

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1043 (Sub-No. 1)

MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.—DISCONTINUANCE OF  
SERVICE AND ABANDONMENT—IN AROOSTOOK AND  
PENOBSCOT COUNTIES, ME.

Decided: December 27, 2010

Digest:<sup>1</sup> Montreal, Maine & Atlantic Railway, Ltd. is permitted to stop providing rail service and to dispose of 233 miles of railroad line in northern Maine due to its financial losses from operating the line. The railroad will have to fulfill certain conditions to protect both the environment and the interests of its employees affected by this action. The State of Maine will be permitted to acquire the line, and the railroad may provide service until the State chooses a new operator.

OVERVIEW

The Application. On February 25, 2010, Montreal, Maine & Atlantic Railway, Ltd. (MMA) filed an application under 49 U.S.C. § 10903 for permission to abandon and discontinue service over approximately 233 miles of rail line (the line) in Aroostook and Penobscot Counties, Me.<sup>2</sup> On March 17, 2010, the Board had notice of the proceeding published in the Federal

---

<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Specifically, the application identified the line to be abandoned as comprising: (1) the Madawaska Subdivision, consisting of approximately 151 miles of line between milepost 109 near Millinocket and milepost 260 near Madawaska in Penobscot and Aroostook Counties; (2) the Presque Isle Subdivision, consisting of approximately 25.3 miles of line between milepost 0.0 near Squa Pan and milepost 25.3 near Presque Isle in Aroostook County; (3) the Fort Fairfield Subdivision, consisting of approximately 10 miles of line between milepost 0.0 near Presque Isle and milepost 10.0 near Easton in Aroostook County; (4) the Limestone Subdivision, consisting of approximately 29.85 miles of line between milepost 0.0 near Presque Isle and milepost 29.85 near Limestone in Aroostook County; and (5) the Houlton Subdivision, consisting of approximately 16.9 miles of line between milepost 0.0 near Oakfield and milepost 16.9 near Houlton in Aroostook County. Later, the railroad and the State realized that the application inadvertently listed the end point of the Houlton Subdivision as milepost 16.90

(continued . . .)

Register, denied 2 motions to reject the application, and set dates for persons to submit filings on the application.<sup>3</sup>

The Board received timely protests from the State of Maine, by and through its Department of Transportation (State), and from various shippers. Specifically, a joint protest was filed by Irving Woodlands LLC (Irving Woodlands), Irving Forest Products, Inc. (Irving Forest Products and, with Irving Woodlands, Irving), Fraser Papers Inc. (Fraser Papers), Fraser Timber Limited, and Katahdin Paper Company (collectively, Joint Protestants). Separate protests were filed by Huber Engineered Woods, LLC (Huber), The Brotherhood of Locomotive Engineers and Trainmen (BLET), and Louisiana-Pacific Corporation (LP). MMA challenged the claims of these various protests in a rebuttal.<sup>4</sup>

On May 25, 2010, the Board issued an order encouraging the parties to engage in mediation. The Board noted that the State was in the process of seeking voter approval to issue bonds to raise money to acquire the line. The bond referendum was held on June 8, 2010, and passed.

On July 7, 2010, the Board held a hearing on the proposed abandonment in Presque Isle, Me. Congressman Michael Michaud and representatives of United States Senators Olympia Snowe and Susan Collins, shippers, business and community interests, BLET, and the railroad testified. The railroad stated that it and the State had agreed on a purchase price for the line, but that they were still discussing what access the new operator would have over MMA's system. The issue was significant because a new operator would have access to the national rail system only over the MMA at both the north and south end of the line. The Board requested more information about the access issue in an order served on July 20, 2010. The parties filed evidence and argument on the issue on and around August 3, 2010. They filed cross-replies on and around August 10, 2010.<sup>5</sup>

---

(continued . . .)

instead of milepost 17.27, and did not include the "B Spur." The parties request that the Board treat MMA's application as amended to include the revised description of the Houtlon Subdivision. This small, technical correction is reasonable and will be granted. At Appendix A, we have included Figure 2 from the Final Environmental Assessment issued in this proceeding on July 19, 2010. This figure shows the line, the shippers on it, and the local roads.

<sup>3</sup> In decisions served on April 5, 2010, and April 26, 2010, the Board modified this procedural schedule.

<sup>4</sup> Some of the evidence was submitted under seal pursuant to a protective order the Board granted on March 4, 2010. In this decision, we discuss certain confidential data to the extent necessary to render a thorough and well-reasoned decision.

<sup>5</sup> In addition to comments from the parties to the abandonment, the Board received comments and replies from the Canadian Pacific Railway Company (CP), Kansas City Southern  
(continued . . .)

The Board's Section of Environmental Analysis (SEA)<sup>6</sup> prepared environmental documentation examining the environmental impacts of the proposed abandonment and discontinuance of service. This effort culminated in the issuance of a Final Environmental Assessment (Final EA) on July 19, 2010.

The Agreement. On October 20, the State and MMA jointly notified the Board that they had reached an agreement on the terms and conditions of a transaction whereby the railroad agreed to sell the line to the State for continued rail service. Those terms and conditions were set out in a "Term Sheet" filed by the parties. The parties stated that they would begin preparation of a definitive purchase and sale agreement and would file it with the Board, together with a request that this agency issue a decision approving the abandonment of the line, "determining that the State shall not become a rail carrier as a result of the purchase of the line, and permitting the consummation of the abandonment if the sale and purchase does not go forward."

On December 9, 2010, the State and MMA jointly submitted a petition detailing their agreement and the relief they seek. They assert that they have substantially completed the negotiation of a purchase and sale agreement and the related trackage rights and interchange agreements necessary to implement the settlement.<sup>7</sup> They place a number of conditions on their

---

(continued . . .)

(KCS), and the Association of American Railroads (AAR). Given the importance of these issues to the rail industry, we will make them parties of record in this abandonment proceeding.

<sup>6</sup> As part of the Board's reorganization of its former Office of Economics, Environmental Analysis, and Administration, effective on September 1, 2010, SEA is now the Office of Environmental Analysis (OEA). Because SEA conducted much of the Board's environmental analysis prior to the reorganization, we will refer to that entity as SEA in this decision.

<sup>7</sup> The key provisions of the proposed purchase and sale agreement, as described by MMA and the State, are as follows: purchase price is \$21.1 million; closing on or before December 31, 2010; MMA to provide service on behalf of the State as "interim operator" pending the selection by the State of a permanent operator; MMA agrees to grant the permanent operator "permanent overhead trackage rights" (1) over the MMA line between Madawaska and St. Leonard, NB, and (2) over the MMA line between Millinocket and Brownville Junction; the State agrees to require the permanent operator to grant MMA permanent overhead trackage rights between Madawaska and Millinocket; if the State fails or refuses to go to closing on the agreement, MMA may proceed to consummate the abandonment; if MMA fails or refuses to go to closing, the parties agree that the Board should reopen its decision authorizing the abandonment and restore the parties to the procedural status quo that existed before the parties filed their October 20 letter with the Board; and finally, that the Board enter an order "consistent with the requirements of the purchase and sale transaction," in particular, one that meets five

(continued . . .)

transaction. They ask that the Board grant the abandonment; acknowledge that the State will not become a common carrier after the purchase; and allow the railroad to consummate the abandonment, subject to environmental conditions, if the State fails to close on the deal; or, if the railroad fails to close on the deal, withdraw the grant of abandonment authority and reinstate the opposition of the State and shippers to the abandonment.<sup>8</sup>

To further this plan to continue rail service, the State indicates in the December 9 petition that it has agreed to withdraw its opposition to MMA's abandonment and discontinuance application on the condition that MMA proceed with the transaction. The State recommends in that filing that the other parties that had submitted opposition to the abandonment and discontinuance of service do the same to ensure continued rail service.

