

FINANCE DOCKET NO. 29328¹

**BURLINGTON NORTHERN, INC.—PURCHASE (PORTION)—
CHICAGO, MILWAUKEE, ST. PAUL, AND PACIFIC
RAILROAD COMPANY (RICHARD B. OGILVIE, TRUSTEE)**

Decided August 21, 1980

This decision involves applications of four entities to purchase selected properties of the bankrupt Chicago, Milwaukee, St. Paul, and Pacific Railroad Company (Milwaukee) located in the States of Washington, Montana, Idaho, North Dakota, South Dakota, Minnesota, and Wisconsin, under the Milwaukee Railroad Restructuring Act. We are approving the proposed sales of certain Milwaukee properties to Burlington Northern, Inc. (BN) and the Union Pacific Railroad Company and Oregon-Washington Railroad & Navigation Company (collectively UP). We are taking no action on the competing applications of the Montana Railway Corporation (MRC) and Bennett Lumber Products, Inc. (Bennett).

Fritz R. Kahn and Ellen A. Efros for applicant Bennett Lumber Products, Inc.

Frank S. Farrell and Louis A. Harris for applicant Burlington Northern, Inc.

Raymond W. Brault and Terry C. Whiteside for applicant Montana Railway Corporation.

William P. Higgins, John J. Connor, and Joseph D. Anthofer for applicants Union Pacific Railroad Company and Oregon-Washington Railroad and Navigation Company.

Delon E. Coker and James E. Armstrong for the United States Department of Defense.

Edward J. Schack, Special Counsel, Interstate Commerce Commission.

James C. Wiles, Jacob P. Billing, and Leo S. Fisher for the State of South Dakota.

Jeanne H. Sisson for Champion International Corporation.

¹This decision embraces Finance Docket No. 29303 (Sub-No. 1), Montana Railway Corporation—Purchase (Portion)—Chicago, Milwaukee, St. Paul, and Pacific Railroad Company (Richard B. Ogilvie, Trustee), Finance Docket No. 29370, Union Pacific Railroad Company and Oregon-Washington Railroad & Navigation Company—Purchase (Portion)—Chicago, Milwaukee, St. Paul, and Pacific Railroad Company (Richard B. Ogilvie, Trustee), and Finance Docket No. 29402, Bennett Lumber Products, Inc.—Purchase—Washington, Idaho and Montana Railway Company (Richard B. Ogilvie, Trustee).

M. Michael Monahan for Chicago Milwaukee Corporation and Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Edmund J. Kenny and James A. Vroman for the First National Bank of Chicago.

Daniel S. Kuntz for the North Dakota Public Service Commission.

Fritz R. Kahn and Ellen A. Efros for Pottlatch Corporation and St. Maries River Railroad Company.

Edward J. Hickey, Jr., and Thomas A. Woodley for the Railway Employees' Department.

George E. Tilley for Scott Paper Company.

John N. Kramer for Wisconsin River Transit Commission.

Fred H. Tolan for shipping interests supporting Burlington Northern, Inc.

DECISION

By THE COMMISSION:

INTRODUCTION

This proceeding, encompassing applications of four entities to acquire portions of the properties of the bankrupt Chicago, Milwaukee, St. Paul, and Pacific Railroad Company (Richard B. Ogilvie, trustee) has been consolidated because the applications are inconsistent with one another to some extent.

BN seeks to acquire about 400 miles of track and properties in Washington, Idaho, Montana, North Dakota, South Dakota, Minnesota, and Wisconsin. The properties are scattered through the seven States in about 30 parcels, and are located near BN lines. The proposed purchase would enable traffic on the Milwaukee lines to connect with the present BN system. The longest segment of track sought by BN is about 75 miles, and the shortest, less than 1 mile. BN has been providing service over these Milwaukee properties since March 1980, pursuant to a court order dated March 18, 1980.

Montana Railway Corporation (MRC), a nonfor-profit, noncarrier corporation, seeks to acquire over 1,200 miles of track and properties in Montana, Idaho, and Washington. This includes about 820 miles of main line trackage and about 382 miles of branch line trackage. Several of these branch lines are ones which are also sought by BN. MRC also seeks trackage rights over Milwaukee, BN, and UP at various points.

UP seeks to acquire about 100 miles of Milwaukee trackage located in Washington and Idaho, as well as certain terminal trackage in Washington. UP has operated two of the line segments sought in joint ownership with Milwaukee for many years. One line segment sought by UP is also

sought by MRC. UP has been providing interim service over the segments it seeks to acquire pursuant to a court order dated April 7, 1980.

Bennett seeks to acquire the 47-mile Washington, Idaho and Montana Railway (WI&M), a subsidiary of Milwaukee operating between Palouse, WA, and Bovill, ID. BN also seeks to acquire WI&M.

Most of the properties involved were included in our decision of January 29, 1980, in AB-7 (Sub-No. 86), *Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul, and Pacific Railroad—Abandonment—Portions of Pacific Coast Extension in MT, ID, WA, and OR*, in which we recommended that abandonment be authorized by the bankruptcy court, Judge Thomas McMillen presiding (court). We also recommended that actual abandonment be postponed until we and the court had considered a reorganization plan, and that sales and transfers of certain lines be considered.

The Milwaukee Railroad Restructuring Act (MRRRA), 45 U.S.C. 904 section 5(b), enables the court to authorize sales or transfers of lines of the Milwaukee only if we have approved the transaction (with or without modification or condition) or have not acted on the application for sale or transfer within the time prescribed by the court (not to exceed 180 days). These proceedings are conducted pursuant to our regulations set out at 49 CFR 1111.20 *et seq.*, *Acquisition Procedures for Lines of Railroads*, 360 I.C.C. 623 (1980), 45 F.R. 6107. The standard we apply in considering on a sale or transfer application under the MRRRA is whether or not the transaction is in the public interest.

