

233501



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1071

**STEWARTSTOWN RAILROAD COMPANY
ADVERSE ABANDONMENT
IN YORK COUNTY, PENNSYLVANIA**

ENTERED
Office of Proceedings
DEC 13 2012
Part of
Public Record

**UPDATE AND
REPLY TO
STEWARTSTOWN RAILROAD COMPANY'S NOVEMBER 30, 2012
PETITIONS TO STAY, AND TO RE-OPEN THE STB'S
NOVEMBER 14, 2012 DECISION GRANTING
ADVERSE ABANDONMENT AUTHORITY**

1. James Riffin ("Riffin"), herewith provides the Surface Transportation Board ("STB") with an Update of negotiations between the parties, and a Reply to the Stewartstown Railroad Company's ("SRC") November 30, 2012 Petitions to Stay and to Re-open the STB's November 14, 2012 Decision (served November 16, 2012) granting the Estate of George Hart's Application for Adverse Abandonment of the SRC's Line of Railroad in York County, PA.

2. The purpose of this Reply is several fold: A. To make a formal reply to what was filed; B. To apprise the Board of what is going on behind the scenes; C. To attempt to persuade those standing behind the lawyers, to reach a settlement. The first part of this Reply will be non-legalistic. The legalistic part will be at the end.

3. The Estate's primary goal is to collect a debt. A secondary goal is to preserve the Line. The main goal of the Directors of the SRC, should be to preserve as much as is possible of the SRC, not because it is 'needed' for rail service, but because of its historic significance. A secondary goal of the Directors is to retain ownership and control.

4. Riffin knew George Hart, and knew what he attempted to do over the course of his lifetime: He attempted to preserve railroads. He was instrumental in the creation of the Pennsylvania Railroad Museum in Strasburg, PA. He went to great lengths to preserve the Stewartstown Railroad. Those who knew Mr. Hart, know that the destruction of the Stewartstown Railroad was the last thing that he would have wanted. However, he had serious disagreements with the other Directors of the SRC. He put a lot of his own money into the SRC, in an effort to save it. Riffin seriously doubts if he ever intended for those funds to be a 'loan.' However, the disagreements became so intense and personal, he had the lien that is the underlying subject of this proceeding, created. And as Keith O'Brien has stated, the Executor of Mr. Hart's Estate has a legal duty to pursue that lien.

5. This dispute is similar to a divorce. Due to the acrimony between the parties (Mr. Hart and the other Directors of the SRC), the 'kids' (the SRC) are made to suffer. And just as in many divorces, the emotions of the parties dictate what happens. It is no longer, 'what is best for the kids.' It is 'how can I hurt the other party?' Mr. Hart knew how strongly the other Directors liked the SRC, and how much the SRC meant to them. He also knew that if he hurt the SRC, that would hurt the other Directors. In effect, it was his way of 'getting even.' The SRC is not just a line of railroad. It is a part of the historic fabric of Southern York County.

6. The Northern Central ran from Maryland to Lake Erie. When Penn Central elected to abandon the Northern Central after Hurricane Agnes, Maryland took the position: Abandon the line. Pennsylvania took a different position: Save the line. Pennsylvania felt so strongly about saving the line, that Pennsylvania fought the abandonment, then bought the Pennsylvania portion of the line after the abandonment fight was lost. Pennsylvania has spent multiple millions of Dollars saving the Northern Central.

7. The SRC never needed 'saving.' Until now. A whole host of people have pledged a considerable amount of money in their collective effort to 'save' the Stewartstown Railroad. The only question is: How best to 'save' the Stewartstown Railroad?

8. Which leads us to our present situation. For reasons unknown to Riffin, the existing management of the SRC have been unable to attract sufficient revenue-producing freight traffic to the SRC, to make it financially viable. The SRC has a legally-enforceable debt. Parties distant have no 'personal' interest in saving this little historic railroad. If something is not done quickly, this little historic railroad will no longer be. And another part of history will be forever lost.

9. Riffin believes the first goal should be the preservation of the Stewartstown Railroad, as a line of railroad. Not just because it is historic, but because it is actually needed as a line of railroad. There are virtually no locations on the Northern Central where rail shippers can locate. There are a number of locations on the Stewartstown line where rail shippers can locate (and are located). No one, to date, has 'marketed' the Stewartstown line. Riffin has spent a number of years studying the Northern Central and the Stewartstown, trying to figure out how to attract rail shippers. He believes that he has found sufficient potential rail traffic to make the Stewartstown financially viable. Which is why he has a desire to acquire the Stewartstown. Riffin has been told his ideas will not work. He believes they can work. He is willing to try.

10. Part of the underlying problem is the unrealistic values that have been ascribed to the Stewartstown's Line. Both the Estate and the Directors of the SRC have convinced themselves that the Stewartstown has assets with substantial market value (in the neighborhood of a million Dollars). They have even obtained 'appraisals' that purport to demonstrate that the SRC's assets have substantial market value.

UPDATE

11. On November 28, 2012, Riffin had a conversation with Ken Bitten, a SRC director, regarding the STB's November 14, 2012 Decision.

12. On December 1, 2012, Riffin had a two-hour conference call with Ken Bitten, Renee Bitten, Eric Bickelman, and Dave Watson, four of the SRC's nine directors. During that conference call, Riffin gave his opinion regarding the STB's November 14, 2012 Decision, the SRC's Petitions to Stay and to Re-open. Riffin has provided the cite for the STB's March 23, 2001 decision in *The Township of Woodbridge, NJ, et. al.*, STB Docket No. 42053, and has

indicated the STB's position in the *Woodbridge* decision.¹ Riffin then suggested that those desiring to preserve the SRC should: (A) create a new entity; (B) channel the pledge funds the SRC has been obtaining, into that new entity; (C) have the new entity seek permission from Riffin, the Estate and the STB, to file an Offer of Financial Assistance to purchase those portions of the SRC Line that Riffin does not offer to purchase, or in the alternative, provide Riffin with sufficient funds to purchase those portions of the SRC Line that Riffin does not presently intend to offer to purchase.

13. Riffin has indicated that in his opinion, while the SRC may win the present fight (vacate the Adverse Abandonment decision), the SRC is likely to lose the war (preserve its Line from a foreclosure sale by the Estate). [If the Adverse Abandonment Decision is vacated, the Estate could file suit in a State court, then have the State court seek an opinion from the STB regarding whether the STB's jurisdiction would bar the sale of the Line at a foreclosure sale. The Estate could then argue before the STB, that since the SRC voluntarily pledged its assets as collateral for the Hart Note, the SRC would be judicially barred from arguing before the STB that the sale of the Line, as a line of railroad, would 'unreasonably interfere with interstate commerce.' The STB, citing its *Woodbridge* precedent, then would likely hold that the STB's primary jurisdiction would not bar the sale of the Line to another entity that had sought and obtained authority to acquire and operate the Line as a line of railroad. The SRC would lose its line of railroad. The Estate would obtain funds to satisfy the Note. The line of railroad would be preserved (providing someone offered to acquire and operate it as a line of railroad). If no one offered to acquire and operate the line, then the STB could grant authority to abandon the Line. End result: The SRC loses its line of railroad, just a few months later. The Estate obtains funds to satisfy a portion of the Note. The SRC and the Estate incur substantial additional litigation costs, thereby reducing the net return to the Estate.]

14. Riffin has argued that if the SRC were to reach a negotiated settlement, it could use some of its present 'leverage' to induce the Estate to permit the SRC to acquire the portion of the Line that Riffin does not want. On the other hand, if the SRC elects to continue to litigate, it will ultimately lose all of its 'leverage,' and will have the outcome 'crammed down its throat.' (The

¹ "We explained that Conrail had voluntarily entered into the agreements, and thus the preemption provision should not be used to shield the carrier from its own commitments. Rather, because '[t]hese voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce' (decision [December, 2000] at 5), we declined to upset them."

