail is in the Debtor), the Debtor will realize as salvage about the amounts listed on Ex. 3 for rail and other metal items which belong to the Debtor.

17. Estimates of real estate salvage (Tr. 170 et seq.) are subject to greater uncertainties. As real estate affected by any abandonment is sold, the Debtor will realize significant sums, but I can make no more precise finding than that. I have no doubt that the estimates of real estate salvage were made honestly and in good faith by the Debtor's manager of real estate (Tr. 163) and a private real estate firm (Tr. 167-169) but the disposal of such real estate may encounter unfore-

seen difficulties and may take substantial time.

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18. The freight stations on the two branches are all within fairly short distances of other rail service by the Debtor (Tr. 101-102).

- (a) Candia is twelve miles from rail delivery points in Manchester.
- (b) Raymond is fourteen miles from Exeter.
- (c) Epping is eight miles from Exeter.
- (d) Fremont is ten miles from Exeter.

19. The proposed abandonment involves the Debtor's retention of about three miles of track east of Manchester (serving freight customers in the Manchester community). Tr. 30, 149. See Tr. 49 to 54, 3-100 to 3-101. There are shippers and freight receivers with side tracks in this three-mile segment. Also, at the eastern end of the proposed abandonment, the Debtor proposes to retain about one-fourth of a mile of track west of Rockingham Junction in the town of Newfields for engineering reasons, viz. to preserve the opportunity of turning trains and cars at that point. Tr. 49 et seq. I find that both these retentions are reasonable. The State of New Hampshire thus far has not produced any proposal for an independent operation of this line. There has been no reliable indication that it will do so. Tr. 19-28, 2-4 to 2-6. See Tr. 176-177. ✓

✓ There is no indication in the evidence that it would be impossible to work out trackage arrangements, over the two retained segments, if abandonment by the Debtor should be authorized and if the State of New Hampshire then should attempt to work out a short line operation of the two branches. The evidence does not enable me to make findings about the nature of the three miles of track just east of Manchester, i.e. whether they constitute "terminal facilities" under § 3 (5) of the Interstate Commerce Act [U.S. Code (1970) Title 49, as amended. See Pub. L. 94-535, § 215 (a). See also Tr. 53, 3-100 to 3-101].

Shippers close to Manchester (in the three-mile stretch not to be abandoned) should not be deprived of direct service by the Debtor if that service can fairly be continued. In any event, recent legislation affords an opportunity for negotiations for further operation of the branches by others than the Debtor while (or after) the abandonment is being considered by the Interstate Commerce Commission. See the Railroad Revitalization and Regulatory Reform Act of 1976; Pub. L. 94-210, § 802, inserting a new § 1A in the Interstate Commerce Act. See Tr. 2-2 to 2-3.

20. Exhibit 6 purports to compute the reduction in loss if an abandonment of the two branches did not affect at all the Epping branch between Epping and Newfields. For reasons already noted in connection with discussing Exhibits 7 and 13, the expense item of "Beyond line costs" on Ex. 6 may be too high. Adjusting that item in proportion to the cars moving to Epping in 1975 (Ex. 8 - 70 at Epping out of 81 for the two branches as a whole) would reduce the \$7,400 (allowed above in par. 9 for the whole of the two branches) to about \$6,000 instead of the \$12,462 allowed on Ex. 6. I find that the loss from continued operation of only the rail line between Epping and Rockingham Junction would be not less than \$12,000 to \$16,000 (instead of the not less than \$28,000 estimated in par. 11, supra, for the whole of the two branches). This, of course, necessarily is at best an approximation and rough

estimate of the minimum loss only on this easterly segment of the Epping branch.

21. The amount of the losses, which are now being incurred on the two branches (as I have found them above, pars. 9, 11, 20), obviously will not be realized as savings in full immediately upon authorization of abandonment. Reductions in work force will depend in part upon the authorization of other abandonments, the effect of which in the aggregate will permit force reductions. Over a period of time, however, I conclude that the Debtor should be able to effect savings of at least the losses on the two branches computed on the basis which has been employed in pars. 9, 11, and 12, above. Tr. 3-116 to 3-117, 3-120 to 3-122.

