

FINANCE DOCKET No. 20943

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ABANDONMENT BETWEEN DURANGO AND SILVERTON, COLO.

Decided April 23, 1962

Present and future public convenience and necessity not shown to permit abandonment by the Denver and Rio Grande Western Railroad Company of that portion of its narrow gage line of railroad between Durango and Silverton, Colo. Application denied.

T. A. White and *Ernest Porter* for applicant.

Edwin R. Lundborg and *John J. Conway* for the Colorado Public Utilities Commission and the State of Colorado.

William J. Donlon and *Herbert M. Boyle* for railway labor organization, protestants.

R. Franklin McKelvey, *Lewis M. Perkins*, *Carl A. Helfin*, *H. M. Valentine*, *F. Wayne Laros*, *Haworth B. Tanner*, and *Arthur M. Lorenson* for other protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, McPHERSON, AND BUSH

TUGGLE, Commissioner:

Exceptions to the report, certificate, and order recommended by the examiner were filed by applicant, and a number of protestants¹ and the Colorado Public Utilities Commission replied.

On December 21, 1959, the Denver and Rio Grande Western Railroad Company, a common carrier by railroad subject to part I of the Interstate Commerce Act, filed an application under section 1(18) of the act for authority to abandon that portion of its narrow gage line of railroad, hereinafter called the Silverton branch or the line, extending from engineer's survey station 3661-09 (milepost 452.25) in Durango, Colo., to engineer's survey station 2362-90 (milepost 497.13) at Silverton, Colo., a total distance of 45.6 miles.

¹ Board of County Commissioners of San Juan County, Colo., Board of County Commissioners of La Plata County, Colo., town of Silverton, Colo., Durango Chamber of Commerce, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Locomotive Engineers, Brotherhood of Maintenance of Way Employees, Switchers Union of North America, Silverton Chamber of Commerce, San Juan Wool Growers Association, La Platte County Cattlemen's Association, Valley Packing Company, Swanson's Groceries, Farmington Lumber and Hardware Company, Willis Trucking Company, Imperial Hotel, Tom Jacques, William Girard, Raymond Farmer, Chuck Thompson, Jr., Jake Brown, Ross C. Beaver, Norman Wells, Wilford Wheeler, Brotherhood of Railway Clerks, State Mineral Resources Board of Colorado.

At the oral hearing held herein, the application was opposed by the Colorado Public Utilities Commission, protestants listed in footnote 1, shippers, and other civic and labor groups. Briefs were filed and the report, order and certificate issued by the examiner recommended denial of the application for abandonment of the Silverton branch and grant of a certificate authorizing abandonment of operations over the line from October 1 to June 1 of each year. His report sets forth a detailed description of the line involved, its history, construction, and pertinent facts pertaining to the abandonment. These facts are adopted as our own and will be restated only to the extent necessary for clarity in discussing the issues raised in the exceptions and replies. Oral argument has been granted and heard. Our conclusions differ in certain respects from those recommended by the examiner.

The examiner found that the passenger service offered on the line cannot be obtained by other transportation media; that each year, since 1951, it has resulted in substantial net profits to applicant's system; and that there is a continuing and substantial need for passenger service during the summer months. He further found that the demand for freight service has not been substantial, although the volume of freight traffic handled has increased from year to year during the past 3 years; that this lack of demand has been influenced, in part, by applicant's failure to provide the most adequate and convenient service during summer months, and by restrictions imposed during other periods of the year; that despite the need for service evidenced by miners, sheepherders, and the electric generating plant located in Tacoma, Colo., a need for year-round freight service had not been established; that the present condition of the line is adequate for the seasonal service performed; and that there is no justification for applicant to expend the substantial sums that would be required in order to rehabilitate the line for year-round service. In the absence of a need for either passenger or freight service, other than during the summer months, the examiner found that an undue burden would be imposed upon interstate and foreign commerce by requiring applicant to render a year-round service, and concluded that the present and future public convenience and necessity permit the abandonment of operation of the line during the period from October 1 to June 1 of each year, but that the public convenience and necessity does not permit abandonment of the line.