SRC has some present leverage, since it could continue to litigate, thereby increasing the litigation costs incurred by the Estate.)

15. Riffin has pointed out to both parties that while the SRC is not likely to prevail on its ‘adverse abandonment jurisdictional’ issue, the SRC may prevail on two other arguments (neither of which it has presently raised, but is not precluded from raising):

A. The STB has consistently held that abandonment authority (and acquisition authority), is permissive. The STB has never ordered a railroad to abandon a line of railroad the STB has granted authority to abandon. In this proceeding, the SRC may elect to not abandon the portion of the Line that Riffin does not acquire. Since the STB’s order granting abandonment authority does not mandate abandonment, (and in fact waived the one-year time period within which abandonment must occur to prevent the abandonment authority from expiring), the SRC could merely refuse to notify the STB that it has consummated abandonment. And since the STB’s jurisdiction remains until the Line is actually abandoned, the Estate could be precluded from foreclosing on the Line for a considerable period of time.

B. The SRC could in fact begin providing common carrier rail service to shippers. Riffin has indicated to the parties that Riffin could begin providing interstate common carrier rail service in less than 30 days.² And if Riffin can do it, the SRC could likewise do it. (Decidedly

² As the STB is aware, Riffin has submitted verified statements to the STB from three shippers who have a desire for freight rail service. One of those shippers is Maryland Concrete, which gets its aggregates (30,000 tons / year) from the Vulcan quarry in York, PA. Presently, the aggregates are trucked to Maryland Concrete. It would be less expensive to truck the aggregates to Hanover Junction (an eight-minute truck ride), then load the aggregates into waiting hopper cars. Once ten or so hopper cars are loaded, the cars would be carried to Shrewsbury, PA by the SRC. At Shrewsbury, the cars would be unloaded into a dump truck, then trucked the last 3 miles to Maryland Concrete [or trucked 300 feet to Shrewsbury Concrete (9,000 tons / year)]. An alternative would be to rail the aggregates from Hanover Junction to SRC’s tracks in New Freedom, then transloaded to a dump truck in New Freedom. This would add one additional trucking mile, but would eliminate the need to rehabilitate the SRC’s tracks from New Freedom to Shrewsbury. The track between New Freedom and Hanover Junction is basically Class I track, having been kept that way by Ken Bitten, when he used the Line for passenger service. The SRC presently has authority to operate on the track between New Freedom and Hanover Junction (and to Hydes, PA, for that matter.) See DOP 57, filed December 20, 1984. Approved by the ICC, January, 1985. This authority has never been abandoned. Trackage rights continue until abandonment authority is obtained, even when the underlying trackage rights agreements have expired. See *Thompson v. Texas Mexican RY Co.*, 328 U.S. 134, 146-147, 66 S.Ct. 937, 945 (1946). Since the aggregates originate in PA, and are ultimately delivered to a shipper in Maryland, the move would constitute ‘interstate commerce.’ Riffin could easily make this happen, since he has a Class A CDL license, and has a tandem-axle dump truck with current tags on it. He has a prime mover capable of moving rail cars, and could put sides on his three 89-foot steel-deck flat cars stored in York, PA.

so if Riffin were to provide a bit of assistance.) And if the SRC were to begin providing rail service, that would constitute ‘new evidence,’ which would justify ‘re-opening’ the proceeding, and would justify vacating the adverse abandonment order. (As Riffin pointed out, the SRC need only convince one Board Commissioner to switch sides, since the decision was a divided decision. And the provision of a significant quantity of rail service would certainly undermine the basic underpinning for the decision: That the Line was no longer needed for continued rail service / that the SRC had not taken reasonable steps to solicit traffic.)

16. To conclude this non-legalistic section, Riffin would remind the Estate that the Estate does not presently have a ‘slam-dunk.’ (The SRC could prolong the proceeding for a considerable period of time.) Nor can the SRC avoid losing its line of railroad forever. (The Estate can force the sale via *Woodbridge*.) Riffin can compel the SRC to convey to Riffin that portion of the Line that Riffin desires, by asking the STB to Set Terms and Conditions. Presently, each party has something to offer the other party. That makes a settlement possible, and the preferred outcome.

REPLY – STAY REQUEST

17. As the Estate has pointed out, the SRC failed to address the four criteria for a Stay. That alone is sufficient to deny the Stay request. In addition, abandonment authority has already been stayed, as has the date by which an OFA must be filed, to permit the SRC time to provide Net Liquidation Value information to Riffin. So at the moment, there is nothing to stay. (The SRC has not asked to stay the date by which information must be provided to Riffin.)

REPLY – ADVERSE ABANDONMENT JURISDICTION

18. In *Norfolk Southern Railway Company – Adverse Abandonment – St. Joseph County, IN*, STB Docket No. AB-290 (Sub-No. 286) (STB served Feb. 14, 2008) (“*Notre Dame*”), the City of South Bend, IN and Notre Dame University filed an adverse abandonment petition with the STB, seeking adverse abandonment of tracks on the campus of Notre Dame University. The STB denied the adverse abandonment. The STB’s decision was appealed to the U.S. Court of Appeals, D.C. Circuit. Appeal No. 08-1150. At oral argument, the three panel judges asked the parties to brief the issue of whether the STB has jurisdiction to entertain an adverse abandonment

petition, since The Congress had changed the language in 49 U.S.C. 10903 when the Interstate Commerce Commission Termination Act (“ICCTA”) was passed in 1995. The three parties submitted briefs, a copy of which is appended hereto.

19. John Heffner, counsel for Intervenor The Chicago, Lake Shore & South Bend Railway Co., LLC, argued that when The Congress enacted the ICCTA, it changed the wording of 49 U.S.C. 10903, and further argued that The Congress emphasized its goal of preserving rail lines. Notre Dame and the City of South Bend argued *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”). The STB argued that the issue had not been raised before the STB. Consequently, the appellate court was barred from addressing the issue. (An issue not raised, is waived.) The STB also argued that it had jurisdiction, basing its argument on the Supreme Court’s decision in *Thompson v. Texas Mexican RY Co.*, 328 U.S. 134, 66 S.Ct. 937 (1946), and citing numerous cases wherein adverse abandonment had been granted, all without the jurisdictional issue being raised.

20. The D.C. Circuit elected not to address the jurisdictional issue, since it did not need to address the issue in order to affirm the STB’s decision not granting adverse abandonment.

21. The jurisdictional issue was first raised by Norfolk Southern, which questioned who had standing to file an adverse abandonment application.

22. Since the issue was not raised by SRC prior to the STB rendering its November 16, 2012 decision, in all likelihood, the D.C. Circuit would not address the issue were it to be presented to the D.C. Circuit via a SRC Petition for Review. However, this is not clear cut, since ‘jurisdiction’ may be raised at any time, including for the first time on appeal, and since it was the D.C. Circuit which raised the issue, not one of the parties.

23. Pursuant to *Chevron*, if a statute expressly addresses an issue, that is the end of the matter. The clear language of the statute is to be given effect. However, if a statute does not expressly address the issue, then the agency has the authority to interpret the statute. In effect, ‘fill in the blanks.’ The agency’s interpretation of the statute will be given effect, so long as it is ‘reasonable.’ Even if the court would not have reached the same conclusion.