The court directed us to act on BN's application within 90 days of acceptance of the application for consideration. The schedule for this consolidated proceeding has been based upon that 90-day deadline. Since we accepted the application for consideration on May 23, 1980, we must act on it by August 21, 1980.

APPLICATION OF BURLINGTON NORTHERN

Purchase of Milwaukee properties.—On March 10, 1980, the Milwaukee trustee executed a letter agreement with BN providing for the sale of the requested Milwaukee properties for \$21 million in cash. The majority of the Milwaukee parcels which BN seeks to purchase consist of station or terminal trackage and portions of branch lines contiguous to existing BN lines. The proposed purchase would also include approximately 57 miles of main line track.² A list of all the properties sought by BN is included as appendix A-1.

²These main line segments are Easton-Cedar Falls, WA; Warden-Othello, WA; and Butte-Newcomb, MT.

The bankruptcy court granted preliminary approval of this sale under section (5)(b)(3) of the MRRRA. At the same time, the court authorized BN to operate interim service over the lines it seeks to purchase.

In support of its application, BN claims that the \$21 million cash price will benefit the Milwaukee estate, as will traffic conditions accorded Milwaukee under BN's agreement with the trustee.

The shipping public and communities and customers on the segments proposed to be purchased will also benefit; BN claims service will be provided for many former customers of the Milwaukee who otherwise would be deprived of it. BN plans in some areas to offer better service than that provided by Milwaukee and to provide better single-line routes via BN to destinations on the BN system. BN will also offer more direct routings, shorter transit times, better control and tracing of shipments and increased opportunity for innovative service and rate proposals.

In addition, acquisition of the properties will permit BN to broaden its traffic and revenue base. BN anticipates that it will achieve substantial traffic benefits from the purchase of the properties, which produced more than 41,000 carloads in 1977, representing an estimated \$44 million in annual revenues.

BN's operating plan details the frequency of service it plans to offer over each segment. BN describes its proposal as unlikely to result in economies or savings to BN. However, because many of the Milwaukee properties are at points also on BN's system, service to those properties can be performed with minimal additional expense.

In its operating plan, BN has listed new connections which would be constructed between BN and Milwaukee facilities. Planned rehabilitation of the various segments, at a total estimated cost of \$13,742,778, is also described in the plan. That rehabilitation would bring all the segments BN seeks to purchase to at least FRA class I standards, and many segments to higher levels than that. No discontinuance of service, facilities, or line abandonments are planned as a result of the transaction.

BN claims that the transaction will have favorable effects upon both BN and former Milwaukee employees. BN employees would have additional work on existing jobs assignments, resulting from increased traffic levels. In addition, BN entered into the March 4, 1980 Labor Protective Agreement (March 4 agreement), along with other railroads involved in midwest rail restructuring. Under the terms of that agreement eligible BN employees will receive a monthly compensation guarantee. Employees of the Milwaukee and the WI&M will also benefit under the March 4 agreement; 88 former employees of these lines will continue their employment, and their Milwaukee service will be recognized in

determinations of seniority and benefits. These employees are also eligible for monthly compensation under the March 4 agreement.

Numerous parties, listed in appendix B-1, have expressed support for BN's proposed purchase. Most of them are shippers formerly served by Milwaukee and currently receiving interim service from BN. In general, they favor BN's application because they claim it not only would guarantee them continued service, but also would result in more reliable service, better transit times, and more adequate car supply. The Milwaukee trustee also submitted comments in favor of the sale to BN.

Opposition to the BN application focuses on several issues: the effect of the proposed purchase upon MRC's inconsistent application; BN's proposed purchase of the WI&M line; and the nature of some of the terms of BN's agreement with the Milwaukee trustee relating to the closing of the Miles City, MT gateway.

MRC and its supporters³ contest BN's application because it includes main line track and facilities which are also sought by MRC. The Montana parties argue that BN has selected only the most profitable segments of Milwaukee line for its proposal, and that other shippers not on these segments would be left without service if the sale to the BN is finalized (thus precluding a sale to MRC of the larger package of Milwaukee properties which it seeks). MRC also argues that BN's past abuses (in terms of rates and service), coupled with its lack of capacity to meet future demands for transporting natural resources should lead us to deny the application. More important, MRC strongly urges denial because the purchase would strengthen BN's already dominant position in the area. MRC is particularly concerned about coal traffic, and argues that the national interest would not be served by BN's continuing domination of line-haul transport of Montana-produced coal. The concentration of heavy tonnage on a single east-west line through southern Montana would cause disruption and other impacts upon communities adjacent to the line, it claims.

BN responds to the argument that its segmented purchase proposal will leave some shippers without any service by stating that more than 95 percent of all rail traffic formerly handled by the Milwaukee can be carried by BN and other purchasers. It claims that its current capacity is adequate for current traffic, and that it will be able to improve its facilities and enlarge capacity should traffic increases require.

We conclude that BN's proposed purchase should be approved. We have seriously considered the arguments offered in opposition; especially

³Supporters include Senator John Melcher; Senator Max Baucus; Congressman Ron Marlenee; Congressman Pat Williams; the ICC Office of Special Counsel; Mr. R. L. Pemberton, spokesman on behalf of present and former Milwaukee employees and on behalf of concerned citizens of Harlowton, MT; and other parties whose statements were submitted by the Montana Farmers' Union and MRC.

the charge that the sale of the line to BN would greatly strengthen an already dominant carrier which is the sole source of rail transportation for many shippers. However, we believe that significant transportation benefits will result from the BN purchase. Shipper who would otherwise lose rail service entirely will continue to receive it. Area shippers can be expected to receive better service as a result of the sale. The benefits include more reliable service, shorter transit times and better control and tracing of shipments. We also note that the sale will benefit the Milwaukee estate and will secure advantages for former employees of the Milwaukee as well. If we were to disapprove the BN application because of the arguments advanced by MRC we would be taking a risk that many former Milwaukee customers would receive no rail service whatsoever.

