

Note

Proposed Regulatory Reform in the Area of Railroad Abandonment

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I. BACKGROUND

Railroads have played a major part in the growth of this nation. However, the last fifty years have seen the railroads' prestige and strength fall dramatically. Though the demise of passenger service has been a highly visible development, the rail industry's freight transportation has also faltered.

A 1979 analysis of the rail industry by the Association of American Railroads (AAR)¹ portrayed the precipitous decline of the national rail industry and described its present precarious state. According to the AAR, the percentage of total intercity ton-miles hauled by the railroads dropped from 77% in 1929 to 36% in 1977. In the same period, the railroads' share of total freight revenues decreased from 72% to 21%. The Interstate Commerce Commission (ICC) has set a target return on investment of 10.6% in order that the railroads might ensure investment sufficient for the maintenance of adequate service. However, on the whole, the industry has fallen far below this goal.² The rate of return for the industry has been not more than 1.5% in the last four years and has not exceeded 4% in the last twenty years.³

1. Association of American Railroads, *Economic Regulation of Rail Freight Operations* (Feb. 5, 1979) [hereinafter cited as AAR, *Economic Regulation*].

2. *Id.* at 1-2.

3. In most profitable region of service, the group earnings are less than half of this target

The Department of Transportation (DOT) has determined five factors which have caused the decline of the rail industry.⁴ First, a movement to a service-oriented, high technology economy from heavy industry and shifts in the location of industry have changed the traditional rail markets. Second, management has been stifled by extensive regulation which has limited innovative programs. Third, indirect government subsidy of rail's competitors by the provision of rights-of-way has put the rail industry at a disadvantage.⁵ Fourth, the rail industry has fallen behind its competitors in making use of new technological developments. Finally, though there have been substantial wage and benefit increases, labor and management have failed to implement new methods of increasing productivity.⁶

One primary problem for the railroads has been the maintenance of excessive trackage and facilities. Two-thirds of all the rail traffic today moves over only 20% of the rail system, while 10% of the total trackage accounts for only one-half of 1% of the traffic.⁷ There are various reasons for such inefficient use of track. Among these reasons is the fact that in the past, rail lines were often built on speculation in anticipation of traffic that failed to materialize. The railroads also frequently built alongside existing lines of other rail competitors in a particular area. Light traffic over a line would result from a cyclical process; less profitable lines were not maintained in good condition which in turn resulted in a reduction in demand for service. Redundant trackage has also resulted from frequent mergers within the industry.

Railroads have sought to divest themselves of these unprofitable or redundant lines through abandonment proceedings. The DOT followed certain abandonment applications and gave an overview of ICC actions in those applications. It found that from 1964 through 1972, the ICC approved 13,958 miles for abandonment of the 19,767 miles the railroads

return. Of the individual companies, only two of the fifteen largest railroads earned as much as a 7% return in 1977, while none earned over 8%. The AAR showed the comparison of rates of return among the major competitors as follows:

	Return on Net Investment	Return on Equity
Class I Railroads	1.52%	1.80%
Motor Carriers of Property	19.23%	23.67%
Water Carriers, Inland and Coastal	16.03%	17.18%

Id. at 2.

4. Department of Transportation, *A Prospectus for Change in the Freight Railroad Industry* (Oct., 1978), at 39 [hereinafter cited as *DOT, Prospectus for Change*].

5. In 1976, railroad maintenance of right-of-way equaled 35.8% of the annual revenue, motor carrier right-of-way equaled only 3.7% of revenue, while water carriers paid no right-of-way maintenance costs. Association of American Railroads, *Railroad Deregulation: A Matter of Necessity* at 3 (May 23, 1979) [hereinafter cited as *AAR, Deregulation: Necessity*].

6. *DOT, Prospectus for Change*, *supra* note 4, at 39.