24. 49 U.S.C. 10903 does not address the issue of ‘adverse abandonment.’ The words ‘adverse’ and ‘third-party’ do not appear in the statute. Consequently, it would appear that the STB has authority, pursuant to *Chevron*, to interpret 49 U.S.C. 10903, and to decide whether an abandonment application may be filed by a third-party. In support of this position, the STB may rely upon the *Tex-Mex* case, wherein the Supreme Court held that an abandonment application may be filed by a third-party. Of note, the statute in *Tex-Mex* [§1(18)] used the phrase “no carrier by rail,” whereas 49 U.S.C. 10903 uses the phrase “a rail carrier.” The phrases appear to be the same. John Heffner’s arguments, that the 49 U.S.C. 10903 language uses the word ‘only,’ whereas the 1(18) section did not contain this word, and the fact that The Congress emphasized that its goal was the preservation of rail lines, when it enacted the ICCTA, are unlikely to be strong enough to overcome *Chevron*. In addition, it is a basic tenet of statutory interpretation that a statute will be held to abrogate the common law only if it expressly so provides. (The many cases holding that the ICC, and now the STB, have jurisdiction to decide adverse abandonment applications, would constitute ‘common law,’ and as such, would be abrogated only if The Congress expressly said it intended to abrogate this body of case law.)

25. End result: The D.C. Circuit is likely to hold that the STB has jurisdiction to accept and decide third-party-filed abandonment applications.

26. While Riffin does not like adverse abandonment proceedings, this particular decision removes some of the rigidity that is in *Denver & Rio Grande Railway Historical Foundation – Adverse Abandonment – In Mineral County, CO*, STB Docket No. AB-1014 (STB served May 23, 2008). In *Denver & Rio Grande*, the STB held that OFA’s would never be permitted in an adverse abandonment proceeding. In this proceeding, the STB has held that OFAs would be permitted, since no one requested that the proceeding be exempted from the OFA procedures. (And since the Estate expressly stated that it wanted the OFA process to be available.)

CONCLUSION

27. The Stay request should be denied. The Petition to Reopen should be rejected.

28. The parties should attempt to reach a settlement. Continuing the fight, will not alter the ultimate outcome: The SRC will lose its Line. Continuing the fight is not cost-effective for the Estate: Whatever value is obtained from selling the assets of the SRC, will inure to the benefit

of Baker and Miller, not to the Estate. The primary goal of the SRC, should be the preservation of the Line. With a settlement, this is possible. The primary goal of the Estate, should be obtaining as much of its lien as is possible. With a settlement, more money will flow into the hands of the Estate, rather than into the coffers of Baker and Miller.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2012, a copy of the foregoing Update / Reply, was served by first class mail, postage prepaid, upon Alex Snyder, Barley Snyder, P.O. Box 15012, York, PA 17405-7012 and upon Keith G. O'Brien, Baker and Miller, Ste 300, 2401 Pennsylvania Ave, Washington, DC 20037.



James Riffin

D.O.P 57

STEWARTSTOWN RAILROAD COMPANY

FILED 12/20/84

NORTHERN CENTRAL BRANCH (USRA LINE
145) BETWEEN HYDE AND NEW FREEDOM
IN YORK COUNTY, PENNSYLVANIA

HEFFNER'S BRIEF

**CHICAGO, LAKE SHORE & SOUTH BEND RR
INTERVENOR**

**ARGUED: CONGRESS' GOAL WAS PRESERVATION OF RAIL LINES
STATUTE SHOULD BE INTERPRETED LITERALLY**

(ORAL ARGUMENT HEARD FEBRUARY 19, 2009
BEFORE JUDGES SENTELLE, GINSBURG, AND KAVANAUGH)

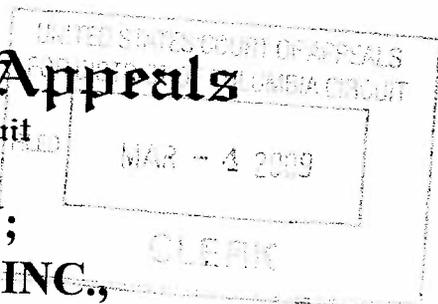
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In The

United States Court of Appeals

MAR - 4 2009

For The District of Columbia Circuit



RECEIVED

**CITY OF SOUTH BEND, IN;
BROTHERS OF HOLY CROSS, INC.,**

Petitioners,

v.

**SURFACE TRANSPORTATION BOARD;
UNITED STATES OF AMERICA,**

Respondents,

and

**THE CHICAGO, LAKE SHORE &
SOUTH BEND RAILWAY CO., LLC,**

Intervenor.

**ON PETITION FOR REVIEW FROM
THE SURFACE TRANSPORTATION BOARD**

**SUPPLEMENTAL POST ARGUMENT
BRIEF OF INTERVENOR
THE CHICAGO, LAKE SHORE &
SOUTH BEND RAILWAY CO., LLC**

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TABLE OF CONTENTS

| | <u>Page</u> |
|-----------------------------------|--------------------|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION AND BACKGROUND | 1 |
| THE ISSUE PRESENTED | 1 |
| ARGUMENT | 1 |
| CERTIFICATE OF FILING AND SERVICE | |
| ADDENDUM | |

TABLE OF AUTHORITIES

Page(s)

CASES

Canadian National Railway-Adverse Discontinuance-Lines of Bangor And Aroostock Railroad Company Et Al,
STB Docket No. AB-279 (Sub-No. 3) (Serv. May 3, 2004) 5

CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application—Canadian National Railway Company and Grand Trunk Western Railroad, Inc.,
STB Docket No. AB-31 (Sub-No. 38) (Serv. Feb. 1, 2002) 5

Minnesota Commercial Railway Company-Adverse Discontinuance-In Ramsey County, MN, Et Al,
STB Docket No. AB-882, (Serv. July 16, 2008)..... 5

*Modern Handcraft, Inc.-Abandonment in Jackson County, MO,
363 I.C.C. 969 (1981)..... 4, 8

*New York City Economic Development Corporation-Adverse Abandonment-New York Cross Harbor Railroad-In Brooklyn, NY,
STB Docket No. AB-596 (Serv. Dec. 15, 2004) 5, 6

*New York Cross Harbor R.R. v. STB,
374 F.3d 1177 (D.C. Cir. 2004)..... 6

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STB Docket No. AB-400 (Sub-No. 4) (Serv. November 18, 2004) 8

* Authorities upon which we chiefly rely are marked with asterisks

Tacoma Eastern Railway Company-
Adverse Discontinuance of Operations Application-
A Line of City of Tacoma in Pierce Thurston, and
Lewis Counties, WA,
STB Docket AB-No. 548 (Serv. October 16, 1998)..... 5

*Thompson v. Texas Mexican Ry. Co.,
328 U.S. 134 (1946)..... 4

*Yakima Interurban Lines Association-
Adverse Abandonment-In Yakima County, WA,
STB Docket No. AB-600 (Serv. November 19, 2004)..... 6, 8

STATUTES

49 U.S.C. § 10101(4) 8

*49 U.S.C. § 10903 *et seq.*..... 1, 2, 3, 6

49 U.S.C. § 10905 7

OTHER AUTHORITY

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And Adm. News at 793, 796, 814, 851, and 865-6..... 7

INTRODUCTION AND BACKGROUND

The Chicago, Lake Shore & South Bend Railway Co., LLC (“CLSSB”), Intervenor in support of Respondents Surface Transportation Board (the “Board” or the “STB”) and United States of America in the above-captioned proceedings, files this post argument supplemental brief as directed by the Court in its order issued February 19, 2009.

These proceedings concern two Petitions for Review filed by Petitioners the City of South Bend, IN (“the City” or “South Bend”) and Brothers of Holy Cross, Inc. (collectively “the Petitioners”) seeking to overturn two rulings denying an application Petitioners had filed with the Board seeking the “adverse” abandonment of a short railroad line in South Bend owned by Norfolk Southern Railway Company (“NSR”). CLSSB desires to acquire this line from NSR.

THE ISSUE PRESENTED

The issue presented is very simple: does the Board have jurisdiction under the I.C.C. Termination Act of 1995 (hereafter “the ICCTA”) to entertain and grant or deny an application for the “adverse” abandonment of a railroad line filed by a party other than a common carrier railroad. CLSSB believes the answer is “no.”