The parties wish to consummate their purchase and sale agreement by December 31, 2010. The parties state that, after the consummation of the sale, MMA will provide interim service until the State chooses a new operator for the line.

In a decision served on December 10, the Board asked that replies to the December 9 petition be filed by December 17, 2010. This expedited procedure was requested by the State and MMA, and was necessary and reasonable in order to permit the Board to issue a decision by December 31, 2010, as requested. On December 10, 2010, LP stated that it supports the settlement and conditionally withdraws its comments and protests dated April 21, 2010, August 3, 2010, and August 10, 2010. Similar conditional withdrawals were filed by Irving on December 15, 2010, and by Huber on December 16, 2010.

On December 17, 2010, Twin Rivers Paper Company (TR), successor in interest to Fraser Papers, together with the United Steelworkers International Union and United Steelworkers Locals 4-0291, 4-0365, and 4-1247 (the USW)<sup>9</sup> (collectively, TR/USW) filed a joint reply to the December 9 petition, asking that the Board deny the relief requested by the State and MMA until various conditions and requests for relief enumerated by TR and the USW have been met. On

---

(continued . . .)

“Board-related” conditions enumerated by the two parties and described below in the “Acquisition By State and Future Operator” section of this decision.

<sup>8</sup> The State and the railroad also ask that the Board not issue a decision prior to the Federal Railroad Administration (FRA) giving notice that it will release a lien on the line. In a December 16, 2010 letter to the Board, the FRA states that it will release the lien upon the sale's closing.

<sup>9</sup> The USW filed a petition for leave to intervene on December 17, 2010. In it, USW states that it represents many of the members of the hourly work force at the Madawaska mill of TR and joins in the reply to protect the interests of the employees whom it represents. We will grant USW's petition to intervene.

December 20, MMA filed a motion for leave to file a rebuttal to the reply of TR/USW and filed a rebuttal. The same day, the State also filed a rebuttal to the TR/USW reply. Both MMA and the State ask the Board to deny the relief requested by TR/USW. Irving filed a letter expressing similar views on December 22. On December 23, 2010, TR requested leave to file a letter in reply to the rebuttals of MMA and the State, and the December 22 letter of Irving. TR stated that its letter contains no new facts or arguments, but instead addresses the characterization of its position by MMA, the State, and Irving.

Upon review of the transportation and environmental record, we conclude that the application should be granted, subject to environmental, historic preservation, and employee protective conditions as set forth in this decision.

### BACKGROUND

MMA began its operations in January of 2003, after it purchased substantially all of the rail assets of the bankrupt Bangor & Aroostook Railroad Company (B&A). Among those assets was the line in question.

The majority of the rail traffic handled by MMA on the line relates to the paper and forest products industry. Forest products handled by MMA include logs, wood chips, dimensional lumber, oriented strand board (OSB),<sup>10</sup> and fiberboard, along with wood pulp, paper products and associated raw materials. Paper and forest products originate in Maine and are shipped both locally and to destinations throughout North America. MMA also handles inbound rail traffic related to these industries, such as clays, brighteners, adhesions, and other chemicals, as well as oil used for energy. Paper and forest products represent 24 percent of MMA's rail carload business in general and 81 percent of the business on the line it proposes to abandon.<sup>11</sup>

The paper and forest products industries have been under a great deal of economic strain. MMA explains that the financial condition of the paper industry in general has declined, which has led to paper mill closings and bankruptcies. With the increase in digital communications, there has been a corresponding decrease in printed communication. The paper producers' markets have therefore shrunk. In some cases, the paper producers have shifted to specialty types of paper, which tend to be produced in smaller shipment sizes that are more conducive to transportation by truck. Similarly, according to the Vice President of Sales & Marketing for MMA, forest product producers, and in particular lumber mills, OSB producers, and other mills producing composite lumber products, have seen their market eroded by the current housing and credit crises.<sup>12</sup>

---

<sup>10</sup> OSB, which is a building material, consists of waterproofed panels formed from wood strands.

<sup>11</sup> See MMA's Confidential Application, V.S. McGonigle 2, February 25, 2010.

<sup>12</sup> See *id.*, V.S. McGonigle 3.

Shippers on the line have suffered because of these trends and have accordingly generated less and less traffic. The number of carloads originated or terminated on the line that MMA seeks to abandon has decreased dramatically from 15,130 carloads in 2005 to 5,527 in 2009, a 63 percent decline.<sup>13</sup> The railroad's gross revenues have subsequently declined from approximately \$9.5 million to approximately \$4 million, a decrease of 58 percent.<sup>14</sup>

The railroad asserts that declines in traffic and revenue have made the line unprofitable. The railroad claims that the burden of keeping the line in operation is even greater given that the line needs to be repaired. MMA does not believe that it can make a profit on the line. The railroad argues that the line has become a drain on its entire system and that the shippers have transportation alternatives at their disposal. Thus, MMA asks us to grant its application.

The State initially opposed the application, although it has now conditionally withdrawn that opposition. A number of shippers also filed comments opposing the application, and these parties, either jointly or separately, raise a number of concerns.<sup>15</sup> They claim that they are dependent upon rail service and that trucking their freight would greatly increase their costs. These increased costs would lead them to lose customers and to eliminate workers. These parties also claim that the drop in traffic reflects a cycle, and that they will generate more rail traffic once the economy improves.

## **DISCUSSION AND CONCLUSIONS**

The statutory standard governing an abandonment or discontinuance of service is whether the present or future public convenience and necessity permit the proposed abandonment or discontinuance. 49 U.S.C. § 10903(d). In implementing this standard, we must balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. Colorado v. United States, 271 U.S. 153 (1926). Environmental concerns are considered and weighed along with transportation concerns in evaluating the public interest.

This balancing involves a question of whether, and to what degree, shippers will be harmed if rail service is no longer available. The fact that shippers and communities are likely to incur harm and added expense is insufficient by itself to outweigh the detriment to the public

---

<sup>13</sup> See id.

<sup>14</sup> See id.

<sup>15</sup> As noted above, LP submitted a conditional withdrawal of its opposition on December 10, 2010, Irving submitted a conditional withdrawal on December 15, 2010, and Huber submitted a conditional withdrawal on December 16, 2010. TR/USW oppose the grant of abandonment authority.

interest of continued operation of uneconomic and excess facilities. Protestants must show that the harm to shippers and communities outweighs the demonstrated harm to the railroad and interstate commerce resulting from continued operation. See Chi. & N. W. Transp. Co.—Aban., 354 I.C.C. 1, 7 (1977).

In determining whether to grant or deny an abandonment or discontinuance application, we balance a number of factors, including operating profit or loss (comparing the revenues earned from the traffic on the line to the costs incurred by the railroad from hauling that traffic), other costs the carrier may experience (including opportunity costs, i.e., the economic loss experienced by a railroad from forgoing a more profitable alternative use of its assets), and the effects on shippers and communities. No one factor is conclusive. See Cartersville Elevator, Inc. v. ICC, 724 F.2d 668, aff'd on reh'g, en banc, 735 F.2d 1059 (8th Cir. 1984).