7. *AAR, Economic Regulation*, *supra* note 1, at 3.

sought to abandon. During that same period, the total route mileage declined slightly over 4% (a decrease of 8,603 miles). The move to abandon is continuing. In 1976, there were ninety-four applications filed with the ICC involving 1,635 route miles.⁸

In another DOT study of twenty-five abandonments⁹ between the years of 1951 and 1969, the average savings to the railroads involved were \$4,600 per mile (in 1973 dollars). If this figure were applied to lines abandoned from 1951 through 1972, the annual savings by 1973 would be \$90 million.¹⁰ The aftereffect of abandonments on the shippers involved is difficult to assess because before an abandonment both the shippers and the railroads begin certain anticipatory actions. Service on the line begins to deteriorate because of declining revenues for the railroad and market requirements. Also, the volume of traffic tendered by shippers declines as service over the line deteriorates. Therefore, an abandonment may be but the culmination of economic changes, not necessarily their cause.

Past abandonments and ones proposed for the future are seen as creating a problem requiring a quick resolution. The DOT has projected that the nation's freight level will double by 1990, with the railroads showing the biggest increase in traffic of the major methods of freight transport. The DOT gives as reasons for rail's traffic increase the fact that the railroads have the excess capacity to absorb a large portion of the freight and that rail transport is fuel efficient.¹¹ With the maintenance of a healthy rail system of utmost importance, prompt action is necessary. Therefore, DOT suggested that major reform is needed to avoid annual multi-billion dollar subsidies.¹²

II. CURRENT ACT

To abandon a line under current law,¹³ a railroad has the burden of proving the "present or future public convenience and necessity" require or permit the abandonment or discontinuance.¹⁴ While the economic condition of the line is not a factor in this determination, the Commission is required to consider the "serious, adverse impact on rural and community development."¹⁵ The Commission presently uses a "weighing" or "balancing" approach to determine whether any particular abandonment would

8. DOT, *Prospectus for Change*, *supra* note 4, at 84.

9. *Id.*

10. *Id.*

11. A railroad can move a ton of freight with one-fourth as much fuel as a large truck. AAR, *Deregulation: Necessity*, *supra* note 5, at 4.

12. AAR, *Economic Regulation*, *supra* note 1, at 2.

13. 49 U.S.C. §§ 10101-11999 (1979).

14. 49 U.S.C. § 10904(b) (1979).

15. 49 U.S.C. § 10903(a) (1979).

be consistent with the present or future public convenience and necessity. Using this method, the Commission will compare the burden to the carrier of continued service with the adverse effects on shippers and local communities.¹⁶ Some of the considerations in such a determination are "the population of the territory serviced, the use by the public of the service sought to be discontinued, other available transportation in the area, the general financial condition of the carrier involved, and the losses it suffers in providing the service."¹⁷

In addition to proving public convenience and necessity, the petitioning railroad must fulfill a complex and lengthy set of procedural requirements. A carrier must submit its application at least sixty days in advance of the proposed abandonment effective date.¹⁸ However, if the application is opposed, a certificate can be issued only if the line was described on a diagram showing lines for which the carrier plans abandonment filed with the Commission at least four months prior to the date of the application.¹⁹

After an application for abandonment is filed, the Commission may order an investigation and postpone the abandonment "for a reasonable period of time."²⁰ Even if the Commission finds that a certificate should issue, it may postpone issuance for another six months if it finds that a "financially responsible person" has offered assistance equal to the difference between the revenues attributable to the line and the "avoidable cost"²¹ of providing service, plus a reasonable rate of return on the value of the line.²²

Experience under the current law has shown the procedure to be vague and cumbersome. The ICC has attempted to issue interpretative regulations, but substantial parts of these regulations have been found unlawful.²³ Also, the existing abandonment procedures provide for no compensation to railroads for the losses incurred in operating the lines while the abandonment process is taking place. To those losses are added the high

16. See, *Chicago & Eastern Illinois R. Co.—Abandonment*, 354 I.C.C. 789, 795 (1978).

17. *Atchison, T. & S.F. Ry. Co. Discontinuance of Trains*, 334 I.C.C. 735, 745 (1969). Use of the service can include future use if that future use can be shown with specificity; *Chicago and North Western Transp. Co.—Abandonment*, 354 I.C.C. 114, 118 (1977). The general financial condition of the railroad, not just the condition of the line to be abandoned, may be a factor, depending on the circumstances of the case; *Georgia Northern Ry. Co. Abandonment*, 354 I.C.C. 436, 444 (1976). No standard has been set for what would constitute insufferable losses on a line. Again, the losses sustained will be balanced against other considerations; *Gulf, Mobile & Ohio R. Co. Abandonment*, 354 I.C.C. 422, 430 (1973).