After examining MRC's application, we have concluded, as discussed below, that we do not now have enough information to either approve or disapprove it. To disapprove BN's application under these circumstances could expose shippers to a loss of all rail service; such action here would not be in the public interest.

Purchase of WI&M line.—Bennett strongly opposes BN's purchase of the WI&M, a subsidiary of the Milwaukee whose line is located between Palouse, WA, and Bovill, ID. Bennett argues that because BN is itself a major owner of timber concerns, BN would operate the line according to its own proprietary interests rather than in a manner responsive to the lumber producers with which it competes.⁴ In addition, the integration of the WI&M into the BN system would serve to strengthen BN's dominant position in the area, making it difficult for independent operators to compete with BN.

Bennett also has specific complaints related to the interim service now provided by BN. Bennett argues that BN has refused to handle special lumber cars (Thrall-door cars) designed and built for Bennett; that BN has declined to adopt the lumber rates to UP destinations (which Milwaukee had offered); and that a BN purchase would preclude shippers from routing traffic over UP.

Bennett urges that, if BN's application is approved, BN be compelled either to allow shippers to use private cars built to shippers' specifications or to provide similar equipment for those shippers. Bennett also seeks a condition requiring BN to honor the lumber rates to UP destinations in which Milwaukee had joined.

Governor John V. Evans of Idaho requests that serious consideration be given to any applications for purchase of the WI&M other than BN's. Should we approve the sale to BN, he requests a condition that service and rates be negotiated between shippers on the line and BN prior to finalization of the sale.

⁴Bennett itself seeks to purchase the WI&M. That application is discussed below.

Finally, two affected shippers filed comments in support of BN's purchase of the WI&M line. Scott Paper Company operates a chip plant on the St. Maries-Bovill Branch of the Milwaukee, and uses the WI&M to transport chips to its mill in Everett, WA. Latah County Grain Growers, Inc. is a grain cooperative located on the WI&M. Both organizations are familiar with BN service and want it continued.⁵

In response, BN denies Bennett's assertion that it would disfavor lumber producers because of its own timber interests. BN argues that Bennett's statement is completely unsupported and points to the fact that six lumber and plywood shippers filed statements in support of BN's purchase of the line. BN also states its willingness to utilize Bennett's Thrall-door cars.

BN further denies Bennett's allegation that BN ownership of the WI&M line would preclude availability of reduced, open-end incentive rates to intermountain territory. BN claims that WI&M divisions under these rates are satisfactory to BN, and that BN would not withdraw from the reduced rates on lumber routed via Bovill, ID, over the St. Maries River Railroad Company (SMRR) to Plummer, ID, and thence to the UP for intermountain destinations. Earlier in this proceeding, BN had argued that it would not offer these incentive rates on similar WI&M traffic routed through Palouse, WA (the western endpoint of the WI&M line). However, since BN would be able to route traffic through the eastern endpoint of the WI&M, the reduced lumber rates sought by Bennett would be compensatory after the purchase.

We are approving BN's purchase of the WI&M line. BN maintains that its rail operations and its natural resource activities are separate, and that its rail operations are not influenced by its Resources Division. In addition, BN's agreement to offer incentive lumber rates on WI&M traffic effectively disposes of Bennett's arguments relating to potentially higher WI&M lumber rates.⁶ Should Bennett's apprehensions be justified by any discriminatory activities on the part of BN, Bennett and other interested parties may seek relief from this Commission.

Closing of Miles City gateway.—Those provisions of the BN agreement with the trustee which require closing of the Miles City gateway are the most controversial feature of BN's application. The Miles City gateway was opened by a condition of the Northern Lines merger designed to offer a competitive alternative to the merged carrier.⁷

⁵Their comments, however, were filed before Bennett's application for purchase of the WI&M was submitted. Neither shipper commented upon the Bennett application.

⁶We will not condition our approval, as Governor Evans suggests, upon BN's negotiation of rates and service with shippers. We do not wish to delay the sales of Milwaukee property. In addition, negotiation of service and rates is properly a voluntary matter for both parties. Should a given rate or practice be unreasonable or discriminatory, interested persons may seek relief before this Commission.

⁷*Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228, 268 (1967).

BN's agreement contains the following provisions:

14. *C. All Other Future Unit Coal Train Movements.* Rates, routes and divisions with respect to all other future unit coal train movements shall be negotiated by the parties.

15. *No Miles City Gateway for Other Traffic.* Except as provided in paragraph 14 for interline unit coal train traffic, Miles City shall be closed as a gateway.

16. *Continuation of Traffic Conditions.* After acceptance of this offer Burlington Northern shall take no steps to reduce or eliminate the standard traffic conditions preserved for Milwaukee in paragraph 11.c of this offer, and shall take no steps to close the Miles City gateway as to traffic which will move via Miles City as provided in paragraph 14 of this offer. Likewise, after acceptance of this offer Sellers shall take no steps to open the Miles City gateway beyond the scope provided in paragraph 14, and will dismiss the Trustee's complaint in I.C.C. Docket No. 37332 F, *Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Richard B. Ogilvie, Trustee v. Burlington Northern Inc.*

The Office of Special Counsel (OSC), along with other parties, argues that these provisions would prevent Milwaukee's participation in all but certain excepted categories of traffic. OSC characterizes such a result as inconsistent with our policy of promoting competition.

Several civic parties, including Senator George McGovern, Senator David F. Durenberger, and Governor Albert H. Quie of Minnesota, are concerned that the controverted portions of the agreement will cause the remaining Milwaukee system to lose substantial existing and potential traffic. As a result the future of remaining Milwaukee lines may be placed in jeopardy.

Another argument for disapproval of the Miles City closing is the effect the closing would have on coal traffic that might be developed by companies that would be served by the proposed Tongue River Railroad and by mines that may be opened in southeastern Montana in the Powder River Basin. It is argued that this traffic would have no transportation alternative to BN. For powerplants located on the Miles City extension of the Milwaukee, the decrease in traffic on that line could lead to substantial surcharges on energy supplied by those plants.