In preparing an abandonment application, a railroad computes the revenues it earned from the traffic on the line to be abandoned during the most recent 12-month period, known as the base year. It also computes the revenues it would expect to earn during a 12-month period in the immediate future, known as the forecast year. Usually, the two numbers are similar, and that is the case here. MMA computes that it has earned about \$8.8 million from operations in the base year and expects to earn about \$9.1 million from operations in the forecast year. Avoidable costs are those the applicant will cease to incur if it abandons the line. MMA calculates that it incurs costs in excess of \$12.9 million annually.<sup>16</sup>

Here, the record shows, first, that continued operation of the line by MMA would impose a substantial economic burden on the railroad and its entire system, potentially undermining MMA's service on its other lines. It is unclear that an economic recovery would counteract the harm this line causes to MMA and the service it provides to shippers on the remainder of its system. Second, truck transportation is, or could be, available, to transport the vast majority of shipments at issue in this case. Third, the environmental review shows that, with the environmental mitigation that we will impose, the proposed abandonment would have no significant environmental impacts. We will discuss these three elements and how we weigh them in balancing competing interests to determine whether the present or future public convenience and necessity permit the abandonment of the line. As a result of that balancing, we conclude that the public convenience and necessity permit abandonment.

---

<sup>16</sup> In its evidence MMA divides up its costs into those it incurs on the line (on-branch costs) and costs it incurs off the line (off-branch costs) in hauling traffic that earns revenue attributable to the line. Here, the railroad supports its on-branch cost figures with data on the expenses it incurs for employees, fuel, locomotives, freight cars, and other expenses. Consistent with our rules at 49 C.F.R. § 1152.32(n), MMA computes off-branch costs using the Uniform Rail Costing System (URCS), the Board's "general purpose costing system for all regulatory costing purposes." Adoption of the Uniform Rail Costing System as a General Purpose Costing System for all Regulatory Costing Purposes, 5 I.C.C. 2d 894, 899 (1989).

## I. Economic Burden of Continued Operation

All of the evidence of record demonstrates that continued operation of this line would impose a substantial economic burden on MMA. According to MMA, the avoidable loss in the forecast year is \$3.8 million;<sup>17</sup> Irving claims the avoidable loss in the forecast year is \$2.16 million;<sup>18</sup> and the State claims the avoidable loss is “\$800,000 in excess of revenues.”<sup>19</sup> Under these analyses, the only ones presented in the record, this line is losing revenue, even before we consider the opportunity and rehabilitation costs.<sup>20</sup>

---

<sup>17</sup> MMA’s Confidential Rebuttal, Exh. B, line 17, May 26, 2010.

<sup>18</sup> See Joint Protestants’ Confidential Reply, TDC-4, line 17, April 21, 2010.

<sup>19</sup> See State’s Confidential Reply 7, April 21, 2010. Although the State also asserts that it does not believe that MMA had met its burden of clearly establishing that its cost of operating the abandoned lines exceed its revenues, *id.* 2-3, the State’s own analysis shows that the railroad’s costs exceed its revenues.

<sup>20</sup> We note that the estimates by Irving and the State rest on a number of criticisms of MMA’s revenue and cost presentations that we find unpersuasive. Irving claims that revenue should be increased on the order of \$.5 million, because it represents traffic that the railroad will retain either by transloading or by rerouting onto MMA lines that will not be abandoned. But that traffic must be attributed to those other lines, not to the line being abandoned. Irving also criticizes the way MMA uses URCS to compute the off-branch costs of conducting rail operations in terminals. Irving subtracts \$1.1 million from the costs by computing different terminal costs for different types of movements, rather than using average terminal costs for all the movements. But URCS is a formula predicated on the use of average costs. Average costs are accepted in lieu of real costs when obtaining evidence of real costs is impracticable or unduly burdensome. Mixing together average costs and real costs is a problem, because some, but not all, of the average costs are displaced, and are displaced selectively. The result is a hybrid that does not reflect either real costs or average costs. Irving also argues that as a result of the abandonment MMA will incur costs on its remaining lines, but those costs are properly attributable to the remaining lines. It is because of them, not the line being abandoned, that the costs need be incurred. The State also challenges the railroad’s cost presentation. It claims that the abandonment will trigger a \$4.95 million penalty payment to the State pursuant to a contract between the two. Whether the railroad has breached its contract with the State is a matter for a state court to say, not us, and we will not find that MMA has incurred a penalty without such a ruling. Moreover, a one-time penalty is not evidence that MMA may profitably operate the line in the future. Finally, the State argues that MMA is inefficient, that it uses too many locomotives (12 instead of 6), too many freight cars (760 instead of between 304 and 457), and too many mechanical employees (12 instead of 5). In its rebuttal, the railroad has reduced the number of freight cars needed for operations and the costs associated with those cars. But it argues that it needs 12 locomotives to provide a necessary reserve for emergencies and for scheduled maintenance, and that it needs the 12 employees to carry out the mechanical work. The State does not show that its alternative is feasible. The above analysis confirms that the estimates by

(continued . . . )

Opponents to the proposed abandonment have claimed that the drop in MMA's traffic is temporary and that shippers will generate more rail traffic once the economy improves. But the record here fails to show whether or how soon a complete economic recovery would counteract the harm this line causes to MMA and the remainder of its system. Rather, the record supports MMA's argument that it cannot operate the line profitably, and that the line has become a drain on its entire system. Any possible rebound in traffic levels and revenues are too speculative to support denying MMA's request to abandon the line.<sup>21</sup>

In addition, MMA foregoes considerable opportunity costs if the line is not authorized for abandonment. Opportunity cost (or total return on value of road property) reflects the economic loss experienced by a carrier from forgoing a more profitable alternative use of its assets. Under Abandonment Regulations—Costing, 3 I.C.C.2d 340 (1987), the opportunity cost of railroad property is computed on an investment base equal to the sum of: (1) allowable working capital; (2) the net liquidation value (NLV) of the line; and (3) current income tax benefits (if any) resulting from abandonment. The investment base (or valuation of the road properties) is multiplied by the current nominal rate of return, to yield the nominal return on value. The nominal return is then adjusted by applying a holding gain (or loss) to reflect the increase (or decrease) in value a carrier will expect to realize by holding assets for 1 additional year.

All of the parties acknowledge significant opportunity costs, although they disagree on the amount. MMA calculates the opportunity cost to be \$2.1 million,<sup>22</sup> and Irving claims \$2 million.<sup>23</sup> Although the State did not calculate opportunity costs, the evidence it submitted results in opportunity costs of \$773,000.<sup>24</sup> Even relying upon the most conservative calculation

---

(continued . . .)

Irving and the State of MMA's avoidable losses are too optimistic: under any reasonable view of the record, the line is losing substantial amounts of money.

<sup>21</sup> See Ind. Rail Road Co.—Abandonment Exemption—In Martin and Lawrence Counties, Ind., AB 295 (Sub-No. 7X)(STB served March 26, 2010); San Joaquin Valley R.R.—Abandonment Exemption—in Tulare County, Cal., AB 398 (Sub-No. 7X)(STB served June 6, 2008); Union Pac. R.R.—Discontinuance—in Utah County, Utah, AB 33 (Sub-No. 209) (STB served Jan. 2, 2008) and Sierra Pacific Industries—Abandonment Exemption—in Amador County, Cal., AB 512X (STB served Feb. 23, 2005).

<sup>22</sup> MMA's Confidential Rebuttal, Exh. B, May 26, 2010.

<sup>23</sup> See Joint Protestants' Confidential Reply, TDC-4, Line 16, April 21, 2010.