18. 49 U.S.C. § 10904(a)(1) (1979).

19. 49 U.S.C. § 10904(d) (1979).

20. 49 U.S.C. § 10904(c)(2) (1979).

21. 49 U.S.C. § 10905(a)(1) (1979) defines "avoidable cost" as all expenses incurred over that line that would not be incurred if the line were abandoned.

22. 49 U.S.C. § 10905(b) (1979).

23. H.R. Doc. No. 96-78, 96th Cong., 1st Sess. 43 (1979).

costs of the administrative proceeding itself.²⁴

The most common complaints from the railroads themselves centered around "cost" considerations, lack of standards, and length of proceedings. The railroads complain that the Commission refuses to recognize return on investment in branchline assets and the expense of removing weight restrictions in order to permit heavier cars to use branchlines when computing "costs" of operations. Also, the Commission recognizes only "historical" maintenance costs which do not reflect the current economic problems of the industry. Another problem is that the Commission has developed no objective standards for determining what constitutes "serious, adverse impact on rural and community development" which is required to be considered in evaluating the proposed abandonment's consistency with the "public convenience and necessity."

Finally, the industry is unhappy with the length of time the Commission consumes in deciding abandonment cases. In the case of one railroad, reported in June of 1979, thirty-seven applications, concerning a total of 1,185 miles, have been filed since the current law went into effect on February 6, 1976. Of these applications, seventeen have been decided and twenty are still pending decision. The average time for the decided cases was 16.8 months with the average age of the pending applications being 28.4 months. The longest time taken to decide a case was thirty-one months, while the shortest time was two months (an application which involved 1.13 miles of line). The oldest pending application of those filed since February 6, 1976, was thirty-three months.²⁵

III. DOT STUDY

In October, 1978, pursuant to directives of the Railroad Revitalization and Regulatory Reform (4R) Act of 1976,²⁶ the DOT published an exhaustive study of the rail industry's overall standing.²⁷ In this publication, the DOT reported the decline of the rail industry and identified its major causes. The DOT then went on to evaluate the effectiveness of the 4R Act in alleviating the financial plight of the rail industry. In the area of abandonment proceedings, the DOT found the ICC's disposition of applications had advanced from the prior practice of having proceedings last from two to three years (with a few going beyond four years) to the present status of handing down most decisions within fifteen months, with uncontested applications

24. *Id.* at 44.

25. *Proposed Railroad Deregulation: Hearings on S. 796 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 13-15 (1979) (statement by William H. Dempsey, President of the Association of American Railroads) [hereinafter cited as *Dempsey*].

26. 49 U.S.C. §§ 504, 901 (1979).

27. *DOT, Prospectus for Change*, *supra* note 4.

being decided within two months.²⁸

Though the actual time spent in the proceedings has decreased, there are still substantial legal and administrative costs associated with the abandonment process which can exceed \$50,000 per application.²⁹ Though 97% of the applications filed between 1960 and 1969 were approved, some railroads chose to avoid the time and considerable expense of pursuing an abandonment by the continuation of services at a loss on some small branchlines.³⁰ This practice, together with all the difficulties and costs involved in abandonments pursued, caused the DOT to state that "the primary test of the public convenience and necessity in abandonment proceedings should reflect the total benefits and costs—both public and private—of continued line operation in the context of other transportation alternatives."³¹

IV. DOT PROPOSALS

Finding the rail industry in such dire condition, the DOT developed three options for amending the current procedures for abandonment. These proposals reflect the idea of "maximum reliance on competitive market forces."³² The DOT also recommended liberalizing entry and rate provisions for motor carriers so that these carriers could provide service to markets losing rail service. However, the Secretary of Transportation did stress the fact that rail legislation should take precedence in light of the present, desperate need of the nation's railroads.³³