22. The Debtor has been in process of reorganization under the Bankruptcy Act for over six years. Its service is important to the State of New Hampshire for the Debtor provides about ninety per cent of the rail mileage in the State. Tr. 2-30 to 2-31. The service is vital to the economy of those regions which give it significant use. The Debtor has not been operating at a profit and it, as a system, has not in any one of the calendar years, 1971 to 1975 (see Ex. 9), had a "net railway operating income." Each year that figure has been in red ink. The Trustees of the Debtor are (and have been) entitled to consider the public interest from the broad standpoint of how best the Debtor can survive to provide its basic rail services to customers who are using them and will use them enough to

permit continuation of railroad operation. They must consider shearing off the Debtor's least used, least essential, and most unprofitable operations. They must weigh (a) the broad public interest in the most basic rail service which can be made viable against (b) the interest (partly public and partly private, see Tr. 2-23) of individual shippers and freight receivers on unprofitable branch lines (not adequately used or likely soon to be so used; see Tr. 2-30). I perceive in this record no indication that the Trustees have not taken the public interest into account, both in 1973 and upon reconsideration of the problem in 1976. They have had an opportunity to reconsider the 1973 application for abandonment and they have decided to continue to press it. Although I am of opinion that the estimates of losses from the two branches presented to them both in 1973 and 1976 were overstated, the Trustees have reached their decision after opportunity to consider essentially all the documentary evidence presented to me, and to have that evidence analyzed for them by the Debtor's staff.

23: The Trustees have not been shown to have been aware of the mistake in computing Account No. 249 in the original form of Ex. 13, which is discussed in Appendix 2, par. C, infra. Because their action on September 21, 1976 (see par. 6, supra, discussion of Ex. 1) preceded the final hearing before me on November 1, 1976, they obviously then had no opportunity to examine the testimony heard on that day. Under the new abandonment regulations promulgated by the Interstate Commerce

Commission (I.C.C.) on November 4, 1976, see 41 Federal Register (Nov. 4, 1976) 48520, and fn. 2, supra), the Debtor (before pressing an abandonment petition before the I.C.C.) must undertake to prepare carefully a number of exhibits based upon much more time consuming and refined accounting methods (see Ex. 13, Sheet 5, note 1) than the Debtor has employed heretofore. The approximations of the loss from the branches shown in revised Ex. 13, necessarily will be supplemented by new maps and exhibits required by the new regulations. The Trustees doubtless will examine (a) such new exhibits, (b) the testimony taken on November 1, 1976, (c) this report, and (d) any decision of this Court which may deal with this report. Nothing in the present record leads me to expect that such an examination is likely to result in any change in the Trustees' decision of September 21, 1976. It may be, however, that this Court will wish to be assured (before the Trustees actually file an abandonment petition with the I.C.C.) that the Trustees are then proceeding with full knowledge of all the data then available. I would not regard this as necessary but, if the District Judge should take a different view, it would be wholly feasible to require (as a condition of granting permission to initiate I.C.C. proceedings) that the Trustees undertake to reconsider the abandonment petition after the new exhibits are available, and file then with this Court a certified copy of their

definite decision to proceed. There is, however, significant evidence that (as I conclude, see par. B, infra) the two branches constitute a burden upon the Debtor's system. Accordingly, I recommend that the Debtor should now be given appropriate authority to proceed with the petition to the I.C.C. before it must incur any expense (which may be substantial) of compliance with the new I.C.C. regulations.

24. The State of New Hampshire in effect contends that the Trustees have not adequately considered alternatives to abandonment of the branches. I perceive on the evidence no possibility or suggestion of any viable alternative in the absence of some subsidy. No real alternative has been suggested by the Debtor or by the State. Elimination of all signal expense would not avoid some annual loss on the branches or the necessity of undertaking promptly some rehabilitation expenditure. The State has not advanced before me any specific proposal for short-line operation of the branches or any subsidy. In view of the provisions of Pub. L. (1974) 93-236, Title IV, Local Rail Services, especially § 402, § 802 (inserting a new § 1a in the Interstate Commerce Act), and § 803, it would be natural that a State might wish to wait until abandonment had been authorized by the I.C.C. with the result that a Federal subsidy might then become available, before proposing any subsidized operation. This may explain why

no proposal for subsidized continued operation has been advanced. The possibility of a later subsidy should not prevent present consideration by the I.C.C. of abandonment, if a petition for abandonment now appears to be reasonable in the absence of a subsidy. Indeed I.C.C. action in 1977 may operate indirectly to induce or to make possible an appropriate subsidy arrangement. See Tr. 2-4 et seq.