In addition to coal traffic, grain movements would also be confined to BN if the original version of the agreement with the trustee were consummated. However, BN has agreed to certain additional exceptions to the closing. Under these modifications, Miles City would remain a gateway for joint rates and through-routes for the following traffic:

1. Unit coal train movements from origins on BN in Montana and Wyoming to units Nos. 1 and 2 of Wisconsin Power and Light Company at Columbia, WI.

2. Unit coal train movements from origins on BN in Montana and Wyoming to Weston Spur, WI.

3. Wheat from North Dakota origins on the Milwaukee westbound to the North Pacific Coast for export.

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4. All traffic originating at or destined to stations or industries on lines owned or operated by the State of South Dakota or on lines of the Milwaukee in South Dakota, not served by BN.

Because of these changes, the States of North Dakota and South Dakota have withdrawn their original opposition to the BN application, which they now support.

However, the modifications do not accommodate all of the interests which oppose the gateway closing. Governor Quie of Minnesota is concerned that closing Miles City as a gateway will place Minnesotans at a competitive disadvantage in major agricultural markets. Without competitive rail service, farmers allegedly will be faced with rail rates which will cause them serious harm. Senator Durenberger claims that, to some extent, higher rates on grain traffic will also be caused by the lack of joint rate agreements applicable to Minnesota commodities, resulting in additional shipping costs of 10 percent or more for Milwaukee shippers. Senator Durenberger also argues that BN has discriminated against Minnesota shippers by allowing certain exceptions to the ban on Miles City interchange, while denying interchange to Minnesota grain.

In response, BN argues that its operating plans do not provide for major switching operations at Miles City, a gateway located on one of its southern lines. BN ordinarily routes a majority of its traffic through Minot, ND, where it maintains a switching yard capable of processing 1,800 cars per day, four times the capacity of its yard at Laurel, MT (the closest yard to Miles City, which does not itself include yard facilities).

In addition to its desire to route traffic over its optimum facilities, BN also seeks to preserve as much long-haul traffic as possible. Closing the Miles City gateway assures BN of certain revenues which are reflected in the purchase price offered to the trustee. Modification of that agreement, including our conditioning approval upon opening the gateway, could be grounds for BN to terminate the agreement.

Furthermore, BN argues, the gateway closing is unlikely to result in the consequences predicted by opposing parties. BN claims that contrary to Senator Durenberger's assertion joint rates for traffic interchanged at Appleton (a gateway east of Miles City where Milwaukee interchanges with BN) are now in effect and have been since 1979. BN also argues that those joint rates are not, in the future, reasonably likely to be higher than joint rates via Miles City.

We have decided to approve all of BN's application, including its agreement with the trustee as modified by the listed exceptions to the closing of Miles City. BN negotiated the terms of purchase at arms length; we assume that the trustee, in entering into the agreement, con-

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sidered such factors as the effect of the closing upon the remaining Milwaukee lines. Those parties opposing the gateway closing have, for the most part, been able to secure concessions from the BN which will alleviate the harsher effects of the gateway closing. We are persuaded that Minnesota shippers would not receive substantially lower rates were we to allow the gateway to remain open, since it is unlikely that the new Milwaukee operation will maintain the same rates as the old. In addition, BN would remain a significant participant in these routes (with ability to influence joint rates) regardless of whether Pacific Northwest traffic is routed via Miles City or Appleton. We also note that, should BN's rates become too high, other routings, involving the Chicago and North Western and the UP, could constitute a competitive alternative to BN service.

Application of Union Pacific.—The UP seeks to acquire the Milwaukee properties set out in appendix A-2 for a purchase price of \$19 million in cash. The agreement entered into between the trustee and UP has been preliminarily approved by the court, which has authorized UP to provide interim service over the properties.

UP argues that purchase of the properties will enable it to provide more efficient service. Maintenance on the lines will be upgraded, and use of equipment and railroad facilities will be improved, resulting in increased capacity and operating flexibility in the Spokane, Seattle, and Tacoma, WA, terminal areas. UP states that these efficiencies and improvements, as well as retention of service over the lines, will serve the public interest.

The following shippers provided statements of support for the UP proposal: American Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, St. Regis Paper Company, Sears, Roebuck and Co., and Pottlatch Corporation. The South Dakota Department of Transportation and the First National Bank of Chicago also filed comments in support of the UP purchase. They favor the sale because it will provide the trustee with much needed cash and will permit continued service over the lines acquired.

The Milwaukee/UP agreement, section 2.B., provides that the \$19 million purchase price for the transaction is not allocated among the properties; that UP is not obligated to acquire less than all of the properties; and that if the trustee is unable to sell or convey to UP all of the properties agreed upon, UP may elect to acquire less than all the properties if UP and the trustee can agree upon an appropriate reduction in the purchase price.

We find that the purchase by UP of the individual Milwaukee properties involved is in the public interest, because service will continue to be

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provided and various efficiencies are likely to be achieved. However, in reviewing the transportation aspects of the proposed sale and the underlying agreement between UP and the trustee, we have not considered the combination of properties as nonseverable, as the contract does.

Our interest is to enable service to be provided where it is needed. Since we see no direct relationship between the individual parcels of property involved, our approval of the proposed sale should not be construed as approval of the restriction imposed by section 2.B of the contract.

Application of Montana Railway Corporation.—MRC seeks to acquire the Milwaukee properties and various trackage rights set out in appendix A-3. Although MRC does not have an agreement with the trustee to purchase these properties, MRC estimates a reasonable purchase price to be \$55 million. Funding for purchase and rehabilitation of the properties is dependent upon approval of loan and grant applications by the United States Departments of Agriculture and Transportation. MRC also hopes to receive funds available to Idaho and Montana under the Railroad Revitalization and Regulation Reform Act of 1976 and revenues from Montana State bonds, as well as venture capital.