The three options for reform offer decreasing degrees of relaxation of the current abandonment procedures. "Option A" provides for a three-year transition period during which a railroad could abandon a line on 240-days notice to the public. During that three-year period, the rail carrier seeking an abandonment would be required to accept a subsidy offer which would cover the full costs of operation and maintenance of the line, including a rate of return sufficient to attract investment capital. The opportunity for ICC or commercial arbitration would be given to either party to determine the adequacy of the subsidy offer. Five years after its enactment, "Option A" would allow abandonment simply on 240-days notice. A carrier in this position could not be required to continue service even if a subsidy were available. However, the railroad would be required to offer

28. A major factor in the length of the abandonment proceedings is the requirement that an environmental impact statement be prepared and filed.

29. DOT, *Prospectus for Change*, *supra* note 4, at 51.

30. *Id.*

31. *Id.* at 128.

32. Department of Transportation, *Transportation Regulatory Reform, Rail Regulatory Reform Options*, Tab B, 1 [hereinafter cited as *DOT Reform Options*].

33. Letter from Brock Adams to James E. Carter (Dec. 15, 1978).

the line for sale (at the line's net liquidation value) to any financially responsible person proposing to use the line for rail transportation.³⁴

The second possibility for reform, "Option B", contains substantially the same provisions of "Option A" with two exceptions. First, the current abandonment procedures would remain in effect for three years with "Option A" then going into effect. The other deviation from the pure "Option A" is that at the end of the "transition period" the railroad could sell the line for its net liquidation value or be required by the ICC to continue to operate if a full subsidy should be provided.³⁵

Under "Option C", the legislation would provide the basic structure of either "Option A" or "Option B" but would allow the provisions of either to be available only to rail lines that are not generating revenues sufficient to cover the "full cost" of providing the rail service.³⁶

The DOT based these proposals on the following four premises:

There is a fundamental crisis in the rail industry that could paralyze the system by 1985;

This crisis can and should be solved in the private sector;

Absent changes in government and private sector policies, the Federal Government could be forced to spend at least \$20 billion to perpetuate an inefficient system; and

Deregulation is the essential first step in a private sector solution.³⁷

The position of the DOT is that complex and extensive regulation of the rail industry has stifled the railroads' ability to keep up with modern developments of the market. By deregulating the industry and allowing risks to be taken and rewarded, better management will be attracted to the industry.³⁸

V. ADMINISTRATION'S PROPOSALS

On March 27, 1979, the Administration's proposals for regulatory reform of the rail industry were introduced in the United States Senate as S. 796.³⁹ These proposals, with some minor changes, were then introduced in the United States House of Representatives on June 21, 1979, as H.R. 4570.⁴⁰ Under H.R. 4570, several significant changes in the present abandonment procedures are proposed. First, the requirement that the ICC consider the "serious, adverse impact on rural and community development" in determining public convenience and necessity is repealed.⁴¹ Instead, the Commission is required to conclude that the proposed

34. *DOT Reform Options*, *supra* note 32, at 24.

35. *Id.* at 25 (though it is not said who will provide this subsidy).

36. *Id.* at 26.

37. *Id.* Tab A, at 1.

38. *Id.* at 3.

39. S. 796, 96th Cong., 1st Sess., 125 CONG. REC. § 3498 (1979).

40. H.R. 4570, 96th Cong., 1st Sess. (1979).

41. *Id.* § 132(a)(1).

abandonment is consistent with the public convenience and necessity if: (1) no objection is filed to the abandonment application; (2) the railroad shows the revenues attributable to the line do not meet or exceed the "full cost"⁴² of operation of that line; (3) the Commission finds the benefit to the railroad (including the benefit of the ability to put that capital to other use) exceeds the detriment to the objecting party.⁴³