ARGUMENT

A resolution of this issue revolves around the 1995 revision to the abandonment provisions of the former Interstate Commerce Act (“the ICA”), 49 §

U.S.C. 10903 *et seq.* Prior to December 31, 1995, federal economic regulation of railroads was governed by the ICA as administered by the former Interstate Commerce Commission (“the ICC”). On that date the President signed into law a new federal statutory scheme for the economic regulation of railroads. That new statute, the ICCTA, is administered by the agency that replaced the ICC, the Surface Transportation Board. As relevant here, the ICCTA contains provisions regulating the entry and exit (abandonment and discontinuance of service) from the railroad business as well as other matters such as railroad mergers, corporate control and acquisition, rates and service.

The pre-1996 abandonment provisions of the ICA read:

Sec. 10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may-

- (1) abandon any part of its railroad lines; or
- (2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance...

By contrast, the ICCTA states:

Sec. 10903. Filing and procedure for application to abandon or discontinue

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to-

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An

abandonment or discontinuance may be carried out only as authorized under this chapter.

(2) When a rail carrier providing transportation subject to the jurisdiction of the Board under this part files an application, the application shall include....

As two members of the Court observed during argument, the 1995 law contains a subtle but very significant change. The ICA did not specify who was eligible to seek abandonment or discontinuance authority. It merely forbade the railroad from abandoning a line or terminating service until the ICC found that the public convenience and necessity required or permitted that action. By contrast, the ICCTA not only states that it is a *rail carrier* that *must* file the application for authority but adds that “abandonment or discontinuance may be carried out *only* as

authorized under this chapter.” [words italicized for emphasis]. CLSSB does not believe that Congressional intent could be clearer.

The concept of an “adverse” abandonment or discontinuance originally dates back to the 1946 Supreme Court decision in Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 145. Although the Court never used the term “adverse” abandonment, it has generally been cited for the proposition that a party having an interest in a rail line may seek authority for the abandonment of the line or discontinuance of service over it against the wishes of the subject carrier so long as permission is sought from the ICC or now the Board.¹ The use of the term “adverse” abandonment first appeared in transportation case law in the 1981 case, Modern Handcraft, Inc.-Abandonment in Jackson County, MO, 363 I.C.C. 969 (cited as Modern Handcraft), involving an application filed by a public agency for the abandonment of and subsequent condemnation for a public use of railroad property that had not been used for any transportation purposes for many years. Between 1981 and December 31, 1995, the ICC considered and decided but a handful of cases involving such “adverse” abandonments, typically involving community efforts to acquire railroad rights-of-way that had long been unused and

¹ That case involved an attempt by the carrier that owned a rail line to evict a bankrupt carrier having trackage rights over it for failure to pay rent after the owner terminated the trackage rights agreement.

for which no party had expressed any interest in acquiring or using for rail transportation purposes.

The enactment of the ICCTA brought a veritable flood of “adverse” abandonment and discontinuance cases.² Many of these proceedings involved community efforts to terminate the incumbent railroad’s common carrier rights and operations and remove the federal preemption powers related thereto so the community could use local law to evict the carrier and then condemn the right-of-way for some public purpose. See, e.g., New York City Economic Development Corporation-Adverse Abandonment-New York Cross Harbor Railroad-In Brooklyn, NY, STB Docket No. AB-596, served December 15, 2004; CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application—Canadian National Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38), served Feb. 1, 2002; and Minnesota Commercial Railway Company-Adverse Discontinuance-In Ramsey County, MN, Et Al, STB Docket No. AB-882, served July 16, 2008.

² The adverse discontinuance cases typically involved either an effort by a public agency that owned a rail line to evict a tenant short line railroad that was unwilling to leave the premises upon termination of the lease or at the end of the lease term or involved the eviction by the owning railroad of a railroad having trackage rights over the owner’s line. See, e.g., Tacoma Eastern Railway Company-Adverse Discontinuance of Operations Application-A Line of City of Tacoma in Pierce Thurston, and Lewis Counties, WA, STB Docket AB-No. 548, served October 16, 1998 and Canadian National Railway-Adverse Discontinuance-Lines of Bangor And Aroostock Railroad Company Et Al, STB Docket No. AB-279 (Sub-No. 3), served May 3, 2004.

The Board has historically denied adverse abandonment applications where the line was either being actively used or, in the case of an out of service line, the line had a potential for continued operations and incumbent carrier had taken reasonable steps to acquire traffic. Yakima Interurban Lines Association-Adverse Abandonment-In Yakima County, WA, STB Docket No. AB-600, slip op. served November 19, 2004 (hereafter Yakima). To the best of Intervenor's knowledge, only one of these cases, New York Cross Harbor R.R. v. STB, 374 F.3d 1177 (D.C. Cir. 2004), was the subject of a federal appellate court decision.³ There can be little doubt that Congress intended to limit the ability to initiate an abandonment proceeding to railroads when it rewrote section 10903. In accordance with the Court's directions, CLSSB examined the legislative history behind the adoption of the current abandonment provisions. While neither the House nor Senate versions of what eventually became the ICCTA specifically address the issue of who can seek abandonment authority, the principal focus of both versions is the preservation of uneconomic branch lines by short line railroads. For example, the

³ The application was filed by an agency of the City of New York that owned certain railroad facilities operated by the New York Cross Harbor Railroad, lessee. No party questioned the Board's jurisdiction to entertain the application. Arguably, the City as the rail line owner was a common carrier railroad subject to the Board's jurisdiction. The Court overturned the Board decision granting the City's application and remanded the case back to the Board which, in turn, then denied the City's application. New York City Economic Development Corporation-Adverse Abandonment-New York Cross Harbor Railroad-In Brooklyn, NY, STB Docket No. AB-596, served December 15, 2004.

House Report states that the abandonment procedures administered by the TAP [the agency proposed by the House for regulating railroad entry and exit] “afford the best opportunity for the line to be sold and operated as a viable short-line railroad.” The House version called for “streamlining and modernizing the processing of applications”... “with the primary goal of the reforms contained in this section ...to maximize the opportunity for the line to be acquired for continued operation by a smaller railroad...” House Report No. 104-311. The House and Senate versions differed in the respect that the House proposed that railroads be permitted to pursue abandonments through a notice rather than a licensing process, where as the Senate retained the traditional abandonment public convenience and necessity application process. Ultimately, the conference committee selected the Senate’s version of the abandonment provisions. But the conference report contains nothing to change the focus of the abandonment provisions on service preservation as evidenced by the Senate’s retention of the offer of financial assistance provisions of the former Act’s section 10905. House Conference Report No. 104-422; 1995 U.S. Code Cong. And Adm. News at 793, 796, 814, 851, and 865-6.

The fact that the conferees chose to add language to the effect that an abandonment or discontinuance could only be carried out only as authorized under this chapter suggests that Congress intended for the Board to interpret the

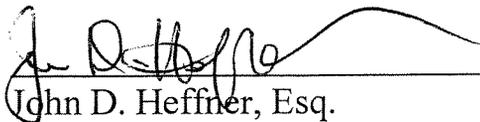
abandonment statute very literally in carrying out its abandonment responsibilities. After all, Congress knows how to write legislation and the fact that the law's language limited the class of parties eligible to initiate an abandonment proceeding to a railroad was intentional.

One of the stated goals of the nation's Rail Transportation Policy found in 49 U.S.C. § 10101(4), retained by the new law, is to ensure the development and continuation of a sound rail transportation system. A common theme that pervades all of the Board's abandonment decisions is the need to protect the public from unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. Yakima slip op. at 4, citing Modern Handcraft, *supra* at 972. A decision allowing a nonrailroad applicant such as the Petitioners to seek abandonment authority would be contrary to Congressional goals, particularly in view of the fact that the ICCTA's abandonment provisions are more restrictive than those of the ICA. As the Board has acknowledged in its decisions, the grant of "adverse" abandonment requests could present a serious threat to the long-term viability of the national rail infrastructure, by gradually chipping away pieces of the nation's rail system. Seminole Gulf Railway, L.P.-Adverse Abandonment-In Lee County, FL, STB Docket No. AB-400 (Sub-No. 4), slip op. served November 18, 2004, at 6.