<sup>24</sup> See State's Confidential Reply 7, April 21, 2010. We calculated this number by taking total valuation of property (\$16,071,044) and multiplying that number by a nominal rate of return of 4.81%, which equates to \$773,017. We note, however, that this calculation relies upon the State's proposed nominal rate of return of 4.81%, while both Irving and MMA relied upon a more reasonable rate of return of 18.15%. If we use this far more reasonable 18.15%

(continued . . .)

of avoidable loss and opportunity cost, there can be no doubt that the line is losing money on operations. In light of these findings, we need not consider the rehabilitation costs proposed by MMA.

## II. Alternative Transportation Is Available

A major issue in this case has been the extent to which alternative transportation is available. The record supports MMA's argument that trucking has become an increasingly competitive alternative to freight rail in northern Maine. MMA explains that the area served by the line has a system of highways and a motor vehicle capacity that is more than adequate to handle the increased volume of truck traffic that would be diverted as a result of the proposed abandonment. Furthermore, a number of MMA's forest products industry customers, most notably Irving Woodlands, currently uses and will presumably continue to use an extensive network of unregulated, private roads that accommodate motor vehicles with much higher payload capacities than are permitted on public highways.<sup>25</sup> The railroad estimates that its rail market share compared to trucks in the area served by the line amounts to less than 10% of overall shipping activity.<sup>26</sup>

MMA further explains that customers currently use truck/rail transloading transportation services. There are a number of transloading sites, both on MMA lines and on the lines of other rail carriers in the area served by this line. For example, MMA notes that its affiliate, Logistics Management Systems, operates a warehouse and transloading facility in the Bangor, Me. area on an MMA line that will continue to be operated if this line is abandoned. MMA is also considering the establishment of a new transloading facility at Millinocket, Me., which is at the southern end of the line proposed for abandonment.<sup>27</sup>

As discussed in more detail below, the potential environmental impact of the diversion of freight from rail to trucks in the event the line is abandoned was also thoroughly examined during the Board's environmental review. That analysis confirms that the majority of the commodities at issue here are now transported by truck, and that most of the shippers are located in close proximity to a regional roadway network that has both the capacity and operational characteristics to accommodate the potential added traffic.

---

(continued . . .)

figure and exclude holding gains/losses, the State's evidence would show the far more reasonable opportunity cost of \$1,431,930.

<sup>25</sup> See MMA's Confidential Application 19, February 25, 2010.

<sup>26</sup> See *id.* 7.

<sup>27</sup> See *id.* 19-20.

### III. Environmental Impacts of the Abandonment

#### a. The Environmental Review Process.

The Board conducted an environmental review of the potential abandonment, consistent with the requirements of National Environmental Policy Act (NEPA), as amended (42 U.S.C. § 4321), the Board's environmental regulations (49 C.F.R. pt. 1105), and the regulations of the Council on Environmental Quality (CEQ) implementing NEPA (40 C.F.R. §§ 1500-08).

In performing its environmental analysis for proposed rail abandonment cases, SEA, on behalf of the Board, usually prepares an environmental assessment (EA). 49 C.F.R. § 1105.6(b)(2). The EA process typically begins by evaluating and verifying the Environmental and Historic Reports prepared by the railroad applicant containing the information required by the Board's environmental rules, which must be served on appropriate agencies and other entities at least 20 days prior to the railroad seeking abandonment authority from the Board. 49 C.F.R. §§ 1105.7, 1105.8. But in this case, SEA granted MMA's request to submit environmental information to SEA in the form of a more detailed Preliminary Draft Environmental Assessment (PDEA).<sup>28</sup> After reviewing the PDEA, on February 4, 2010, SEA served the PDEA on a wide range of Federal, state, and local agencies, and Federally recognized Indian Tribes in Maine for their preliminary review and comment. Comments on the PDEA were requested in time for MMA to consider them in its application, which was submitted on February 25, 2010 (21 days after service of the PDEA).

SEA responded to the comments received in a Draft EA, which evaluated the following environmental issues: land use; transportation and transportation safety; energy; air quality; noise; safety on the rail right-of-way (including an analysis of hazardous materials transported); socio-economic impacts that would result from changes to the physical environment; biological resources; water resources (including impacts to wetlands, streams, lakes, ponds, and rivers); and historic and cultural resources. The Draft EA also considered a number of alternatives to the proposed abandonment that could potentially result in the continuation of rail service on the line and the No-Action alternative, which would maintain the status quo. Preliminary mitigation recommendations also were presented.

The Draft EA was issued for public review and comment on April 9, 2010. SEA responded to the environmental issues raised by commenters in a Final EA, which also discussed potential indirect and cumulative impacts. The Final EA was served on July 19, 2010.

With respect to the potential environmental impact of the diversion of freight traffic from rail to trucks in the event of an abandonment, the Draft EA explained that the majority of freight

---

<sup>28</sup> The CEQ rules specifically permit applicants to prepare their own EAs. The PDEA process gives the railroad applicant the opportunity to provide the Board and the agencies that receive copies of it with information specifically targeted to the facts at issue in the proceeding.

(more than 90%) transported by shippers located along the line already moves by truck. Board staff also conducted a Traffic Diversion analysis that assumed that four trucks would be needed to move the amount of freight currently moved by one MMA rail car. That analysis showed that the increased truck traffic that would result from the proposed abandonment would not exceed the vehicular capacities of any of the potentially affected roadways.<sup>29</sup>

The Final EA includes a map (Figure 2, reproduced here as Appendix A) showing shippers' locations on the local and regional road system. The map shows that most of the shippers' facilities are either along major roads or within very close proximity to a major road network (SR-11, US-1, and I-95) that has both the capacity and operational characteristics to accommodate the projected increase of 150-200 vehicles per day (equating to an average of 6-8 vehicles per hour) that would result in the event of an abandonment. The Final EA also addressed concerns about the amount of damage that might be caused by the increase in trucks on the local roadways. It concludes that roadway damage is not a function of the percentage increase in trucks; it is a function of the volume of trucks. Here, as the Final EA explains, the total volume of trucks (existing truck traffic and truck traffic resulting from an abandonment) on the affected roadways would still be very small.

Specifically, in Aroostook County, Route 11 is the roadway that would experience the greatest percentage increase in truck traffic in the event of an abandonment. The roadway currently carries 200 trucks, on average, per day. The abandonment would add 152 trucks to the roadway, making the total 352.<sup>30</sup> However, Route 11 has, within the past decade, undergone a complete reconstruction. Route 11 was designed to handle a peak truck loading of approximately 300 heavy trucks in the opening year (2002) and 400 heavy trucks in the design year (2025). The design assumed a growth rate of about 1.7% per year for the life of the project. In fact, the State's statistics for Aroostook County indicate that vehicle-miles traveled on Route 11 only grew by about 0.4% per year from 1998 through 2008. Therefore, the roadway can accommodate more growth than has actually been experienced, and the Board's analysis shows that Route 11 should be able to handle the increase in truck traffic that might occur following an abandonment.<sup>31</sup>

In addition, the Final EA explained that the increased truck traffic for the worst case scenario (73,344 one-way trips per year including bridge traffic) that would be diverted from the rail line proposed for abandonment would have a minimal impact on overall highway safety in the region. This is because trucks generally have not been involved in the majority of accidents on the potentially affected roads, and the State has been working to improve traffic flow,

---

<sup>29</sup> See Draft EA iv. The measure of truck traffic is projected to be 48,352 trips per year, excluding bridge traffic (i.e., overhead traffic that neither originates nor terminates on the rail segments at issue here) or 73,344 trips per year including bridge traffic.

<sup>30</sup> See Final EA 12.