CONCLUSIONS

On all the evidence and on the findings set out above I reach the following conclusions:

A. To the extent that, in the foregoing paragraphs, I have found that losses on the two branches are currently being incurred, I regard as reliable the figures (supporting such losses) presented to me by witnesses called by the Debtor. Higher losses may in fact be the result of current operations, but I am not convinced by the evidence, and parts of exhibits to that effect and I do not rely upon such evidence and parts of exhibits.

B. I conclude that the loss now being incurred on the two branches of at least \$28,000 (although not as large as the losses estimated by the Debtor) is a significant burden on the Debtor's ability to continue basic rail service on the balance of the Debtor's system, including those parts of the system serving areas in New Hampshire depending upon

losses) presented to me by witnesses called by the Debtor. Higher losses may in fact be the result of current operations, but I am not convinced by the evidence, and parts of exhibits to that effect and I do not rely upon such evidence and parts of exhibits.

B. I conclude that the loss now being incurred on the two branches of at least \$28,000 (although not as large as the losses estimated by the Debtor) is a significant burden on the Debtor's ability to continue basic rail service on the balance of the Debtor's system, including those parts of the system serving areas in New Hampshire depending upon and making substantial current use of the Debtor's lines.

C. There is no substantial ground on which to expect development of significant additional rail traffic on the two branches within the next five years.

D. The economies effected by the Debtor on the two branches since 1972-1973 have been prudent. These include the shift of "bridge" traffic to other lines of the Debtor and reduction in frequency of service on the two branches.

E. Inconvenience and some additional expense will be caused to the remaining receivers of freight on the two branches by abandonment of the two branches. These consequences, I conclude, are outweighed by the more general public interest in enabling the Debtor to maintain its most significant main line and other service elsewhere on its system. Even those shippers adversely affected have rail service within

a reasonable distance and (with some adjustments) can change their operations to use that rail service.

F. The Debtor, upon abandonment, will realize substantial benefit from salvage of rails and other items on any part of these branches permitted to be abandoned.

G. No evidence before me indicates any firm prospect of State or industrial subsidy of the two branches. Despite the suggestion in cross-examination (that economies could be effected by a change in methods of highway protection), there has been no indication in evidence that the New Hampshire regulatory authorities are (or would be) inclined to approve such changes. Opportunity to offer a State subsidy or other support will continue, of course, during any further proceedings growing out of the present petition.

RECOMMENDATION

I recommend that the Debtor be given leave to apply to the Interstate Commerce Commission for permission to abandon these two branches.

Dated this day of 197

Respectfully,

Master

Certificate

On *December 24, 1976*, I submitted by first class mail postage prepaid to counsel (Mr. Collins, and Messrs. Parks and Weinberg) appearing before me in this proceeding, a copy of a draft of the foregoing report with a notice that I would receive written objections to this report and suggestions for modification of this report, postmarked on or before January 11, 1977. All such written objections and suggestions have been considered. I now file this report (including any modifications of the draft report) for the consideration of the Court, together with the transcript of the testimony and copies of the exhibits presented before me.

Dated this day of 1977.

Master

APPENDIX 1 (see par. 14, supra)

On the evidence, I find the following facts with reference to (a) the recipients and shippers of freight on the Epping and Fremont branches, and (b) certain other matters.

EAST MANCHESTER - R. C. Hazelton Company is the only customer now receiving rail freight. Tr. 3-25 to 3-27. They receive carloads of high-cost heavy industrial machinery, tractors, road building machinery, graders, and similar items. They now have a private siding, but could (at slight additional expense) receive freight in Manchester two to three miles distant and truck it or use the self-propelled items to move this freight to their plant.

Emery Waterhouse formerly received freight at East Manchester. It has sold its plant and moved to Portland, Maine. Tr. 3-35, 3-102. There is some possibility that the new owner of Emery Waterhouse's former plant may want to use rail facilities but it is not certain enough to require significant consideration.