It may well be that the law should contain a process whereby communities or other appropriate parties could force the abandonment of rail lines and rights-of-way needed for public purposes. If so, Congress should address this need in legislation specifically enacted for that purpose with implementing regulations carefully prepared by the Board after due notice and extensive public comment. However, CLSSB submits that this transaction is not the place for the Board to entertain an “adverse” abandonment request.

Accordingly, CLSSB requests that this Court find that the Board did not have jurisdiction to entertain the “adverse” abandonment application filed by Petitioners and that their Petitions for Review be dismissed for lack of jurisdiction.

Respectfully submitted,



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Due: March 5, 2009

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this the 4th day of March, 2009, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit, via hand delivery, the required number of copies of this Supplemental Post Argument Brief of Intervenor for Respondent, and further certify that I served, via Electronic Mail and United States Mail, postage prepaid, the required number of said Brief to the following:

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The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

A handwritten signature in black ink, appearing to be 'W. J. S.', written over a horizontal line.

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ADDENDUM

MERCE Ch. 109

Ch. 109 LICENSING

49 § 10903

necessary to provide adequate, efficient, and safe facilities to enable the rail carrier to perform its obligations under this subtitle, including extension of any of the carrier's railroad lines after issuance of a certificate under section 10901 of this title. The Commission may authorize a rail carrier to act under this section only if it finds that the expense involved will not impair the ability of the carrier to perform its obligations to the public. The Commission may conduct a proceeding on its own initiative or on application of an interested party.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1403.)

HISTORICAL AND STATUTORY NOTES

| Revised Section | Source (U.S.Code) | Source (Statutes at Large) |
|-----------------|-------------------|---|
| 10902 | 49:1(18)(c) | Feb. 4, 1887, ch. 104, 24 Stat. 379, § 1(18)(c); added Feb. 5, 1976, Pub.L. 94-210, § 801(a), 90 Stat. 126. |

In the first sentence, the words "after 10901 of this title" are inserted for clarity.

LIBRARY REFERENCES

Commerce §85.8.
C.J.S. Carriers § 35 et seq.

§ 10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

- (1) abandon any part of its railroad lines; or
- (2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(b)(1) Subject to sections 10904-10906 of this title, if the Commission—

- (A) finds public convenience and necessity, it shall—
 - (i) approve the application as filed; or
 - (ii) approve the application with modifications and require compliance with conditions that the Commission finds are required by public convenience and necessity; or

bor Executives' Ass'n 1993, 999 F.2d 574.

merce Commission act- capriciously in failing under Revised Inter- section [49 U.S.C.A.), of conditioning sale in payment by vendor l protections for those on the line. Railway Ass'n v. I.C.C., C.A.9, 9.

nd classification yard l line" requiring Com- despite its cost and ex- efficiency in handling re yard would be locat- sting main-line track d solely for storage, ssification of railroad . I.C.C., 1983, 711 F.2d D.C. 86, certiorari de-), 464 U.S. 1056, 79

ackage acquisition incidental trackage rs are not governed by onsolidation, merger, of control, but, rather, statute authorizing on- ation of railroad lines. cutives' Ass'n v. I.C.C., 72, 260 U.S.App.D.C.

merce Act created no Guardia Act's general ance of injunctions in 4 to accommodate, and Act forbade, injunction ke after railroad's sale mpted from require- e Commerce Act by ICC - contrary to unions' way Labor Act. Pitts- ie R. Co. v. Railway Ass'n, 1989, 109 S.Ct. 10, 105 L.Ed.2d 415, on 744.

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49 § 10903

INTERSTATE COMMERCE Ch. 109

(B) fails to find public convenience and necessity, it shall deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under sections 11347 and 24706(c) of this title.

[(c) Repealed. Pub.L. 96-448, Title IV, § 402(a)(2), Oct. 14, 1980, 94 Stat. 1941]

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1403; Pub.L. 96-448, Title IV, § 402(a), Oct. 14, 1980, 94 Stat. 1941; Pub.L. 98-216, § 2(14), Feb. 14, 1984, 98 Stat. 5; Pub.L. 103-272, § 5(m)(24), July 5, 1994, 108 Stat. 1378.)

HISTORICAL AND STATUTORY NOTES

| Revised Section | Source (U.S. Code) | Source (Statutes at Large) |
|--|--|---|
| 10903(a) (less last sentence). | 49:1a(1) (1st sentence less words related to certificates). | Feb. 4, 1887, ch. 104, 24 Stat. 379, § 1a(1) (1st sentence), (4); added Feb. 5, 1976, Pub.L. 94-210, § 802, 90 Stat. 127, 128; Oct. 19, 1976, Pub.L. 94-555, § 218(b), 90 Stat. 2628. |
| 10903(a) (last sentence). | 49:1a(4)(a) (words following the period). | |
| 10903(b) | 49:1a(1) (1st sentence, words related to certificates), (4) (less the words following the period in subsection (a) and less the last 2 sentences). | |
| 10903(c) | 49:1a(4) (last 2 sentences). | |

In subsection (a), the phrases "(hereafter in this section referred to as 'abandonment') and '(hereafter referred to as 'discontinuance')" are omitted as unnecessary. The last sentence is restated for consistency.

Subsection (b) restates the source provisions for clarity and consistency. The first sentence and the words "Subject to sections 10904-10906 of this title" are inserted for clarity. The words "upon an order" are omitted as unnecessary. The words "terms and" are omitted as unnecessary. The word "deny" is substituted

for "disapprove" for consistency. The citation "section 565(b)" is substituted for "section 565" as being more precise.

In subsection (c), the words "Except as otherwise provided in sections 10905 and 10906 of this title" are inserted for clarity.

1994 Amendments

Subsec. (b)(2). Pub.L. 103-272, § 5(m)(24), substituted "sections 11347 and 24706(c) of this title" for "section 11347 of this title and section 405(b) of the Rail Passenger Service Act (45 U.S.C. 565(b))".

LEGISLATIVE HISTORY

HOUSE REPORT NO. 104-311

[page 84]

with the decisionmakers. In addition, the current 31-month schedule for merger proceedings is shortened to a maximum of 270 days.

Various Inter-carrier Transactions: The common carrier obligation, lines sales, through routes, joint rate jurisdiction, car hire, car supply and car interchange, terminal trackage rights and reciprocal switching jurisdiction are all transferred to the TAP under existing standards with minor modifications for large Class I railroads' transactions. A new separate procedure without mandatory transaction costs imposed by the agency is established for smaller Class II and Class III railroads' transactions.

Abandonments: The current approval process under the "public convenience and necessity" standard is transferred to the Panel. Where appropriate, the TAP is authorized to alter the scope of a proposed abandonment to afford the best opportunity for the line to be sold and operated as a viable short-line railroad.

Exemption Authority: This critical function that allows for further deregulation through administrative action is transferred to the TAP. The deadline for deciding whether to begin an exemption proceeding is set at 90 days after an application is received, and any ensuing exemption proceedings must be completed within one year. Restrictions on intermodal ownership are eliminated, and the TAP is required to employ its exemption authority "to the maximum extent" consistent with applicable law.

Labor Protection: No change is made to the level of protection in transactions involving Class I railroads. In line purchases and other inter-carrier transactions involving smaller (Class II and Class III railroads), Worker Adjustment and Retraining Notification Act levels of labor protection are imposed.

Summary of Motor Carrier Provisions of H.R. 2539. H.R. 2539 eliminates and then reenacts a revised Motor Carrier Act. The new Motor Carrier Act established in the bill eliminates numerous unnecessary provisions and streamlines many other of the ICC's functions regarding the regulation of the motor carrier industry. Most of the remaining functions are transferred to the Department of Transportation, with limited responsibilities transferred to the Transportation Adjudication Panel.