<sup>31</sup> See *id.* iv.

mobility, and access in various sections of the I-95, SR-11, and US-1 corridors in Aroostook County.<sup>32</sup>

The EA also addressed concerns that the increased truck traffic would result in impacts on the Canada lynx and other local species, and recommended mitigation. It explained that the State's data on roadway crashes with animals, including the Canada lynx, shows that the predominant animals involved in such crashes are deer and moose, and that the likelihood of an increase in road kill of the Canada lynx would be minimal. SEA's final recommended mitigation included a consultation condition that would require MMA to prepare a salvage plan in consultation with SEA, U.S. Fish and Wildlife Service, Maine Department of Conservation, and Maine Department of Inland Fisheries and Wildlife, prior to commencement of any salvage activities on the line.<sup>33</sup>

To minimize other potential environmental impacts of the proposed abandonment, SEA recommended consultation conditions with the Maine Department of Conservation's Natural Areas Program regarding potential impacts to rare plant species and/or significant natural plant communities and with the U.S. Army Corps of Engineers (USACE) to determine if a Section 404 permit under the Clean Water Act (33 U.S.C. § 1344) would be required during salvage activities for any potential impacts to waters of the United States, including wetlands. SEA also recommended a condition that requires MMA to consult with the U.S. Environmental Protection Agency regarding stormwater management.<sup>34</sup>

In addressing potential salvage-related erosion concerns, the EA explains that MMA plans to remove most, if not all, of the track materials by rail, and that MMA does not intend to disturb any of the underlying ballast or track bed or perform any activities that would cause sedimentation or soil erosion. Moreover, MMA does not anticipate any dredging or use of fill in the removal of track material. To ensure that MMA's salvage activities would not result in sedimentation to water bodies, SEA recommended that we impose a condition requiring MMA to comply with best management practices for preventing soil erosion while conducting any salvage activities on the line.<sup>35</sup>

Based on the results of its environmental analysis, SEA also recommended a condition to ensure MMA's compliance with best management practices to prevent spills into waterways during salvage activities;<sup>36</sup> a condition requiring MMA to notify the National Geodetic Survey

---

<sup>32</sup> See id. v.

<sup>33</sup> See id.

<sup>34</sup> See id.

<sup>35</sup> See Draft EA 15.

<sup>36</sup> See id.

90 days before conducting any salvage activities;<sup>37</sup> a condition that would require MMA to use best management practices during salvage activities to ensure that dust is adequately controlled;<sup>38</sup> a condition limiting salvage activities to appropriate daytime hours to reduce salvage-related noise;<sup>39</sup> and a historic preservation condition.

Based on the results of all of its analysis, SEA concluded that the proposed abandonment would not significantly affect the quality of the human or natural environment, if the Board imposes the mitigation measures recommended, and that there was no need here to prepare a full Environmental Impact Statement (EIS).

In light of the agreement to sell the line, SEA has revised its recommendations. It notes that, should the sale proceed, the line would be rehabilitated, rail service would continue, no diversion to truck would occur, and no salvage activities would take place. Because no salvage would occur, the eight salvage conditions it had recommended would be moot. Therefore, the environmental section recommends that the Board only needs to impose these conditions should the line be abandoned and the sale not proceed.

Similarly, the new developments have also affected the historic preservation condition recommended in the Final EA. Following receipt of information that the MMA rail line would continue to be operated, SEA determined that the proposed undertaking would no longer have the potential to cause effects on historic properties. The Maine SHPO concurred with this determination. Thus, SEA recommends that the historic condition should only be imposed if the line is abandoned and the line sale does not occur.

b. Our Assessment of the Environmental Issues.

We find that SEA has taken the requisite “hard look” at the potential environmental impacts of the proposed abandonment and discontinuance and we adopt all of SEA’s analysis, including the environmental analysis not specifically discussed above. We also find the recommended conditions in the Final EA reasonable and feasible to minimize the potential adverse environmental impacts that could occur in the event of an abandonment and will impose them if the sale of the line does not close and the abandonment proceeds.

**IV. The Public Convenience and Necessity Permit Abandonment**

We balance the competing interests to determine whether the present or future public convenience and necessity permit the abandonment of the line. Assuming the sale of the line to the State goes smoothly, this is a simple analysis. Authorizing abandonment ensures that MMA

---

<sup>37</sup> See id. 15, 16.

<sup>38</sup> See id. 30.

<sup>39</sup> See id. 51.

will be able to stop incurring the current operating losses. There would be no gap in rail service under the parties' purchase and sale agreement because MMA has agreed to provide interim service until a permanent operator is chosen. When MMA's operations on the line are discontinued, the new operator would be able to make a fresh start with a refurbished system, and permanent overhead trackage rights to Canadian National Railway, Eastern Maine Railway, and the lines that MMA will continue to operate.

If the sale fails to materialize, however, the loss of service would affect a number of shippers and could have ripple effects in the State's employment. Given these ramifications, the State has gone to great lengths to maintain the line. However, the factors would still weigh in favor of granting the abandonment. As the record shows, continued operation of the line by MMA would impose a substantial economic burden on the railroad and on interstate commerce. Although it is possible that a recovered economy could aid the situation, this is too speculative a reason upon which to deny the abandonment and force MMA to continue sustaining its present losses.<sup>40</sup>

To the contrary, the line represents a burden on MMA's entire system, potentially undermining MMA's service on its other lines. Requiring MMA to continue operating this line at a financial loss would negatively affect other communities, other shippers, and other jobs served by the remainder of the MMA system. Such an outcome would not necessarily do shippers on the line any good in the long term if the rest of the system is adversely affected by the line's continued operation. MMA acquired the line from the bankrupt B&A and, as noted by MMA, it is possible that MMA could soon follow into receivership if the sale does not close and we deny the abandonment application. Even if receivership does not occur, granting the abandonment application will safeguard the remainder of MMA's system and allow MMA to provide reliable service to those shippers.

The majority of freight—more than 90%—transported by shippers located along the MMA rail line proposed for abandonment already moves by truck.<sup>41</sup> Although some shippers have stated otherwise, SEA has verified this contention with independent analysis during the environmental review process.<sup>42</sup> As noted in the record and at the hearing, some shippers tender a greater percentage of their freight to the railroad, but the fact remains that there are transportation alternatives for these commodities. The only product that cannot be transported

---

<sup>40</sup> See Ind. Rail Road Co.—Abandonment Exemption—In Martin and Lawrence Counties, Ind., AB 295 (Sub-No. 7X)(STB served March 26, 2010); San Joaquin Valley R.R.—Abandonment Exemption—in Tulare County, Cal., AB 398 (Sub-No. 7X)(STB served June 6, 2008); Union Pac. R.R.—Discontinuance—in Utah County, Utah, AB 33 (Sub-No. 209) (STB served Jan. 2, 2008) and Sierra Pacific Industries—Abandonment Exemption—in Amador County, Cal., AB 512X (STB served Feb. 23, 2005).

<sup>41</sup> See MMA's Confidential Application 7, February 25, 2010.

<sup>42</sup> See Final EA at iv.

by truck, LP's laminated strand lumber (LSL),<sup>43</sup> which is longer than 48 feet, only comprises 4% of the LSL produced at the company's Houlton facility.

Granting the abandonment will not result in what some fear would be a "stranded segment." As we discussed in the March 17 decision denying the motions to reject the application, the Board's predecessor, the Interstate Commerce Commission (ICC), allowed an abandonment to go forward even when it would result in a line only connecting to a line in Canada.<sup>44</sup> Here, despite concerns, MMA has provided a detailed and realistic explanation of how it will continue to fulfill its common carrier obligation on the northern segment of its system. For example, MMA contemplates that a maintenance facility would cost \$350,000 and that the line would be served by two locomotives.<sup>45</sup> MMA further explains how these locomotives would receive heavy maintenance. Although all the details of this plan have yet to be finalized, MMA has formulated a plan that can be expected to be fulfilled. We find this sufficient.