A new section is proposed that requires the railroad applying for abandonment to prove public convenience and necessity only if an objection is filed. However, if the application is one approved by the DOT,⁴⁴ that application would be approved unless the objecting party could prove the detriment exceeds the transportation benefits as determined by the Secretary of Transportation.⁴⁵ Strict time limits for issuing a decision on an abandonment application are also suggested. If no objection is made within thirty days after the filing of the application, the Commission would be required to issue a certificate approving the abandonment immediately.⁴⁶ If an objection is made, any investigation must be completed within 120 days from the last date on which an objection could have been filed. If the investigation were not to be completed in that time, the application would be approved.⁴⁷

The current section pertaining to offers of financial assistance⁴⁸ would be significantly changed by those proposals. Any subsidy offer would have to be equal to the difference between revenues attributable to the line and the "full cost" of continuing service.⁴⁹ Binding arbitration would be available to reach an agreement on the amount of the subsidy if either party wished it.⁵⁰ A provision for offers of purchase by a financially responsible person or government entity is also included. The purchase price would have to be equal to or greater than the lesser of the fair market value of the line when providing transportation, or the fair market value of the line when used for purposes other than transportation.⁵¹ Binding arbitration would also be available upon request of either party to settle a dispute over purchase price.⁵²

42. "Full cost"—the avoidable cost of providing rail freight transportation on a line, plus an adequate return on capital attributable to the line. *Id.* § 132(c)(1).

43. *Id.* § 132(a)(2).

44. Such approved consolidated abandonment proposals are provided under 49 U.S.C. § 1654(a)-(d) (1979).

45. H.R. 4570, *supra* note 40, § 132(b)(2).

46. *Id.* § 132(b)(4).

47. *Id.*

48. 49 U.S.C. § 10905 (1979).

49. H.R. 4570, *supra* note 40, § 132(c)(3).

50. *Id.*

51. *Id.*

52. *Id.*

The President's message to Congress concerning the proposed amendments stresses the goal of promoting more competition in the nation's entire transportation system. The President sees a major cause of the decline of the rail industry as being the restraint on better management and efficient pricing due to over-regulation by government. Other causes include the increase in the share of freight carried by unregulated trucks and barges, rail's inability to adapt to changing freight patterns, and the insufficient increase in labor productivity as compared to the rest of the economy.⁵³ The President seeks to set up, among other things, new guidelines for ICC approval of abandonment applications. These proposals would ensure that the railroads are not forced to continue to operate money-losing lines while allowing shippers, States, or communities to maintain service by subsidy or purchase.⁵⁴

VI. AAR PROPOSALS

The Association of American Railroads (AAR) takes the position that, if the rail industry is to continue as a viable business, it must be allowed to operate as a business. Therefore, the industry should be given the opportunity to abandon lines which carry little traffic and/or operate at a loss, much as one of its shippers has the freedom to eliminate an unprofitable product line. The AAR points to a 1976 DOT study which indicated that more than 25,000 miles of trackage (about 18% of trackage outside the Northeast) was "potentially light density line."⁵⁵ The DOT estimated the losses on those lines at about \$150 million per year. However, the AAR argues these estimated losses were low, claiming the DOT did not consider the opportunity costs associated with the investment in such lines as well as their potential rehabilitation.⁵⁶ The AAR sees no sound public policy reason for forcing the railroads to incur these costs. Abandonment is considered an important method for reducing those losses and returning the rail industry to an economically viable position.⁵⁷

While conceding the Administration's proposed amendments would greatly improve the current law, the AAR's position is that they are inadequate to alleviate the current economic plight of the railroads. The railroads say the cost and time necessary to pursue an abandonment are far too high to justify the elimination of marginal or unprofitable business.⁵⁸ Therefore, the AAR has its own reform proposals.

The AAR would have Congress eliminate prior Commission approval if

53. H.R. Doc. No. 96-78, *supra* note 23, at 1.

54. *Id.* at 2.

55. AAR, *Deregulation: Necessity*, *supra* note 5, at 18.

56. Dempsey, *supra* note 23, at 13.

57. *Id.*

58. *Id.* at 19.

120-days public notice were given on any proposed abandonment. The effective date of the abandonment could be delayed an additional three months if a public body determined the public interest required continuation of service. This delay would allow for negotiation of a subsidy. Also, the AAR wants the legislation to provide that the railroads be reimbursed for all losses incurred by operations continued beyond the end of the 120-day notice period.⁵⁹ These proposals would allow railroads to eliminate many of the lines that are causing a large part of the current deficit.