Existing ICC functions that have been eliminated, deregulated or reformed:

All tariff filings, except for noncontiguous domestic trade are eliminated.

All rate regulation, except for noncontiguous domestic trade and individual household goods movements are eliminated.

Exemption authority to permit administrative deregulation has been substantially broadened, with restrictions only on cargo loss and damage, insurance, safety fitness, and antitrust immunity.

Federal grants of operating authority have been eliminated.

Regulation of Interstate bus routes and discontinuances has been substantially reformed.

Price regulation and tariff filing requirements for office and exhibit moves have been eliminated.

Household goods dispute resolution has been reformed.

Federal resolution of routine commercial disputes has been eliminated.

Possibility of future
State taxation of
Restrictions on interstate
Review of motor
Restrictions on
have been eliminated
Federal regulatory
Registration and
single Federal regulatory
duplicative and burdensome
State regulation

Motor Carrier functions
portation. Most of the
mercial operation of transportation
ferred to DOT. It is a
will be carried out by the
eral Highway Administration
rying out these responsibilities
currently collected ICC

The primary remaining
motor carrier registration
mum levels of liability
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and the relevant provisions
over existing law to ensure
and obligations imposed by
American Free Trade Agreement

The maintenance of
cial rules (such as lease
rules, rules for shipper
will be transferred to
portation is a truly intermodal
functioning of commerce
established to ensure that
the same rules and procedures
be potentially subject to
DOT shall oversee and
the Committee anticipates
required regarding those

Motor Carrier functions
dication Panel. The Panel
amount of rate regulation
goods, rate regulation
ments to Hawaii, Alaska
sions, and requirements
of joint rates. Approval
immunity and limited
are transferred to the Panel
will be handled by the Panel

Summary of Significant
cludes a number of significant
rized below.

Antitrust Immunity
carrier industry enjoys

ICC TERMINATION ACT

P.L. 104-88

[page 95]

American Bus Association; Mr. Maurice Greenblatt, Chairman of the Board, United Van Lines, Inc.; and Mr. Jerry Gereghy, incoming President, Transportation Brokers Conference of America.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 102. Rail provisions

This section revises and reorganizes the rail portions of subtitle IV of title 49, United States Code, as follows.

SUBTITLE IV—INTERSTATE TRANSPORTATION

Part A—Rail

Chapter 101—General Provisions

Section 10101. Rail transportation policy

This provision continues the relevant portions of former Section 10101a (rail transportation policy). The changes to the content of the rail transportation policy are to conform to the abolition of minimum rate jurisdiction by the Transportation Adjudication Panel (TAP).

Section 10102. Definitions

The amended definitions delete several terms rendered redundant in light of the abolition of regulatory jurisdiction over express and sleeping car companies. Unlike the former Section 10102, the definitions are confined entirely to terms to railroad provisions.

Section 10103. Remedies are exclusive

To reflect the replacement of the Staggers Act system of optional certification of State regulatory agencies to administer economic regulation of railroads using Federal standards, this provision is conformed to the bill's direct and general pre-emption of State jurisdiction over economic regulation of railroads. As used in this section, "State or Federal law" is intended to encompass all statutory, common law, and administrative remedies addressing the rail-related subject matter jurisdiction of the Transportation Adjudication Panel. The bill is intended to standardize all economic regulation (and deregulation) of rail transportation under Federal law, without the optional delegation of administrative authority to State agencies to enforce Federal standards, as provided in the relevant provisions of the Staggers Rail Act.

Chapter 103—Jurisdiction

Section. 10301. General jurisdiction

This provision replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying

LEGISLATIVE HISTORY

HOUSE REPORT NO. 104-311

[page 102]

lines would probably have been permanently abandoned by a higher-cost Class I trunk carrier. In addition, when a struggling shortline (Class III) operation can survive only with an infusion of capital, the Class II carriers often stand in the best position as rescuers of a floundering Class III railroad. Against this background, the Committee considers it crucial to avoid imposing the large and potentially fatal costs of unfunded labor protection benefit mandates on Class II and Class III transactions. To impose such costs would only increase the already substantial risk that the rail lines in question will be permanently abandoned once they have been removed from the route system of a major Class I railroad.

Section 10703. Filing and procedure for notice of intent to abandon or discontinue

* This provision, which replaces former sections 10903 and 10904, streamlines and modernizes the processing of applications for the abandonment or discontinuance of service on a rail line. The primary goal of the reforms contained in this section is to maximize the opportunity for the line to be acquired for continued operation by a smaller railroad, even though the line is revenue-deficient for a large trunk carrier.

The agency's powers include the option to require in appropriate cases that the scope of the proposed abandonment be amended to afford the best opportunity for the line to be sold and operated as a viable short-line railroad. To provide maximum flexibility in addressing situations of this type, the agency may either require that the length of rail line proposed for abandonment be increased, require that trackage rights be included with the proposed abandonment to maximize competitive opportunities for a prospective shortline operator, or require some combination of enlarged abandonment and trackage rights. Labor protection requirements now applicable to abandonments are not changed from existing law. The agency also retains the authority to disapprove a proposed abandonment or discontinuance if not consistent with the public convenience and necessity.

Section 10704. Offers to purchase to avoid abandonment and discontinuance

This provision, which replaces former section 10905, governs so-called "forced sales" of lines proposing for abandonment. The new provision retains the procedure under which the agency screens potential offerors for fitness and, if specified conditions are met, sets the price for the sale of the line proposed for abandonment. The new provision eliminates the alternative (and rarely utilized) process for forcing continued operation of a line through use of a shipper or other non-rail party's subsidy, of its operation. Experience since the enactment of the Staggers Act has shown that, although outright sale of lines through this process can be an important means of assuring continued rail service under new private-sector management, the subsidy procedure is very cumbersome, rarely employed, and requires considerable continuing regulatory supervision by the agency. In keeping with the goal of the bill to minimize the need for Federal regulation, one-time outright sales, rather than continuing policing of subsidy arrangements, are clearly

the preferable sector management

Section 10705. Purposes

In replacing agency authority over abandonment, the bill may be of such alteration

Section 10706

This section carries over the authority for special agency approval of general purposes. Although this tracks former provisions, the exclusive exemption power formerly excluded

Section 10901

This section clarifies the legal duty of the agency. It also clarifies the requirements for change of control under former service from the railroad to a prior condition of the question of the defense that under contract of or rate-reasonable regime since it "reasonable" (although a case treatment with service, the corresponding to such as by through contracts.

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ICC TERMINATION ACT

P.L. 104-88

[page 166]

SUBTITLE IV—INTERSTATE TRANSPORTATION

Part A—Rail

Chapter 101—General Provisions

SEC. 10101. RAIL TRANSPORTATION POLICY.

House provision

This provision integrates the relevant portion of former Section 10101 (general national transportation policy) and former Section 10101a (rail transportation policy). The changes to the content of the rail transportation policy are to conform to the abolition of minimum rate jurisdiction.

Senate amendment

Section 302 (Rail Transportation Policy) amends 49 U.S.C. 10101a, which states the rail transportation policy, to add an additional national policy goal of providing for expeditious handling and resolution of all proceedings required or permitted to be brought under the provisions of this subtitle. The provision recognizes that timely action by the Board is necessary, particularly when providing remedies to protect captive shippers against market abuse.

Conference substitute

The Conference provision integrates all policy goals into a single rail transportation policy. It retains relevant prior policy goals, while adding the additional goal of providing expeditious administrative remedies.

SEC. 10102. DEFINITIONS.

House provision

The amended definitions delete several terms rendered redundant in light of the abolition of regulatory jurisdiction over express and sleeping car companies. Unlike the former Section 10102, the definitions are confined entirely to terms relevant to railroad provisions.

Senate amendment

Section 303 (Definitions) amends 49 U.S.C. 10102, which defines terms used in rail provisions to remove terms that are not pertinent, to update and clarify the term "rail carrier", and to remove references to passenger transportation.