MRC would not operate the lines acquired itself; an operating carrier has not yet been selected. MRC contemplates entering into a lease-purchase agreement with the operator once one is selected. Ultimately, the operating carrier would acquire the lines outright.

MRC's proposal is inconsistent with that of UP between Plummer Junction, ID, and Manito, WA, and with that of BN in several areas. MRC states that it would be satisfied with trackage rights to resolve the inconsistencies. Its proposal, as set out in appendix A-3, includes requests for trackage rights over several segments of the UP and BN. Both BN and UP state that they are unwilling to enter into trackage rights agreement with MRC. We are not empowered to require BN and UP to grant MRC trackage rights, except as a condition to approval of their own purchase applications. Even if we were to impose such a condition, BN and UP could avoid it by electing not to proceed with their own purchases under such terms.

If implemented, the MRC proposal would provide service along the Milwaukee mainline between Miles City, MT, and Marengo, WA, as well as a number of branch lines. Such service in Montana would provide an alternative for shippers who otherwise would have either no rail service or would be served only by BN. MRC's primary objectives are to provide a competitor to BN in Montana, to preserve rail-oriented jobs, and to create new employment.

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Over 60 individuals submitted comments in support of the MRC proposal. (See appendix B-2). Many of these are farmers and small shippers in Montana, who believe they would benefit from competition between BN and MRC.

We agree that, to the extent possible, competition (or the potential for competition) should be preserved. However, MRC has not presented sufficient evidence as to its ability to provide adequate service to support a finding that its proposal is in the public interest.

First, it has not demonstrated the ability to pursue its proposal further. Its lack of present funding is a most serious obstacle. Its lack of an operator, although somewhat less of an obstacle, prevents us from being able to determine whether the operator is capable of providing adequate service. Similarly, the operating plan is indefinite and dependent upon decisions of an operating carrier. Therefore, we cannot judge its feasibility.

Secondly, MRC's financial projections are subject to question and do not provide a sufficient basis upon which to find that its proposal is feasible.

MRC anticipates a small net income after fixed charges after the second and third year of operations.⁸ However, this reflects its own best estimate of the feasibility of its plan, not one prepared by an experienced operating carrier.

BN argues that MRC's revenue projections are substantially overstated, and that its cost projections are understated. We agree that MRC's data is subject to question. For example, its normalized maintenance cost estimates appear low, as do its projections for equipment costs. Furthermore, in projecting revenues, it is difficult to determine to what extent former Milwaukee traffic might be recovered by MRC. On a number of the lines along which MRC expects to provide service, the track has been removed or the court has authorized removal.⁹

MRC states that a final rehabilitation plan cannot be developed until the lines have been acquired and a carrier selected. A preliminary 5-year expenditure program for track rehabilitation is provided, which reflects a study performed for the trustee stating that about \$65 million would be required to rehabilitate the lines sought by MRC. MRC's cash flow statement reflects rehabilitation expenses for 3 years.

This leads us to the third major area of deficiency in the MRC proposal—the availability of the property needed for its proposal. We have already mentioned MRC's need for trackage rights over BN and UP and

⁸This projection does not reflect coal traffic from the Ashland-Birney area of southeastern Montana, which may not become available for 10 years.

⁹Examples include the following segments: Winifred Jet.-Winifred, MT; Great Falls-Agawam, MT; and Moore-Harlowton, MT.

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their unwillingness to grant those rights. We have also pointed out that certain of the track sought has been removed or is scheduled to be removed. Finally, a portion of the main line sought by MRC has already been sold to another purchaser.

On May 15, 1980, the court authorized the trustee to convey to the SMRR and the Potlatch Corporation the Milwaukee properties between Bovill and St. Maries, ID, and a portion of the main line between Avery and Plummer Junction, ID. SMRR is operating the Bovill branch and the segment between St. Maries and Plummer Junction as a common carrier pursuant to a temporary service order issued by our Railroad Service Board. The segment of main line from Avery to St. Maries will be operated as a private railroad.

The Potlatch/SMRR acquisition severs the main line at Avery, ID, and effectively precludes MRC from achieving its goal of reaching a connection with the UP at Marengo, WA. MRC has appealed from the court's order, but no stay pending appeal has been issued. It is, therefore, doubtful that MRC will be able to reach west of Avery, ID, and thence to Marengo, WA, to interchange traffic with UP as planned.

MRC also seeks to acquire the former Milwaukee segment from St. Maries to Purdue, ID, which Potlatch has acquired, and to obtain trackage rights from Purdue to Bovill, ID. It is doubtful that these properties will be available to MRC, for the same reasons.

Because of the major uncertainties which we have discussed, we are unable to find at this time that MRC's proposal is in the public interest. However, we do not wish to preclude the court from having the opportunity to examine a more complete and certain MRC proposal and for that reason do not disapprove it. Should MRC be successful in removing these uncertainties and should MRC in fact be able to provide service substantially as proposed, the public interest could be benefited. A number of shippers who otherwise might have no rail service would be served, and competition could possibly be preserved and/or enhanced along the Northern Tier.

Nevertheless, we recognize the constraints upon the court and the trustee to act expeditiously to protect the estate. In light of these constraints, we believe that the Commission should not attempt to delay action on the sale proposals while MRC resolves the serious uncertainties concerning its application. We do not want to take any action which might jeopardize future service to former Milwaukee shippers or the trustee's ability to conduct the eastern operations of the Milwaukee. Therefore, by our decision not to specifically disapprove the MRC proposal and thus preclude any court review, MRC and its supporters, the existing Milwaukee and the public may each be protected.

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Application of Bennett Lumber Products, Inc.—Bennett is an Idaho corporation which operates lumber mills situated on the WI&M line. Bennett opposes the sale of the WI&M to BN, and Bennett has filed its own application to purchase those portions of the WI&M line required for rail operation and maintenance.¹⁰

Bennett seeks to acquire the line for the same reasons that it opposes BN's application, discussed above. In general it has been displeased with BN rates and service (especially with respect to BN's failure to accept its special cars), and fears that it may receive unfavorable treatment from BN due to BN's own timber interests.