CANDIA - Jaskolka Farms is the only rail user. It receives (at public delivery) shipments of egg cartons. Because there is freight service only one day each week, it, on some occasions at least, picks up freight deliveries at Manchester. The customer could receive all deliveries in that manner. Candia is about twelve miles

from Manchester. At Candia in 1974, the customer received two carloads. In 1975, it received six carloads. In the first six months of 1976, no cars were received. The customer may have picked up some freight at Manchester in 1976. Tr. 3-27 to 3-28.

RAYMOND - There were no cars and no customers at Raymond in 1975 or in the first six months of 1976. Tr. 3-29. As noted elsewhere (par. 13, supra) a gravel pit in Raymond which formerly produced much traffic has ceased entirely to operate. Tr. 3-36. See Tr. 1-88. See also Tr. 1-70 to 1-71. Regis Tanning Company formerly received a few cars, but its plant was never rebuilt after a fire in 1972. Tr. 3-37.

FREMONT - Spaulding and Frost made barrels, tubs, and similar items for the food industry. With the advent of plastics, the company is making the products as specialty items which do not move in rail volume. There have been no cars for 1975 and the first six months of 1976. Tr. 3-29.

There was a request at one time (Tr. 3-48) from the Fremont area to supply special cars to ship pulpwood. Bulk end flat cars were required. The Debtor did not have these cars and its representative concluded that insufficient revenue was involved to call for

obtaining the cars. Tr. 3-134. Myca Forest Industries, Inc., a forest harvesting company, now ships each week from Fremont by truck about two truck loads of round wood and three truck loads of chips. It once sought to move traffic by rail but, when business dried up a year or so ago, pressure for this rail movement was not continued. Business is now beginning to pick up to some extent. The company has not used rail service in the past in any substantial degree. Tr. 3-79 to 3-91. See Tr. 3-92 to 3-97. I conclude that whether any substantial freight business could be developed from these sources is purely speculative and is highly uncertain.

EPPING - (a) Merrimack Farmers Exchange receives cars of grain and feed for their retail store at Epping, mostly (if not entirely) from the Exchange's mill at Bow, near Concord, New Hampshire. The Exchange also operates feed stores at Exeter (served by truck) and at Rochester. At Epping, the Exchange must unload by truck, as there is no direct track to the Exchange's present building. Tr. 3-65. Exeter is eight miles from Epping and the Exchange's truck service to Exeter could be expanded to serve the Epping outlet. This would be less convenient (Tr. 3-60 to 3-75) than present rail service. Tr. 3-29 to 3-31. It would increase

(Tr. 3-57 et seq.) the Exchange's present costs of loading grain on cars by conveyer belt at Bow. See Tr. 3-63 et seq. Grain, however, would continue to move from the West to Bow by rail even if the two branches are abandoned. Tr. 3-62. About half of the shipments of items other than feed grain to the Epping store now move by truck.

(b) Home Gas Company - This company has a private track and two 30,000 gallon tanks for storing liquid petroleum gas. It has a competitor within a half mile which receives his gas by truck and not by rail. Home Gas has a plant at Greenland (20 miles from Epping) and one at Goffstown (30 miles from Epping). Home Gas at Epping pumps gas from the rail cars to the 30,000 gallon tank and then from the tank to trucks for delivery to customers. Tr. 3-31 to 3-32. Home Gas would remain competitive with the other gas company even if rail service is abandoned, but it will lose the advantage over its competition which rail service now affords it.

(c) W. S. Goodrich - This company receives bricks by rail on its private track. In 1974, six cars were received; in 1975, two. Tr. 3-27. Cf. Tr. 3-36. No cars were received in the first six months of 1976. Bricks are received on pallets which have to be removed by fork lift from the cars. Delivery could be taken

at Exeter (eight miles) but it would be more expensive to the company.

(d) J. F. Brown Company is about one mile from the main public delivery where it receives carloads of farm machinery and unloads it to trucks. It could receive this material at Exeter. Additional costs would be the expense of trucking for eight miles. The company received seven carloads in 1974, three in 1975, and none in the first six months of 1976.

(e) Johnson Lumber Company formerly maintained a mill at West Epping and trucked local lumber to load it at a public delivery facility in Epping. The mill has been sold and there has been no business for the last three years. Tr. 3-38.