Some parties have raised concerns about being left dependent on the Canadian regulators if their traffic is rerouted through Canada, but these parties have not pointed to any potentially realistic abuses or deficiencies as a result. They also raise concerns about how their voices would be heard should Canadian National Railway Company (CN) attempt to abandon the connecting line at St. Leonard. However, as noted in a July 28 letter from Geoffrey C. Hare, (Hare Letter) the Chair and Executive Officer of the Canadian Transportation Agency (CTA), that Canadian entity has a regulatory regime similar to ours.

In their December 17, 2010 filing, TR/USW state that the December 9 petition asks the Board to accept an "as-yet incomplete arrangement, the preliminary parameters of which appear to be contrary to the interests of the public in general, the shippers and their employees in preserving competitive rail service options." TR/USW ask that the Board withhold its approval of the petition until all parties to the proceeding have had the opportunity to review all of the relevant documents. TR/USW also note that TR has consistently asserted that no solution to avoid the proposed abandonment is appropriate if it limits the ability of TR to enjoy competitive direct rail service at its Madawaska mill. TR/USW are concerned that the proposed settlement would "restrict[] service options" for TR and other shippers located on MMA lines. They ask the Board to remove the restrictions set out in paragraph 4(e) of the Term Sheet filed on October 20, 2010, outlining the agreement between MMA and the State, because paragraph 4(e) would restrict the operator chosen by the State to overhead service on the Madawaska to St. Leonard line, and MMA would be limited to overhead trackage rights over the 151 miles of line the State

---

<sup>43</sup> LSL is a new strand-based structural composite lumber product developed by LP. LP claims that the product represents an improvement over traditional 2X4 beams.

<sup>44</sup> See Me. Cent. R.R.—Aban. in Penobscot, Hancock and Washington, Counties, Me., AB 83 (Sub-No. 7) (ICC served Nov. 4, 1985).

<sup>45</sup> See MMA's Confidential Rebuttal, V.S. McGonigle 6, May 26, 2010.

would acquire from MMA. Unless the Board removes those restrictions, TR/USW ask that the Board deny the proposed abandonment and also deny the transfer to the State under the terms of the proposed settlement.

In addition, TR/USW claim that there might be “side arrangements” involving MMA and Irving Forest Products. TR/USW ask that, before the Board acts on the matters before us in this case, we afford TR/USW the opportunity to review any agreements Irving Forest Products or the Eastern Maine Railway (an affiliate of Irving Forest Products) has entered into “that relate to or potentially affect the Line and any contiguous rail segments.”

In its rebuttal, MMA states that the agreement between it and the State serves the public interest by preserving rail service in the region, is supported by all the interested parties except TR/USW, and is supported by the FRA and by the State. MMA argues that, under the guise of promoting the greater public interest, TR is really seeking to use this proceeding to obtain a private commercial advantage. MMA notes that TR has intervened (and that USW sought to intervene) in a court proceeding in U.S. District Court for the District of Maine in support of a petition by CN seeking access to TR’s mill in Madawaska, and that TR/USW is seeking to use this proceeding to obtain leverage in that litigation. MMA also states that the Board has no authority over the asserted agreements involving MMA and Irving Forest Products.

In its rebuttal, the State asks that the Board deny TR/USW’s request for relief. The State notes that the “essential terms” of the settlement between the State and MMA have been filed with the Board and made available to the public. The State says that the settlement between it and the railroad serves the public interest by preserving service to approximately 25 shippers and by saving over 1,700 jobs. The State points out that, without a grant of trackage rights to MMA between Madawaska and Millinocket, “Twin Rivers would forever lose any option of moving traffic to or from the south.” The State asserts that “[w]hat Twin Rivers seeks is relief that will benefit it. . . .” The State asserts that its settlement with MMA represents the public interest. Irving expresses similar views to the State and to the railroad in its letter.

None of TR/USW’s claims has merit. At the outset, as noted above, we do not accept the stranded segment argument originally raised by Fraser Papers concerning the Madawaska mill. Even if the line is abandoned and service ceases, the Madawaska mill will have access to all its markets through Canada, and has access to a regulatory regime administered by the CTA to challenge rates or practices in Canada.

The thrust of TR/USW’s arguments focuses, not on the proposed abandonment, but on the proposed agreement between the State and MMA, which is designed to forestall the adverse effects of the proposed abandonment. For example, Fraser Papers expressed concern that a grant of the abandonment would cut off its direct access to its U.S. markets. In its April 21 protest, Fraser Papers noted that the proposed abandonment would force traffic from the Madawaska mill to “travel through Canada, even if the destination or origin was also in the U.S.” The grant of trackage rights to MMA by the State under the parties’ proposed agreement would ameliorate

that problem by allowing MMA to continue to carry the Madawaska mill traffic directly south over the line between Madawaska and Millinocket.

But TR/USW seek a benefit beyond that requested by Fraser Papers. They want the Board to provide, as a condition of our grant of the requested abandonment authority, that the mill be assured of service by an additional carrier, the operator to be chosen by the State to operate the line, a benefit it has not enjoyed in the past. Unlike the shippers actually located on the line proposed to be abandoned, TR/USW do not merely wish to be protected from any adverse effects of the State's acquisition of the line. Rather, they wish to use the transaction as a vehicle to improve their competitive position by gaining access to an additional carrier.<sup>46</sup> TR/USW cite no statutory or regulatory basis for such a request, nor do they point to supporting court or agency precedent.

TR/USW also fail to support their claim that the record here does not provide the public with sufficient information about the transactions before us. MMA filed its application for abandonment on February 25, 2010, almost nine months ago. The record compiled since then is extensive, and the Board's process provided ample opportunity for all interested parties to participate by filing written comments or participating at the Board's Maine hearing. Many comments were filed, including several from Fraser Papers and TR on various aspects of the case. As this decision explains, the record before us here gives us the information we need to determine whether to grant abandonment authority to MMA.

As for information about the sale of the line to the State, TR/USW fail to cite any specific information that they need or which they are entitled to but lack. Both the Term Sheet filed on October 20 and the petition filed on December 9 describe the transaction in sufficient detail for our regulatory purpose of determining whether MMA's application meets the statutory requirements for a grant of abandonment authority. As noted herein, we are not imposing the proposed settlement agreement as a condition of our grant of abandonment authority.

As discussed in more detail below, the Board's role in a sale transaction pursuant to Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions, 363 I.C.C. 132 (1980) (Common Carrier), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982), codified at 49 C.F.R. § 1150.22, as is proposed here, is extremely

---

<sup>46</sup> TR/USW incorrectly claim that Fraser Papers and TR sought even greater relief in an August 3, 2010 filing. There, faced with loss of direct access to their U.S. markets, Fraser Papers and TR sought only "commercially reasonable" trackage rights, "in order to alleviate the potential abusive situation created by the applicant's retention of all access to the nation's rail system." In the context of the Board's request for comments on the access issue, we find it clear that any reference to MMA's control of all access to the nation's rail system referred to the fact that MMA would control access to the rail system at both the north and south end of the line to be abandoned, not to the fact that MMA was the only carrier directly serving the Madawaska mill.

limited. Once we approve a line for abandonment, a state or state agency may acquire (and subsequently sell or salvage) it outside of the Board's normal regulatory oversight. Nothing in the decision creating that process requires that the details of the acquisition be made public. To the contrary, other than notice, there are no procedural requirements for such an acquisition at all. The decision to exempt the acquiring state from agency oversight was made to encourage states to acquire and preserve lines that would otherwise be abandoned, while assuring the states that the lines could promptly be sold or salvaged if continuing rail service proved impractical. To burden this process by requiring MMA and the State to provide all the relevant sale documents, as sought by TR/USW, would undercut the judicially affirmed Common Carrier process. TR/USW did not even cite to Common Carrier, much less show that the provisions of that rule support their request.