Bennett plans to maintain the existing 5 days per week train schedule. Bennett will operate the WI&M as a single-line railroad and does not anticipate any significant changes in traffic levels. It would perform repairs and rehabilitation on the WI&M as needed and it does not plan any capital improvements or maintenance other than normal maintenance. Bennett is prepared to negotiate a purchase price for WI&M which would be satisfactory to the trustee.

Funds for repairs will either be generated internally or provided through Bennett's existing line of credit.

Bennett submitted an unaudited financial statement showing assets of about \$14.2 million as of January 31, 1980. Its net after-tax earnings for 1979 were \$363,421, compared to \$962,170 for 1978.

BN criticizes the incompleteness of Bennett's application. No carrier or operator has been designated; no labor agreements have been executed; and Bennett has no plan for rehabilitation of the line which BN has estimated will require \$2 million over a 5-year period. BN claims that Bennett's allegations regarding BN's service and rate policies are baseless.¹¹

We agree with BN's argument that Bennett's application lacks sufficient information to allow us to make a public interest determination at this time. There are benefits—although admittedly inchoate—which could flow from the Bennett application. Unlike BN, Bennett would have a greater incentive to maintain the joint routes and rates with UP which Milwaukee formerly joined. We appreciate that the Bennett proposal is somewhat speculative since it would have to establish itself as a railroad, whereas BN has facilities and personnel available to begin service immediately. Bennett, however, plans to subcontract the actual operations. While its plan is admittedly in the very early stages, particularly when compared with BN's well developed proposal, it nonetheless may

¹⁰It seeks to purchase trackage, right-of-way and other properties of WI&M extending between Palouse, WA, and Bovill, ID, a distance of 47.99 miles. The line connects with the existing BN main line at Palouse.

¹¹BN's response to Bennett's changes is discussed in the previous section dealing with BN's application for the WI&M line.

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merit consideration by the trustee although we cannot at this time make a determination that the plan is in the public interest.

Labor issues.—Comments of two organizations representing labor interests were filed late. Railway Labor Executives' Association claims that employees may be adversely affected by the BN proposal. The Railway Employees' Department (RED) alleges that employees may be adversely affected by the BN, UP, and Bennett proposals. Bennett replied to RED's petition.

BN and UP are signatories to the Labor Protective Agreement Between the Railroads Involved in the Midwest Restructuring and Employees of Such Railroads Represented by the Railway Labor Executives' Association. This agreement was entered into on March 4, 1980, pursuant to MRRRA, and benefits former Milwaukee employees who are hired by signatory railroads. MRRRA, section 8, provides that former Milwaukee employees have the first right of hire by rail carriers subject to our jurisdiction. MRRRA also states that the court shall provide for employee protection at least as favorable as that required under 49 U.S.C. 11347. We find that the interest of railway labor will be adequately protected with regard to the BN and UP purchases.

We need not consider whether employees would be adequately protected upon the proposed Bennett purchase, since we are not approving that purchase.

Antitrust issues.—BN's reply comments, in a verified statement of C. J. Bryan, included a statement that, during the negotiations between BN and Milwaukee, both the UP and BN expressed tentative interest in the same properties, principally the Stacy Street Yard in Seattle. According to Mr. Bryan, these parties held discussions aimed at resolving their differences prior to the filing of the purchase applications, and those applications reflect the understandings reached during their negotiations with one another.

BN, UP, and the Milwaukee trustee were requested, in a letter dated August 7, 1980, from the Deputy Director, Section of Finance, to explain more clearly to the Commission the nature and extent of these discussions.

The responses we have received indicate that negotiations conducted between BN and UP regarding their offers to purchase property from the trustee could constitute antitrust violations. However, the responses also indicate that BN and UP were, at the same time, exploring the possibilities of joint use arrangements over many of the same Milwaukee properties. Such joint arrangements would serve legitimate and useful transportation purposes and their negotiation would be unlikely to vio-

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late antitrust laws. The responses do not provide us with sufficient information to resolve this issue.

The dangers inherent in collective activity during the bidding process are substantial. In the absence of genuinely independent bidding, we have no assurance that optimum transportation benefits have been produced. Nevertheless, we have concluded that on balance the two applications would lead to sufficient transportation benefits for shippers on the abandoned Milwaukee lines and their denial would impose significant immediate burdens on these shippers. We therefore have decided to approve the applications under the MRRRA. We do not, however, mean by our action today to condone any negotiations which may have violated the antitrust laws. We specifically withhold any antitrust immunity which might be implied in proceedings under the MRRRA upon the negotiations conducted between BN, UP, and the Milwaukee trustee and any resulting agreements. We will refer this matter to the Department of Justice, since it is that agency's statutory responsibility to enforce the antitrust laws. We ask that the Department of Justice keep us informed as to the status of their investigations.

Effect on energy conservation.—Because of our decision in this proceeding allows for the continued use of rail service by many shippers in the States concerned, the impact of our action on energy conservation is beneficial. We are, in this proceeding, attempting to maintain existing rail operations. Since rail service is potentially more fuel efficient than most alternative forms of transportation, our action should encourage energy conservation. In addition, the transportation benefits derived from continued rail service plainly outweigh any potential fuel increases.

Reservation of jurisdiction.—The OSC asks us to retain jurisdiction over the BN/Milwaukee agreement in this proceeding, to permit future adjustments in the competitive situation in the Northern Tier. It argues that because of the loss of Milwaukee as a competitor to the BN, and the closure of Miles City as a gateway, such retained jurisdiction is necessary to protect the public interest.