VII. LABOR'S REACTION

The labor unions in the rail industry say the Administration's proposed amendments are "contrary to the future transportation needs of the nation and hostile to the interests of shippers, railroad employees, and the railroad industry itself."⁶⁰ Labor sees the public convenience and necessity as being replaced by profitability of a rail line as the new standard for abandonment proceedings. Under the proposed reforms, the ICC would approve an abandonment if the line in question were losing money. Labor points out that, as yet, there are no adequate guidelines to indicate how much revenue and expense can be attributed to any given line.⁶¹ The various proposals for reform are seen to have the effect of abolishing jobs at a time when the Federal Government is spending large sums of money to try to create jobs in the private sector. If freer abandonments were available, railroads might abandon all of their branchlines, turning large shares of business over to the motor carriers.⁶² Such actions would result in only a few major, high-density lines throughout the nation and would result in a tremendous loss of jobs. Therefore, any savings to the rail industry would be at the expense of labor.⁶³

Labor would like to see a more cautious approach to deregulation, claiming the current act is still too new to be able to discern its effectiveness in the industry. It also believes any abandonment would have a high impact on shippers and communities and that little attention has been paid to the five to ten year impact of an abandonment on such interests. Railroads,

59. AAR, *Deregulation: Necessity*, *supra* note 5, at 12.

60. *Proposed Railroad Deregulation: Hearings on S. 796 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 3 (1979) (statement of William G. Mahone on behalf of the Railway Labor Executives' Association) [hereinafter cited as *Mahoney*].

61. *Id.* at 8.

62. Remarks of J.J. Otero, Vice President of the Brotherhood of Railway and Airline Clerks (BRAC) at 6.

63. *Proposed Railroad Deregulation: Hearings on H.R. 4570 Before the Subcomm. on Transportation and Commerce of the House of Representatives Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 5 (1979) (statement of Robert D. Fritz on behalf of the Brotherhood of Railway and Airline Clerks).

because of their role in the development of this nation, have been—and still are—charged with the public interest. One spokesman for labor, in appealing for caution, said “[w]hen a railroad line is abandoned and the right-of-way sold, that line is gone forever.”⁶⁴ Labor sees the rail industry as too important to the continued growth of this nation to allow large sections of the system to disappear.

VIII. SENATE PROPOSALS

After the Administration’s proposals were submitted to the Senate as S. 796,⁶⁵ committee hearings gave interested parties a chance to voice their views on the matter of rail regulatory reform. Testimony in these hearings convinced the Senate Committee on Commerce, Science and Transportation that the proposed legislation was not the best means of reform.⁶⁶ The Committee drafted S. 1946,⁶⁷ its own proposal for reform. Senator Cannon introduced S. 1946 to the Senate on October 29, 1979, with the statement that the bill “is to provide the railroads with more pricing flexibility while protecting captive shippers.”⁶⁸

The proposed legislation now before the Senate contains a Railroad Transportation Policy which removes rail carriers from the National Transportation Policy provisions.⁶⁹ The new policy provides that the ICC, in regulating rail carriers, shall consider the following as being in the public interest:

- (1) development and maintenance of a healthy, efficient freight transportation system, in the private sector, in which various modes of transportation are subject to impartial regulation;
- (2) maximum reliance on competitive market forces and on actual and potential competition among all transportation services at fair prices and to enable efficient and well-managed carriers to earn adequate profits and to attract capital;
- (3) avoidance of undue concentrations of market power;
- (4) reduction of regulatory barriers to entry into and exit from the industry;
- (5) maintenance of fair wages and working conditions;
- (6) operation of transportation facilities and equipment without detriment to the public health and safety;
- (7) development and maintenance of a transportation system responsive

64. *Mahoney, supra* note 60, at 8.