Conference substitute

This provision integrates changes common to both House and Senate provisions to reflect reductions in regulatory jurisdiction. To reflect the reorganization of all rail provisions into a separate part, non-rail definitions have been deleted. To clarify that only providers of rail transportation for compensation are within the scope of the statute, the definition of "rail carrier" is limited to persons providing *common carrier* rail transportation.

ICC TERMINATION ACT

P.L. 104-88

[page 180]

roads on one hand and smaller railroads on the other. This should promote clearer and more expeditious handling of the affected transactions, and avoid imposing additional and sometimes potentially fatal costs on start-up operations of smaller railroads who often can keep rail lines in service, even if not viable as part of a larger carrier's system.

As to line acquisitions by Class II railroads, the House provision requires 1 year of mandatory labor protection in the form of severance pay, computed under the standards of section 11126(b). No labor protection requirement is imposed on acquisitions by Class III railroads.

Senate amendment

Section 330 (Authorizing Construction and Operation of Railroad Lines) amends 49 U.S.C. 10901, under which the construction of new rail lines and the operations of new rail carriers must be authorized to reduce the level of employee protection that may be imposed by the Board on smaller carriers and noncarriers. While employee protective conditions have not often been required for such new operations, the minimum level of protection available, if protection was imposed, was inordinately high (up to 6 years of salary protection). As amended, the maximum level of protection that could be imposed on smaller carriers and noncarrier entities is reduced to a more realistic level: advance notice (the same requirement imposed on other industries) and up to one year's salary protection, unless the parties voluntarily agree otherwise. In addition, labor protection arrangements could only be imposed when consistent with the public interest.

Conference substitute

The Conference provision includes the substantive provisions of the House bill. Class II rail carriers acquiring a line under this section are subject to a mandatory 1-year severance pay requirement for severed employees, computed as provided in the House bill. No protection is imposed on Class III rail carrier line acquisitions.

By providing this clear delineation of requirements for Class II and Class III rail carriers acquiring rail lines, the Conference does not intend to limit the availability of section 10901 for non-carrier acquisitions. In addition, Class II and Class III carriers retain the existing option (as do Class I carriers) to obtain approval of inter-carrier transactions under section 11323, such as trackage rights agreements under section 11323(a)(6). The House references to definitions of Class II and Class III rail carriers are deleted as unnecessary. The Conference intends to follow the prior practice in the Staggers Act and elsewhere of employing the Class II and Class III categories formerly established by the ICC, and now to be the responsibility of the Surface Transportation Board.

SEC. 10903. FILING AND PROCEDURE FOR APPLICATION TO ABANDON OR DISCONTINUE.

House provision

This provision (10703), which replaces former Sections 10903 and 10904, converts applications for the abandonment or discontinuance of service on a rail line from a public convenience and

LEGISLATIVE HISTORY

HOUSE CONF. REP. NO. 104-422

[page 181]

necessity" licensing proceeding into a notification process to maximize the opportunity for the line to be acquired for continued operation by a smaller railroad, even though the line is revenue-deficient for a large trunk carrier.

Given the change from licensing to notification, the agency's powers are limited to enforcing the notification requirements and, if appropriate, specifying that the scope of the proposed abandonment be amended to afford the best opportunity for the line to be sold and operated as a viable short-line railroad. Labor protection requirements now applicable to abandonments are unaffected.

Senate amendment

Section 333 (Filing and Procedure for Applications to Abandon or Discontinue) amends 49 U.S.C. 10904, which contains the procedural requirements for applications to abandon a rail line, to remove outdated provisions for rail restructuring plans sponsored by the Secretary and to make conforming changes.

Conference substitute

The Conference provision retains the Senate formulation of an application for abandonment or discontinuance under the public convenience and necessity standard, making other technical changes.

SEC. 10904. OFFERS TO PURCHASE TO AVOID ABANDONMENT AND DISCONTINUANCE.

House provision

This provision (10704), which replaces former Section 10905, governs so-called "forced sales" of lines proposed for abandonment. The new provision retains the procedure under which the agency screens potential offerors for fitness and, if specified conditions are met, sets the price for the sale of the line proposed for abandonment. The new provision eliminates the alternative (and rarely utilized) process for forcing continued operation of a line through use of a shipper or other non-rail party's subsidy of its operation.

Senate amendment

The Senate amendment retains the existing procedures of section 10905, including the option for agency-supervised subsidy of a rail line to keep it in service.

Conference substitute

The Conference provision includes the House provision, with the addition of the subsidy option, but specifies in subsection (f)(4)(B) that any subsidy arrangement must be limited to a maximum duration of 1 year, unless otherwise mutually agreed by the parties.

SEC. 10905. OFFERING ABANDONED RAIL PROPERTIES FOR SALE FOR PUBLIC PURPOSES.

House provision

In replacing former Section 10906, this provision retains existing agency authority to examine the possibility that a line proposed for abandonment may be suitable for alternative public uses. Aban-

donment may be pursued if such alternative use is found to be in the public interest.

Senate amendment

The Senate amendment

Conference substitute

The Conference amendment amends section 10905.

SEC. 10906. EXCEPTED LINES.

House provision

This section relates to the authority of the Secretary to require rail carriers' authority to abandon or discontinue rail carriers' authority for spur, industrial, and terminal tracks are not subject to the general pre-emption provisions of chapter 109. Form

Senate amendment

Section 334 (E) amends section 10906 to require approval requirements for spur, industrial, and terminal tracks conforming changes

Conference substitute

The Conference amendment amends section 10906.

SEC. 10907. RAILROADS.

House provision

This provision (10705) amends section 10907 to require ownership of a line proposed for abandonment, is not subject to the general pre-emption provisions of chapter 109.

Senate amendment

The Senate amendment amends section 10907.

Conference substitute

The Conference amendment amends section 10907.

ICC TERMINATION ACT

P.L. 104-88
[page 182]

onment may be postponed for up to 6 months to allow for the pursuit of such alternatives.

Senate amendment

The Senate amendment retained former section 10906.

Conference substitute

The Conference provision is the House provision, renumbered as section 10905.

SEC. 10906. EXCEPTION.

House provision

This section replaces former section 10907(a) as the source of rail carriers' authority to enter into joint ownership or use arrangements for spur, industrial, team, switching or side tracks without agency approval. The provision also clarifies that such auxiliary tracks are not subject to the regulatory approval processes under chapter 109. Former section 10907(b) is eliminated to conform to the general pre-emption of State economic regulation of rail carriers.

Senate amendment

Section 334 (Exceptions) amends 49 U.S.C. 10907, which exempts spur, industrial, team, switching, and side tracks from the approval requirement for constructions and abandonments, only for conforming changes.

Conference substitute

The Conference provision, renumbered as section 10906, is the House provision.

SEC. 10907. RAILROAD DEVELOPMENT.

House provision

This provision (10707) retains the feeder line development program of former section 10910, under which another party may acquire ownership of a rail line over which service is inadequate. No changes in the former section, other than the deletion of mandatory labor protection, is made.

Senate amendment

The Senate amendment retained former section 10910 with repeals of obsolete and executed provisions.

Conference substitute

The Conference provision combines the House and Senate changes to former section 10910.

**CITY OF SOUTH BEND AND
BROTHERS OF HOLY CROSS JOINT BRIEF**

**BOARD HAS
ADVERSE ABANDONMENT JURISDICTION**

**ARGUED: *CHEVRON* / EXISTING LAW CHANGED
ONLY IF CONGRESS EXPRESSLY SO STATES**

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

PERMANENT

ORAL ARGUMENT WAS HELD ON FEBRUARY 19, 2009

MAR - 5 2009 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
RECEIVED

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| UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT | |
| FILED | MAR - 5 2009 |
| CLERK | |

No. 08-1150
(Consolidated with 08-1301)

CITY OF SOUTH BEND, IN and BROTHERS OF HOLY CROSS, INC.,
Petitioners,

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of Decisions of the
Surface Transportation Board

SUPPLEMENTAL BRIEF OF
CITY OF SOUTH BEND, IN and BROTHERS OF HOLY CROSS, INC.