Such relief is available through the exercise of our continuing jurisdiction; we have the authority to reopen the Northern Lines merger proceeding (*Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967)) to provide the kind of relief suggested by OSC. (Condition 6, appendix L, 331 I.C.C. at 352; 49 U.S.C. 10327(g)(1)). There is no need to impose such a condition in this proceeding as well. Further, there are questions concerning the efficacy of such a condition, in light of the concurrent jurisdiction with the court in cases arising under MRRRA, and the interest of finality in bankruptcy proceedings. The OSC request is denied.

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Other procedural issues.—Senator David F. Durenberger and Governor Albert H. Quie both of Minnesota, requested that we hear oral argument in this proceeding. Because of the time constraints imposed upon us by MRRRA and the court, it has not been possible for us to either take oral evidence or hear argument in this or other proceedings under MRRRA.

On July 30, 1980, Bennett filed a petition for extraordinary relief pursuant to 49 CFR 1100.99, to respond to replies filed by the parties. By reply dated August 13, 1980, BN responded to Bennett's concerns, particularly regarding the availability of rates which might be agreeable to Bennett. Because the record is benefited by these pleadings and none will be harmed, we have considered these documents in arriving at our decision.

On July 30, 1980, the Wisconsin River Transit Commission (Wis River) filed a petition for leave to intervene in this proceeding in opposition to the purchase by BN of the 2-mile Milwaukee line segment from Crawford to Prairie du Chien, WI. BN filed a motion to strike Wis River's petition as not timely filed.

Wis River states no persuasive reason for its failure to enter this proceeding at an earlier time, as required by our decision served May 23, 1980. That decision was published in the Federal Register on June 2, 1980, and a copy of the BN application was served on the Governor, Public Service Commission, and Department of Transportation of the State of Wisconsin.

Wis River believes that BN's acquisition of the line would be inconsistent with Wis River's plans to acquire a line from Lone Rock to Prairie du Chien, WI, and operate it as a short-line railroad. Because of Wis River's delay in filing its petition, the record in this proceeding is inadequate to determine the merits of its position. Because the court has final authority in MRRRA proceedings, relief for Wis River is not foreclosed. Therefore, its petition for relief from this Commission is denied.

VICE CHAIRMAN GRESHAM, concurring:

I believe that under section 5(b), the Milwaukee Railroad Restructuring Act, the Commission has a responsibility, in applying its expertise and providing advice to the court, to reach a positive or negative determination with regard to the proposals before it. On the basis of the evidence available to us at the time of this decision, I believe that the Burlington Northern and Union Pacific proposals are in the public interest and should be approved and that the Montana Railway Corporation and Bennett Lumber Products proposals are not in the public interest and should be disapproved.

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It is ordered:

1. The application of Burlington Northern, Inc. in Finance Docket No. 29328, is approved.

2. The application of Union Pacific Railroad Company and Oregon-Washington Railroad & Navigation Company in Finance Docket No. 29370, is approved as stated above.

3. The petition for leave to intervene of Wisconsin River Transit Commission is denied.

4. The request of the Office of Special Counsel that the Commission retain jurisdiction over this proceeding is denied.

5. This decision shall be effective on the date it is served.

6. The Burlington Northern, Inc. and the Union Pacific Railroad Company and Oregon-Washington Railroad & Navigation Company shall notify the Commission within 30 days of consummation of the transactions. Within 60 days after consummation they shall submit to the Bureau of Accounts journal entries required to record the transactions.

7. Schedules filed by Burlington Northern, Inc. and Union Pacific Railroad Company and Oregon-Washington Railroad & Navigation Company establishing rates and charges applicable to the lines shall refer to this certificate and decision by date and docket number.

8. If the transactions authorized above are not consummated within 1 year of the effective date, this decision shall be of no further force.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam. Vice Chairman Gresham concurring with a separate expression. Chairman Gaskins and Commissioner Alexis absent and not participating.

APPENDIX A-1

Properties sought by Burlington Northern

- (1) Trackage, right-of-way and other properties of WI&M extending between Palouse, WA, and Bovill, ID (milepost 0.0 to milepost 47.99);
- (2) Easement of approximately .48 miles over MILW trackage at Deer Lodge, MT, to enable BN to reach industries at Deer Lodge formerly served exclusively by MILW;
- (3) Right-of-way lands excluding trackage as follows:
 - (a) Between Bonner and Missoula, MT;
 - (b) Between Bearmouth and Drummond, MT;
- (4) MILW trackage and rights-of-way as follows:
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Line of trackage	From		To	
	MP	Location	MP	Location
Sieler-Moses Lake, WA	5.45	Sieler.....	20.00	Moses Lake
Bellingham, WA	0.0	Bellingham	4.88	Cornwell
Sirandell-Sumas, WA	15.96	Strandell	25.3	Sumas
Hampton-Lynden, WA	0.0	Hampton	5.32	Lynden
Spokane, WA	11.96	Spokane Bridge	16.62	Post Falls
Coeur d'Alene, ID	20.29	M. P. 20.29	22.68	Huctner
	25.85	Coeur d'Alene	25.98	Coeur d'Alene
Warden-Othello, WA (Main line).....	1,974.08	Warden.....	1,989.05	Othello
Warden-Othello, WA (Tiflis-Marcellus Branch)	0.0	do	0.6	Warden
Maple Valley-Snoqualmie Falls, WA	2,137.32	Cedar Falls	2,154.2	Maple Valley
	0.0	do	10.31	Snoqualmie Falls
Bonner, MT.....	.50	Bonner	1.46	Bonner
Missoula, MT	1,641.53	Missoula	1,642.27	Missoula
Schilling, MT	1,653.82	Schilling	1,654.0	Schilling
Newcomb-Butte, MT	1,515.9	Newcomb	1,521.51	Butte
Easton-Cedar Falls, WA	2,100.69	Easton	2,137.32	Cedar Falls
Everett, WN BN Conn		Lowell	53.97	Black & Clausin
BN Conn		do	2.54	Eclipse Mill
Do	3.01	Everett	3.87	Weyerhaeuser
Choteau-Fairfield, MT.....	233.27	Fairfield	252.39	Choteau
(Includes Choteau Yard, Choteau-Eastman Jct. and Eastman Jct.-Fairfield)				
Emerson Jct.-Vaughn, MT	3.9	Emerson Jct.	12.1	Vaughn
Great Falls, MT.....	198.92	Great Falls.....	191.87	Loy Spur
(Includes Great Falls trackage)				
Lewistown-Geraldine, MT.....	61.89	Lewistown	137.14	Geraldine
(Includes Spring Creek Jct.-Geraldine and Lewistown-Spring Creek Jct.)				
Moore-Lewistown, MT	42.89	Moore	61.89	Lewistown
Lewistown-Heath, MT.....	0.8	Lewistown	10.44	Heath