Applicant excepts to the inference of the examiner that the public convenience and necessity will require service to the electric plant in Tacoma, Colo., and to sheep raisers in the area, because of their minimal use of the line in the past, or that the abandonment would cause a motor carrier at Silverton to cease operations. It contends that no consideration should be given to the licenses granted for

§12 I.C.C.

the use of motorcars on the line, or to tourist patronage of the line from June through September, which it characterizes as unrelated private agreements and intrastate traffic, respectively. It states that the failure to consider evidence of a contract of sale, pertaining to the line, which if executed would permit continued operations for passenger service, and the examiner's characterization of the mode of transportation to be undertaken by the purchaser as private carriage, constitute error. Applicant takes the position that the public convenience and necessity permit the abandonment, although it concedes that operation of the line does not constitute a burden upon interstate and foreign commerce, and finally that the suspension of service during the winter of each year is lawful.

The reply of the Colorado Public Utilities Commission and that of the other protestants take the position that the report, certificate, and order recommended by the examiner should be sustained. In view of our ultimate conclusion, it is not considered necessary to set forth in detail their various contentions, all of which have been considered in disposing of the issues.

No regular year-round service has been provided over the line since September 1953. From early June to late September of each year, herein referred to as the summer months, applicant operates a mixed train, consisting of 10 passenger coaches and 2 freight cars, triweekly during that period when tourist demand for the service is low, and daily when sufficient demand is present. Applicant uses all its available narrow gage passenger equipment during the summer months, but demand for the service during certain periods exceeds available space and passengers are occasionally turned away. Two additional cars, which are currently used for road service, could be renovated to handle excess passengers but, because the engine now used is taxed to its maximum power, additional cars would require a decrease in the amount of freight carried and curtailment of freight service for which some need has been shown.

The passengers using the train are composed primarily of tourists and sightseers who desire to ride on a vintage narrow gage train pulled by an old-time steam locomotive and enjoy the scenic beauty of the area between Durango and Silverton.

Freight originating on the line or destined to points on the line, from or to points on standard gage lines, must be physically transloaded from or to standard equipment at Alamosa, Colo., a point where the narrow gage line of applicant connects with its standard gage. Although no regular service is provided after the close of the summer months, applicant claims to hold itself out to transport freight whenever a shipment of 10 or more carloads is tendered. During that part of the year, when the train does not operate because of these load restrictions, substituted motor for rail service is offered.

§12 I.C.C.

Operation of the line has shown an increase in both passenger and freight revenue during the years 1957, 1958, and 1959, resulting in profits during each of these periods. Freight revenues of \$1,997, \$2,410, and \$5,499 and passenger revenues of \$86,422, \$110,479, and \$160,784 have been generated during the respective periods, resulting in earnings to the system of \$1,217, \$56,823, and \$85,736. For the first 9 months of 1960, which constitutes the entire operation for that year, total branch line revenue was \$168,216 resulting in a system profit of \$94,315.

Applicant has granted licenses for the use of private motorcars over the subject trackage to Gaddis Mining Company, Ah! Wilderness Guest Ranch, Inc., and Garland Neel, in order to serve their respective enterprises when rail service is not available, and to the Western Colorado Power Company to use the track as a means of access to power lines which are in need of repair, apparently to forestall complaints which might arise from lack of operations during the winter months. There is no indication, however, that operations conducted under the licenses were interstate in character or that equal facilities have been denied to other shippers on the line. Nor was any evidence submitted showing the income derived from the licenses or the extent to which the line was used under such rights. Under the circumstances, such use of applicant's tracks is of little significance in finding whether the present or future public convenience and necessity permit abandonment of the Silverton branch.

The volume of freight transported by applicant over the Silverton branch has shown a steady increase in recent years. During 1957, 1958, and 1959 there were 277 tons, 371 tons, and 444 tons of freight carried. The only shipments that were not transported on the mixed train during the summer months of those years were shipments of less-than-carload quantities, which were moved by a motor common carrier subsidiary of applicant in substituted motor for rail service. During these periods 18, 17, and 13 tons were moved in this manner. In addition to the freight traffic currently available to applicant, increased freight, in the form of sheep and ore, may become available to the line in the future. Shepherders evidenced an interest in resuming use of the branch for the movement of their flocks between their spring and fall ranges rather than trailing them or moving them by motor vehicle. However, the resumption of sheep movements may depend upon the rehabilitation of facilities for loading and unloading and appropriate schedules of movement.