65. S. 796, *supra* note 39.

66. S. 1946, 96th Cong., 1st Sess., 125 CONG. REC. S 15309 (1979) (remarks of Sen. Cannon).

67. *Id.*

68. *Id.*

69. 49 U.S.C. § 10101(a) (1979).

to the needs of the public, in which regulatory decisions are reached fairly and expeditiously;

(8) encouragement of the establishment and maintenance of reasonable rates for transportation without undue discrimination or unfair or destructive competitive practices;

(9) cooperation with each State and the officials of each State on transportation matters;

(10) elimination of noncompensatory rates for rail transportation; and

(11) encouragement and promotion of energy conservation.⁷⁰

In the areas of abandonments, S. 1946 does not change the standards by which the ICC would decide whether or not to grant an abandonment. S. 1946 rejects the administration's proposal to repeal the consideration of "serious, adverse impact on rural and community development"⁷¹ in finding public convenience and necessity. The burden of proving that the present or future public convenience and necessity require or permit abandonment remains with the one applying for the abandonment.⁷² The reforms are designed to reduce the time spent processing such cases and to extend the Bankruptcy Act of 1978⁷³ to bankrupt railroads.

The efforts to streamline the current system reach all stages of an abandonment proceeding. The current Act requires the applicant to file and give notice to the Commission at least sixty days prior to the effective date of the proposed abandonment.⁷⁴ S. 1946 repeals that sixty-day period.⁷⁵ However, the applicant would be required to satisfy the notice requirements "within the most recent 30 days prior to the date the application is filed."⁷⁶ If no protest to the abandonment is filed within forty-five days after the application is filed, the abandonment shall be found to be consistent with the public convenience and necessity and will occur within seventy-five days from the date of the application.⁷⁷

If a protest should be filed within the thirty-day period, the Commission must decide within forty-five days from the application filing date whether to conduct an investigation.⁷⁸ If no investigation is held, the Commission will decide whether the abandonment is consistent with the public convenience and necessity within seventy-five days from the date of filing, using the materials initially submitted by the parties.⁷⁹ If the Commission decides to

70. S. 1946, *supra* note 66, § 2.

71. 49 U.S.C. § 10903(a) (1979).

72. S. 1946, *supra* note 66, § 202(b)(4).

73. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (to be codified principally in 11 U.S.C. §§ 101-151326 and in scattered sections of 28 U.S.C.).

74. 49 U.S.C. § 10904(a)(1) (1979).

75. S. 1946, *supra* note 66, § 202(b)(1)(E).

76. *Id.*, § 202(b)(1)(A).

77. *Id.*

78. *Id.*, § 202(b)(3).

79. *Id.*

issue a certificate of public convenience and necessity, the abandonment will occur within 120 days from the date of the application.⁸⁰

Should the Commission decide to hold an investigation, that investigation must be completed within 135 days and the initial decision must be made within 165 days from the date of the application. If an appeal is taken, a final decision must be issued within 255 days of the date of the application.⁸¹

The proposed legislation provides for the purchase or subsidy of a line, but where the Administration's proposals suggested binding arbitration to settle disputes as to purchase price or subsidy offer, S. 1946 provides that if a disagreement arises either party may request that the Commission establish the conditions and amount of compensation. The decision of the Commission is binding on both parties but the offeror may withdraw his offer within ten days of the decision. The railroad, however, is bound by the Commission's decision.⁸²

Under this legislation, the Bankruptcy Act of 1978⁸³ will apply to any carrier in bankruptcy, whether the railroad was in bankruptcy when the Act was passed or not.⁸⁴ Therefore, if an abandonment has been approved by a bankruptcy court, the Commission is not required to hold a separate hearing of its own but may participate in the deliberations of the bankruptcy court.⁸⁵ Also, if a railroad is in bankruptcy or an application for abandonment is one approved by the Secretary of Transportation, the Commission may waive the requirement of having a system diagram on file at least four months prior to the abandonment application.⁸⁶

These proposals, while falling short of what the Administration requested, do significantly curtail the length of abandonment proceedings and provide some relief for railroads in bankruptcy.