(f) General - In Epping in 1971, 102 carloads were received and twenty carloads were shipped. In 1975, 70 carloads were received and none were shipped. There has "been a continual decline in the . . . business" moving by rail. With respect to "bridge" traffic, which formerly moved over these branches, there is now no revenue traffic in oil moving by rail out of Portsmouth. National Gypsum moves only an occasional carload of wall-board from Portsmouth to Maine, a movement which would not normally use the Epping branch.

APPENDIX 2

CERTAIN FURTHER FINDINGS

A. Exhibit 1, Sheet 5, in 1973 estimated "an approximate average annual loss of \$84,450 for the Epping and Fremont branches for the years 1973, 1974, 1975, 1976, and 1977. See Tr. 68. This in part was based (see Ex. 1, Sheet 9) on predicted expenditures for "Maintenance of Way & Structures" of \$38,790 for 1973, \$31,609 for 1974, \$137,935 for 1975, \$137,910 for 1976, and \$30,235 for 1977. The reduction from a Grade II operation (20 miles an hour maximum) to a Grade I (ten miles an hour) operation (see main report, par. 15) had not then occurred and the estimates were prepared for a hearing (never held) before Judge Ford, at one time marked for March, 1973. I infer that the large proposed maintenance expenditures for 1975 and 1976 were designed (if abandonment did not take place) to bring a deteriorated roadbed (Tr. 74) to a satisfactory Grade II level for increased traffic (Tr. 72, and some "through" or "bridge" traffic, Tr. 77), then expected by the Debtor's Engineering Division (see Tr. 29, 79). There was a prediction by the Engineering Division in 1973 of "a considerable tie replacement program" in 1975 (and also 1976 - see Ex. 1, Sheet 9). At the same time, the Debtor's traffic department (1) was not predicting any increase in freight revenue (kept constant at \$26,648 for the whole five-

year period on Ex. 1, Sheet 9), (2) was telling the Trustees that the Raymond gravel deposit (which had produced a significant revenue prior to 1972, Ex. 1, Sheet 7, and Ex. 8 under heading "Raymond, N. H.") was "worked out" (see Ex. 1, Sheet 4), and (3) that "The principal shipper at East Manchester will remove its facility from the line in the near future." No satisfactory explanation (see Tr. 80 to 82) of the failure of the traffic department and the engineering department to coordinate their predictions and their 1973 estimates appears in the record.

B. The actual 1974, 1975, and 1976 (largely projected from first quarter experience) expenditures for maintenance of way were \$23,574, \$21,492, and \$24,932. See Ex. 7. The 1973 estimated expenditures for 1975 on this item were (as has been noted above) \$137,935 and for 1976, \$137,910. See Ex. 1, Sheet 9. [On Tr. 67, appears a figure of "\$395,000" for 1975, which has no confirmation on Ex. 1, Sheet 9.] The 1973 predictions had ceased to be relevant in 1976, and I gave them no weight as reflecting 1976 conditions which were significantly different because of (1) the removal of "bridge" traffic from the two branches, (2) the greatly reduced frequency of local service, and (3) the reduction of maintenance to Grade I (maximum speed, 10 miles an hour). I had in mind the poor quality of the Debtor's

1973 predictions in considering later predictions by the Debtor's staff.

C. In 1976 at the resumed hearings before me on November 1, 1976, Exhibit 13 was introduced. As originally presented, Account No. "249 Signals and interlockers" was shown for the period January 1, 1976, to June 30, 1976, as \$11,508 and for the projected 1976 annual period as \$23,016. During direct examination (Tr. 3-104 to 3-110, esp. at Tr. 3-109 to 3-111. See Tr. 3-170) of Mr. Kennedy, one of the witnesses (called by the Debtor) testifying about Ex. 13, it was brought out by the Debtor's counsel that an overhead item by error had been duplicated in computing the original figures for Account No. 249. This was described (Tr. 3-109) as a "clerical error." The correct figures for January 1 to June 30, 1976, were \$7,047, and for the projected year 1976, they were \$14,094. At my direction (Tr. 3-169 to 3-170) a corrected Exhibit 13 was submitted to avoid confusion. Both the original form of Ex. 13, and the revised form of that exhibit are included in a pamphlet containing all the exhibits (bound in white cardboard) to be filed herewith. There is no evidence that, up until now, this correction has been brought to the attention of the Debtor's Trustees. The correct figure has been used in par. 9 in computing the total maintenance of way expenses for the first six months of 1976 of \$13,077.