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Line of trackage	From		To	
	MP	Location	MP	Location
Linton, ND	74.41	BN Conn.....	75.53	Linton
Edgeley, ND	63.27	do	61.86	Edgeley
Ellendale, ND	35.66	Ellendale	36.41	Ellendale
Fargo, ND.....	116.00	Fargo	74.61	Fargo
Wahpeton, ND.....	72.55	Wahpeton	74.61	BN Crossing
Pipestone, MN.....	288.20	Pipestone	288.70	Pipestone
Crawford-Prairie du Chien, WI	233.8	BN Crossing.....	235.6	FS Services
Wentworth-Madison, SD.....	325.26	Wentworth.....	334.33	Madison

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APPENDIX A-2

Properties sought by Union Pacific

1. Milwaukee Road's railroad line segment between Manito, WA, and Plummer Junction, ID (approximately 19.5 miles). Union Pacific-OWR&N presently has bridge trackage rights over this segment under an agreement dated March 11, 1955.
2. Milwaukee Road terminal trackage at Spokane, WA, including the Milwaukee Road Yard, together with its interest in jointly owned OWR&N-Milwaukee Road Trackage within Spokane.
3. Milwaukee Road's one-half interest in joint OWR&N-Milwaukee Road trackage and facilities between Black River Junction and Tacoma Junction, WA (approximately 26.1 miles).
4. Milwaukee Road's railroad line segment between Tacoma Junction WA, and Lincoln Avenue in Tacoma, WA.
5. A portion of Milwaukee Road's Tide Flats Yard between Lincoln Avenue and Eleventh Street in Tacoma, WA.
6. Milwaukee Road's interest (either sole or joint) in other terminal trackage in the vicinity of Canal Street in Tacoma, WA (the St. Regis Spur).
7. Milwaukee Road terminal facilities at Seattle, WA, including the Van Asselt Yard and Stacy Street Yard, together with Milwaukee Road's interest (either sole or joint) in other terminal trackage within Seattle, WA.
8. Milwaukee Road's one-half interest in joint OWR&N-Milwaukee Road trackage between Helsing Junction and Aberdeen, WA (approximately 41 miles).

APPENDIX A-3

Properties sought by Montana Railway Corporation

Mainline:

1. Miles City, MT to Marengo, WA (807.0 miles).
2. Plummer Jct, ID to Manito, WA (19.8 miles).

Branchlines:

1. Ringling-Dorsey MT (3.5 miles).
2. Bonner-Bonner Jct MT (2.4 miles).
3. Harlowtown-Lewiston MT (61.3 miles).
4. Lewiston-Heath MT (9.2 miles).
5. Winifred-Jct-Winif. MT (42.7 miles).
6. Lewiston-Falls Yd MT (134.5 miles).
7. Falls Yd Agawam MT (55.6 miles).
8. Dishman-Spokane Br. WA (11.7 miles).
9. Spokane Br-Couer d'Alene WA (10.5 miles).
10. St. Maries-Purdue WA (50.4 miles).

Trackage Rights:

1. At Miles City over Milwaukee system (MP 1120.0-MP 1116.5).
2. Purdue-Bovill over the Washington, Idaho & Montana Railway.
3. Manito-Dishman over the Union Pacific Railroad (UP).
4. Dishman-Spokane over UP.
5. Judith Gap-Billings over Burlington Northern (BN).
6. Running track through Spokane Yard together with rights for (a) interchange with the BN and UP at Spokane, (b) access to reciprocal switching.
7. Miles City-Laurel/Billings over BN.

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APPENDIX B-1

Comments in favor of all or part of the application of Burlington Northern

Weyerhaeuser Company
 Mt. Baker Plywood, Inc.
 Latah County Grain Growers, Inc.
 United States Gypsum Company
 Northwestern States Portland Cement
 Scott Paper Company
 Statements filed by Mr. Fred Tolan, including those of:
 Western Farmers Assn.
 Shukson Frozen Foods, Inc.
 Wolfkill Feed & Fertilizer
 Chef-Reddy Foods Corporation
 Kenney Grain Co.
 American Potato Co./Sunspiced, Inc.
 Mr. Fred Tolan
 Peavey Company
 Carnation Company
 South Dakota Department of Transportation
 Louisiana-Pacific Corporation
 Ellendale Farmers Union Co-op Assn.
 Can Am Wood Products, Inc.
 United States Department of Defense
 North Dakota Public Service Commission
 Champion International Corporation
 First National Bank of Chicago
 Safeway Stores, Inc.
 Farmers Co-op Elevator Co.
 Georgia-Pacific Corporation
 Cargill, Incorporated
 Growmark, Inc.
 Lehigh Portland Cement Company
 National Farmers Organization
 Columbia Grain, Inc.

APPENDIX B-2

Comments in support of Montana Railway Corporation

Senator John Melcher
 Senator Max Baucus
 Congressman Ron Marlenee
 Congressman Pat Williams
 PLM, Inc.
 R. L. Pemberton
 Statements filed by Montana Farmer's Union (15).
 Statements filed by Montana Railway Corporation (59).
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