The movement of ore, the reason for the original construction of the line, has materially declined in recent years, and a smelter in Durango, which was the principal consignee of the ore transported, has been closed. Interest recently has grown in reworking the mines

812 I.C.C.

in the area as well as in the establishment of new operations in heretofore untapped mineral veins. Because of the nature of the terrain surrounding the localities in which it is believed mining can now be profitably undertaken, the only means of transporting ore or concentrates from the mines to the smelter planned to be constructed would be by mule or railroad. The former method of transportation would prove too slow and the cost so high as to preclude successful mining operations from being undertaken. Preliminary surveys of the mineral resources, investment in mining claims and solicitation of funds for the construction of a smelter have been made. There is no indication, however, when operations will commence.

In addition, a substantial amount of harvestable timber is available in the area but, like the ore hoped to be recovered, the operation could not be profitably undertaken without rail facilities.

Some use of the freight operations is made by local merchants and by a carrier who receives coal from the railroad and delivers it to the ultimate consumer. Adequate substitute service is generally available to the merchants and the consumers of the coal.

In view of the interest in the use of the branch by sheepherders and miners, and the possibility that substantial amounts of timber may move over the line, it appears that increased freight revenues will accrue to the branch. Although the amounts of any increases in future traffic are speculative, an increased traffic potential exists, and any realization thereof will serve to increase applicant's income from the branch, which, as previously noted, is operated at a substantial profit.

As indicated, primary use of the line is made by tourists to enjoy the ride on one of the last narrow-gage passenger railroads in North America. Although substantial profit is realized on this service, applicant classifies it as an intrastate operation which an interstate railroad should not be required to perform. Applicant has entered into an agreement to sell the line to the Durango-Silverton Railroad Company, a corporation organized to continue the passenger service on the line, if the abandonment sought herein is authorized. The new company does not desire to undertake the transportation of freight and would not purchase the line if it were required to conduct interstate operations.

Whether the passengers using the line are to be classified as interstate or intrastate traffic is of no consequence in this proceeding since the sole test prescribed for proceedings of this nature is whether the abandonment would be permitted by the present or future public convenience and necessity. In determining whether it is, we must consider the needs of both intrastate and interstate commerce. *Colorado v. United States*, 271 U.S. 153. In addition to the freight moved
§12 I.C.C.

over the line, some of which is in interstate commerce, there is a substantial need for the passenger service provided by applicant between Durango and Silverton. We must, therefore, conclude that the present and future public convenience and necessity do not permit of the abandonment sought herein. As indicated, the line is contributing a substantial profit to applicant's system and denial of the application for abandonment will not constitute a burden on interstate or foreign commerce. Under the circumstances, there was no need for the examiner to seriously consider the proposal by applicant to sell the line to a noncarrier who would perform only the intrastate passenger service now performed by applicant.

Applicant's policy of operating the Silverton branch only during the period from June 1 to October 1 of each year was adopted because the line is subject to damage from snow and landslides during the winter months and operations on a year-round basis would entail substantial additional expenditures without meeting any apparent public need. Applicant has not sought authority for partial abandonment, as recommended by the examiner, and whether such should be permitted is not properly for determination in this proceeding. Under the circumstances, and in the absence of any complaints, we find no reason to disturb applicant's policy in this regard.

It is our conclusion that the Silverton branch serves a distinct public need and that, in view of the substantial use made of the line and the profits accruing therefrom, abandonment of the line is not warranted.

We find that the present and future public convenience and necessity are not shown to permit abandonment by the Denver and Rio Grande Western Railroad Company of its Silverton branch line of railroad extending between Silverton and Durango, Colo., described herein, and that the application should be denied.

An appropriate order will be entered.

COMMISSIONER BUSH concurs in the result.

312 I.C.C.