TR/USW's requests concerning purported side agreements involving Irving Forest Products do not relate to either the proposed abandonment or the State's acquisition under Common Carrier. TR/USW claim that Irving Forest Products has agreed to pay \$1 million as part of the compensation to MMA in order to "buy down" MMA's trackage rights fees. TR/USW fails to show any relevance of such an agreement, if it exists, to either our exercise of our abandonment authority or the proposed transfer to the State under Common Carrier.<sup>47</sup> The purported agreement between MMA and Irving Forest Products, assertedly giving MMA access to an Irving Forest Products plant in St. Leonard, New Brunswick is beyond the scope of our inquiry. Moreover, St. Leonard is in Canada; see Hare Letter, supra. Accordingly, we will not withhold our approval of either the abandonment or the Common Carrier transfer so that TR/USW can seek to engage in discovery of these alleged agreements.

In sum, granting the abandonment will take a substantial burden off of MMA, allow the State to proceed with its purchase of the line, and thereby facilitate the continuation of rail service. If the sale fails to close, we find that the harm to the shippers and communities from the proposed abandonment of the line is outweighed by the demonstrated harm to MMA and the burden on interstate commerce through continued operation of the line. Although some of the opposition has been conditionally withdrawn, even considering the arguments put forward by all the protestants, the railroad has met its burden. Moreover, if the sale fails to close, we will retain jurisdiction over the transaction to permit the State to pursue its OFA, which is currently held in abeyance. We will therefore grant the abandonment application with conditions to mitigate the environmental impact and, as next discussed, with standard labor protective conditions.

In approving this abandonment application, we must ensure that affected rail employees will be adequately protected. 49 U.S.C. § 10903(b)(2). We have found that the conditions imposed in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth

---

<sup>47</sup> Separate Board filings are required for the trackage rights described in the Term Sheet and in the December 9 petition. As part of those filings, the trackage rights agreements will have to be submitted into the public docket. 49 C.F.R. § 1180.2(d)(7).

& Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), satisfy the statutory requirements, and we will impose them here.

Additionally, SEA has indicated that the right-of-way may be suitable for other public use, including as a trail, after abandonment. The State has requested a public use condition under 49 U.S.C. § 10905 for the entire line so that the right-of-way would be retained intact for future rail freight service. The State requests that MMA be prohibited from disposing of the corridor or rails for a 180-day period from the effective date of the abandonment authorization. The State indicates that the 180-day period is needed to conduct negotiations with MMA and to reach agreement with a short-line operator.

We will deny the State's request for a public use condition. As noted by MMA in its May 26, 2010 rebuttal, preserving a rail line for rail freight operations is not considered a public use under § 10905.<sup>48</sup> Section 10905 has been interpreted to promote the use of the property for alternate public purposes, such as highways, other forms of mass transportation, conservation, energy production or transmission or recreation.<sup>49</sup> In contrast, requests for continued rail service are governed by the forced-sale provisions of § 10904, which the State also has invoked to acquire the line. As discussed below, we have held this process in abeyance at the State's request so that the State and the railroad could conduct their negotiations.

### **Acquisition By State and Future Operator**

In the December 9 petition, the State invokes a rule, also known as a "class exemption," established by the Board's predecessor, the Interstate Commerce Commission (ICC), in 1980. The decision promulgating the rule is Common Carrier. There, the ICC created an exemption from the Interstate Commerce Act (the IC Act), exercising a power vested in the agency by 49 U.S.C. § 10505, now 49 U.S.C. § 10502. The exemption allows states and state agencies to acquire, for the purpose of providing continued rail service, rail lines that have been abandoned or have been "approved for abandonment." 363 I.C.C. at 135. Because the rule exempts the acquiring state from all the provisions of the IC Act, the state incurs no common carrier obligation, and may terminate service and sell the line without seeking permission from this agency. The purpose of the rule was to encourage states to invest public money in preserving

---

<sup>48</sup> See Wis. Cent. LTD.–Aban. Exemption–In Douglas, Washburn, and Barron Counties, Wis., AB 303 (Sub-No. 12X) (ICC served Apr. 20, 1993); Otter Tail Valley R.R.–Aban.–In Stearns, Todd, Douglas, Grant, and Otter Tail Counties, Minn., AB 330 (Sub-No. 1) (ICC served Apr. 8, 1991); and Ga. S.W. Div., S. C. Cent. R.R.–Aban. Exemption–Between Preston and Omaha, Ga., AB 385 (Sub-No. 2X) (STB served July 25, 1996).

<sup>49</sup> See Chi. and N. W. Transp. Co.–Aban. in Polk, Warren, Madison, Union, Ringgold, and Taylor Counties, Ia. and in Worth, Nodaway, Andrew, and Buchanan Counties, Mo., AB 1 (Sub-No. 159) (ICC served Sept. 12, 1984).

rail lines that would otherwise be scrapped. States could acquire them with the assurance that they could sell or salvage the lines if continuing rail service proved impracticable.

As the State points out, in order to invoke the Common Carrier rule, the State need only notify this agency, which it has done. The State is investing public money to preserve rail service over a failing line and is proposing to use an operator in order to maintain service. The State's acquisition of the line serves the purpose for which the exemption was established. Therefore, because the State qualifies under the Common Carrier exemption, its acquisition of the line under that exemption would not render it a common carrier.

Offer of Financial Assistance. The State timely filed an offer of financial assistance pursuant to 49 U.S.C. § 10904 in this proceeding on July 19, 2010. The Board found the State to be financially responsible and the offer to be reasonable and accepted the filing in an order served on July 23, 2010. Rather than pursuing an acquisition under § 10904, the State is proceeding under Common Carrier. Because the transfer under the provisions of Common Carrier is contingent upon a satisfactory closing, however, we will hold the § 10904 process in abeyance for 60 days.

Modified Certificate. In the December 9 filing, MMA asked that the Board issue it a modified certificate of public convenience and necessity pursuant to 49 C.F.R. § 1150.23. Pursuant to an "Interim Service Agreement" being negotiated by the parties, following the proposed acquisition of the line by the State, MMA will operate the line on an interim basis until the State can select a permanent operator.

MMA has met or will have met the requirements of 49 C.F.R. § 1150.23 for the issuance of a modified certificate following the transfer of the line to the State and the submission of the additional information noted herein. The parties have provided: (1) the name and address of the operator, MMA; (2) the information on the abandonment giving rise to the acquisition by the State; (3) the proposed operation by MMA, i.e., the petition tells us that MMA will operate the line until the State chooses a permanent operator, and the State and MMA state that proposed operations will be a continuation of MMA's existing service; and (4) a statement by MMA that it will receive no subsidies in connection with its operations, and that there will be no preconditions that shippers must meet to receive service.

To provide the remaining information required for issuance of a modified certificate, MMA is directed to submit a copy of the Interim Service Agreement into the record when it is completed, and is also directed to submit the information on its liability insurance coverage required by § 1150.23 (b)(4)(iii). Our grant of the certificate to MMA will become effective upon the State's acquisition of the line and MMA's submission of the additional material that has been requested. Appropriate notice pursuant to 49 C.F.R. § 1150.23 will be published in the Federal Register.