IX. CONCLUSION

It has become increasingly clear that the rail industry is in a less than desirable economic position. The rail industry, the Department of Transportation, and the present Administration all agree that significant regulatory reform is necessary to put railroads back on their feet financially. Such reforms must be brought about in the near future to avoid a crisis situation in which massive subsidies by the Federal Government will be necessary to

80. *Id.*

81. *Id.*

82. *Id.*, § 202(c).

83. *Supra* note 73.

84. S. 1946, *supra* note 66, § 202(a)(2).

85. *Section-by-section Analysis, Railroad Transportation Policy Act of 1979*, 125 CONG. REC. S 15314, S 15318 (1979).

86. S. 1946, *supra* note 66, § 202(b)(5).

maintain a rail system adequate to meet this nation's transportation needs. While fears of the adverse effects of abandonment are valid, there is little evidence available to show what the exact consequences would be.

In trying to determine the post-abandonment community impacts, several studies have been made on the subject. However, for the most part, no serious adverse consequences were found. In many of the communities observed, no discernible effect of abandonment of rail service was found and a few positive developments were discernible.⁸⁷ In its analysis of the Administration's proposed amendments, the DOT⁸⁸ did not consider a serious, adverse impact to be either very probable or particularly determinative. It pointed out that abandonment of rail service is usually the effect of declining traffic and decrease in demand for service rather than the cause of that decline. The major concern of the DOT was that the railroads no longer be required to "carry the burden of subsidizing uneconomic service"⁸⁹ Shippers and communities most likely to be affected by an abandonment are usually served by an extensive highway network so that motor carriage could either replace the lost rail service or could serve to transport freight to consolidated rail terminals. If the need for rail service is seen as essential to the area, the shipper or a local government entity could offer a subsidy or purchase which, if found reasonable, the carrier would be required to accept.⁹⁰

Any effect on labor would presumably be the same under the proposed amendments as under current law. The proposals before Congress continue the present statutory employee protections. An employee adversely affected by an abandonment is presently provided with up to six years of protection. If the employee loses his job, he is given a separation allowance in an amount up to twelve months' pay. If he is reassigned to a position at a lesser pay, he is given a displacement allowance based on his average earnings for the twelve-month period immediately prior to his reassignment.⁹¹

The DOT has stated the rail industry is in such poor shape that, absent significant regulatory reform, maintenance of an adequate rail system in the future will only be accomplished through massive government subsidy or through nationalization of the rail system. Both of these alternatives would be costly to the taxpayer. The DOT summarized its views on regulatory reform when it stated that "deregulation would represent an important step toward the ultimate goal of permitting railroads to function in a competitive

87. *Dempsey, supra* note 25, Appendix (discussion of several post-abandonment studies).

88. Department of Transportation, *Frequently Asked Questions About Railroad Regulatory Reform Legislation*, 125 CONG. REC. S 3515 (1979).

89. *Id.*

90. *Id.*

91. *Id.* at S 3516.

environment where success—or failure—is based on performance, rather than circumstances beyond the control of management.’’⁹² Unless this nation’s taxpayers are willing to spend large amounts of tax dollars to perpetuate a deteriorating system, some reform in regulatory policies is necessary. While it would be unrealistic to expect any proposal to completely satisfy all interested parties, the Administration’s proposals seem to fall into a middle ground between the stifling over-regulation of the past and the possibility of the destructive results of a total absence of regulation in an essential component of our national transportation system.

The Senate’s proposals fall short of the major reforms requested by the Administration. The burden of proving an abandonment is consistent with the public convenience and necessity remains with the rail carrier. The Commission will have to continue on a case-by-case determination of the merits of abandonment of lines relying on past decisions and the guidelines of the new Railroad Transportation Policy.

However, while failing to ease or better define the burden of proof of the railroads, S. 1946 does statutorily restrict the amount of time that can be consumed in abandonment proceedings. Under the proposed bill, all decisions will be handed down in less than one year’s time. This change may well encourage railroads with marginal or unprofitable lines to pursue an abandonment where under current law a carrier might prefer to absorb the loss rather than face a rather lengthy and expensive process.

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92. AAR, *Deregulation: Necessity*, *supra* note 5, at 20.