Trackage rights. A key part of the agreement between the State and MMA is the latter's expressed willingness to grant trackage rights to the State's operator over MMA's track at the

north and south ends of the line to access other carriers. In addition, the State's operator will grant trackage rights between Madawaska and Millinocket to MMA in order to allow that carrier to connect the northern and southern parts of its system. The State and MMA will need to file notices of exemption pursuant to 49 C.F.R. § 1180.2(d)(7) before those rights may be exercised.

Board-related conditions. In the December 9 petition, the State and MMA identify five "STB-related conditions" that must be met as a prerequisite to consummation of the purchase and sale agreement between the two parties. The parties request that the Board enter an order that meets these conditions. Condition Four, that the Board accept this joint petition as a notice that the State has properly invoked the Common Carrier exemption, has been addressed herein, as has Condition Five, that the Board grant a modified certificate to MMA. Condition Three provides that the Board permit consummation of the abandonment and salvage of the line, should closing pursuant to the purchase and sale agreement fail to occur. The abandonment authority granted herein becomes effective on the date that this decision is served. Should MMA elect to exercise that authority, rather than transfer the line to the State pursuant to the provisions of Common Carrier and 49 C.F.R. § 1150.23, it may do so, subject to the offer of financial assistance process initiated by the OFA filed by the State on July 19, 2010, and the environmental, historic preservation, and labor protection conditions discussed above and set out in the ordering paragraph. The railroad requires no additional permission from this agency to exercise the authority granted herein.

Condition Two is that the Board determine that the OFA submitted by the State "meets the Board's criterion," and postpone the effective date of the abandonment authorization pursuant to 49 C.F.R. § 1152.27(e)(1). The Board has already made the findings regarding financial responsibility of the offeror in the order served July 23, 2010. We then held the OFA process in abeyance at the request of the offeror, the State. As discussed above, we will continue to hold the OFA process in abeyance for 60 days, by which time the transfer of the line should be completed pursuant to the Common Carrier exemption. If the proposed transaction does not go forward, and the State elects to proceed under the OFA rather than under the Common Carrier exemption, the State can ask us to reinstitute the OFA process at that time.

Condition One is that we authorize the abandonment of the line, but provide for the withdrawal of that authority and the reopening of the proceeding to consider the abandonment application, together with the objections filed thereto, in the event that closing does not occur under the purchase and sale agreement as a result of MMA's failure to close.

We will not impose Condition One. As discussed in detail above, the Board is granting the abandonment authority sought by MMA, not because of a private agreement between the railroad and the State, but rather because MMA has properly sought that authority and the record before us supports granting it. The conditional and limited "withdrawals" of the opposition filed by the parties do not permit us to treat the application as unopposed. Because our grant of authority to the railroad is not predicated on the State's consent, the failure of any agreement between the State and MMA would have no effect on our decision.

We find:

1. The present or future public convenience and necessity permit the abandonment of the above-described line, subject to the employee protective conditions in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and conditions that, should MMA seek to abandon the line and operations not continue, MMA shall: (1) prior to commencement of any salvage activities on the line, consult with the Maine Department of Conservation’s Natural Areas Program regarding potential impacts to rare species and/or significant natural communities and shall comply with its reasonable requirements; (2) consult with the National Geodetic Survey (NGS) prior to beginning salvage activities on the line, report the results in writing to SEA prior to initiating salvage activities, and, if NGS has identified geodetic station markers that might be affected by the abandonment, provide NGS with at least 90 days’ notice prior to beginning salvage activities that may disturb or destroy any geodetic station markers to plan for the possible relocation of the geodetic station markers by NGS; (3) consult with the United States Army Corps of Engineers (USACE) prior to commencing any salvage activities on the line to determine whether a Section 404 permit under the Clean Water Act (33 U.S.C. § 1344) would be required during salvage activities for any potential impacts to waters of the United States, including wetlands, and, if applicable, comply with USACE’s reasonable requirements, and report the results of its consultation to SEA in writing; (4) prepare a salvage plan in consultation with SEA, U.S. Fish and Wildlife Service, Maine Department of Conservation, and Maine Department of Inland Fisheries and Wildlife prior to commencement of any salvage activities on the line, consider the potential impacts from salvaging activities to listed threatened and endangered species that may occur in the vicinity of the rail segments proposed to be abandoned, and report the results of those consultations in writing to SEA prior to initiating salvage activities; (5) prepare a salvage plan in consultation with SEA and the U.S. Fish and Wildlife Service to minimize potential impacts from salvaging activities to Federally listed threatened and endangered species that may occur in the vicinity of the rail segments proposed to be abandoned prior to commencement of any salvage activities on the line; (6) consult with the United States Environmental Protection Agency or the appropriate state designee to ensure that any concerns regarding applicable stormwater management requirements are addressed prior to commencement of any salvage activities on the line and report the results of these consultations in writing to SEA prior to initiating salvage activities; (7) implement the following best management practices to control sedimentation and prevent spills and fugitive emissions, including dust and other applicable particulate matter during salvage activities on the line: (a) utilize appropriate techniques, such as silt fences, to minimize soil erosion during salvage; (b) disturb the smallest area possible around streams and wetlands, and immediately revegetate any areas it disturbs during salvage; (c) regularly maintain and inspect culverts, bridge abutments and bridges left in place to avoid degradation to wetland and wildlife habitat areas prior to consummating the authorized abandonment; (d) during the performance of salvage activities on the line authorized to be abandoned, comply with all applicable Federal, state and local regulations regarding fugitive dust and minimize fugitive emissions created during salvage by using such control methods as water spraying and wind barriers; and (e) observe all applicable

Federal, state and local regulations regarding handling and disposal of any waste materials, including hazardous waste, encountered during salvage; (8) to the extent possible, employ best management practices, such as limiting salvage activities to appropriate daytime hours, to reduce noise generated while conducting salvage activities on the line authorized for abandonment; and (9) retain its interest in and take no further steps to alter the historic integrity of the rail segments authorized for abandonment, as well as buildings and structures within the project right-of-way (area of potential effects) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470(f) has been completed, report back to SEA regarding any consultations with the Maine SHPO, and not file its consummation notice or initiate any salvage activities related to abandonment until the Section 106 process has been completed and the Board has removed this condition.

2. Abandonment of the line will not have a serious, adverse impact on rural and community development.
3. As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.
4. If the State acquires the line pursuant to the Common Carrier exemption, it will not become a common carrier itself.

It is ordered:

1. CP, KCS, and AAR are made parties of record in this proceeding.
2. The petition of the USW for leave to intervene is granted.
3. MMA and the State are granted leave to file rebuttal statements, and TR is granted leave to file a response to those statements.
4. The requests of TR and USW are denied.
5. The application is granted subject to the conditions specified above.
6. The OFA process is tolled until February 25, 2011.
7. Notice of a modified certificate for MMA to operate the line on an interim basis will be published in the Federal Register.
8. The State's request for a public use condition is denied.
9. MMA must submit the Interim Service Agreement and information on its liability insurance coverage required by 49 C.F.R. § 1150.23(b)(4)(iii) into the record.

10. This decision and certificate will be effective on its date of service. Any petition to reopen must be filed as provided at 49 C.F.R. § 1152.25(e).

11. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), MMA shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by MMA's filing of a notice of consummation by December 27, 2011, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

# APPENDIX A