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March 5, 2009

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES..... | ii |
| SUPPLEMENTAL ARGUMENT | 1 |
| I. Congress Has Not Eliminated The Board’s Authority To Entertain And Decide Adverse Abandonment Applications..... | 1 |
| A. Nothing in the current statute prohibits filing and consideration of adverse abandonment applications. | 1 |
| B. The Board’s consideration of adverse abandonment applications is consistent with the statute and the prior functions of the Interstate Commerce Commission..... | 3 |
| II. The Board’s Procedures For Determining Adverse Abandonment Applications Are Identical To And Consistent With The Board’s Procedures Governing Carrier-Initiated Abandonments. | 5 |
| CONCLUSION | 10 |

TABLE OF AUTHORITIES*

| <u>Cases</u> | <u>Page(s)</u> |
|--|----------------|
| <i>American Trucking Ass'n v. U.S.</i> , 344 U.S. 298 (1953) | 3 |
| * <i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984), | 1, 3 |
| * <i>Cheney Railroad Company, Inc. v. I.C.C.</i> , 902 F.2d 66 (D.C. Cir. 1990)..... | 3 |
| * <i>Consolidated Rail Corp. v. I.C.C.</i> , 29 F.3d 706 (D.C. Cir. 1994)..... | 4, 7 |
| * <i>Denver & Rio Grande Rwy. Historical Foundation—Adverse Abandonment—In Mineral City, CO</i> , 2008 WL 2154898 (S.T.B.) (May 23, 2008)..... | 8 |
| <i>Fourco Class Co. v. Transmirra Products Corp.</i> , 353 U.S. 222 (1957) | 3 |
| * <i>Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Trans. Co.</i> , 467 U.S. 622 (1984) | 2, 9 |
| * <i>Howard v. S.T.B.</i> , 389 F.3d 259 (1st Cir. 2004) | 4 |
| * <i>Modern Handcraft, Inc., Abandonment in Jackson County, MO</i> , 363 I.C.C. 969 (1981)..... | 2 |
| * <i>New York Cross Harbor Railroad v. S.T.B.</i> , 374 F.3d 1177 (D.C. Cir. 2004) | 3, 4, 7 |
| <i>Tidewater Oil Co. v. U.S.</i> , 409 U.S. 151 (1972)..... | 3 |
| * <i>Thompson v. Texas Mexican Ry. Co.</i> , 328 U.S. 134 (1946) | 2 |
| * <i>United States v. Langley</i> , 62 F.3d 602 (4th Cir. 1995) | 2 |
| <hr/> | |
| <i>Wisconsin Central Ltd.—Abandonment Exemption—In Winnebago County, WI</i> , 1990 WL 287427 (I.C.C.)(Feb. 22, 1990) | 5 |
| <i>Wisconsin Dep't of Transp.—Abandonment Exemption</i> , 1988 WL 225048 (I.C.C.)(Nov. 23, 1988) 5 | |

* **Precedents primarily relied upon.**

Statutes

| | |
|----------------------------|------|
| 49 U.S.C. § 702 | 3 |
| 49 U.S.C. § 10501(b) | 2 |
| 49 U.S.C. § 10903 | 1, 2 |

49 U.S.C. § 109046, 7, 10

49 U.S.C. § 109062

Regulations

49 C.F.R. § 1152.....5

49 C.F.R. § 1152.22.....6

49 C.F.R. § 1152.257

49 C.F.R. § 1152.50.....1

Other Materials

Minority Views: H.R. 2539, The ICC Termination Act of 1995, H.R. Rep. No. 104-311, at 523 (1995)3

Michael L. Stokes, *Adverse Abandonment: Toward Allowing the States to Condemn or Dispose of Unneeded Railroad Land*, 31 *Transp. L.J.* 69 (2003)4

Addendum

STB Decision, AB-290 (Sub-No. 286), *Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN*, October 26, 2006

STB Decision, AB-290 (Sub-No. 286), *Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN*, December 22, 2006

SUPPLEMENTAL ARGUMENT

I. Congress Has Not Eliminated The Board's Authority To Entertain And Decide Adverse Abandonment Applications.

In determining whether the Surface Transportation Board has retained its authority to consider adverse abandonment applications, the first step is to inquire whether Congress has directly spoken to the precise question at issue. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”). In this case, it has not. Neither 49 U.S.C. § 10903, nor any other section of the Act, mentions adverse abandonments. The same is true of all statutory language that previously governed the abandonment process, namely 49 U.S.C. § 1(18), 49 U.S.C. § 1a, and 49 U.S.C. § 10903 following codification of the Act in 1978.

A. Nothing in the current statute prohibits filing and consideration of adverse abandonment applications.

As currently enacted, § 10903 provides that “[a] rail carrier providing transportation subject to the jurisdiction of the Board ... who intends to ... abandon any part of its railroad lines ... must file an application ... with the Board.”¹ In other words, a railroad may not *sua sponte* abandon a line without Board approval. However, nothing in the statute decrees that *only* a rail carrier may invoke the STB’s exclusive and plenary jurisdiction over the abandonment of railroad lines. Nor is there anything in the statute or legislative history of the ICC Termination Act of 1995 (“ICCTA”) to indicate that the Congress intended to strip the Board of its heretofore unquestioned authority to consider adverse abandonment applications filed by other than the

¹ A literal construction of the language suggests that a rail carrier intending to abandon any part of its railroad lines must always file an application with the Board in order to abandon a line. That is not always the case. A rail carrier is not required to file an abandonment application in those situations where no local traffic has moved over a line for at least 2 years and any overhead traffic on the line can be rerouted over other lines. Instead, a petition for exemption will suffice. *See* 49 C.F.R. § 1152.50.

owning railroad.² Furthermore, nothing in the legislation's history or language indicates that Congress intended, by revising the language of § 10903, to alter the Board's exclusive jurisdiction over abandonments or to overrule the Supreme Court's holding in *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 145 (1946), which has long provided the legal foundation for the adverse abandonment concept.

As the Fourth Circuit succinctly explained in *United States v. Langley*, “[i]t is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute.” 62 F.3d 602, 605 (4th Cir. 1995)(en banc), cert. denied, 516 U.S. 1083 (1996) (citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992), *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, (1990), and *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)). “Thus, it is proper to consider that Congress acts with knowledge of existing law, and that ‘absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.’” *Langley*, 62 F.3d at 605 (quoting *Estate of Wood v. C.I.R.*, 909 F.2d 1155, 1160 (8th Cir. 1990)).

Nothing suggests that, in enacting ICCTA, Congress was unaware of the long line of Commission precedents involving adverse abandonments, much less the Supreme Court's decisions in *Tex Mex and Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Trans. Co.*, 467 U.S. 622 (1984). In *Hayfield*, after citing *Modern Handcraft, Inc.—Abandonment in Jackson County, Mo.*, 363 I.C.C. 969, 972 (1981), the Supreme Court remarked that “[t]he Commission's position, of course, is entitled to considerable deference since it represents the

² In the course of enacting ICCTA, Congress explicitly removed the STB's authority (but not its jurisdiction) over the “acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” Compare 49 U.S.C. § 10501(b) with § 10906. The Line in question does not fit within any of the foregoing categories.

construction of a regulatory statute by the agency charged with the statute's enforcement." 467 U.S. at 634. Applying the presumption that Congress knew of, and acted in accordance with, the existing law, it appears that the 1995 amendment to the statute did nothing to exclude non-carriers from filing adverse abandonment actions with the STB.

B. The Board's consideration of adverse abandonment applications is consistent with the statute and the prior functions of the Interstate Commerce Commission.

Under *Chevron*, when the statute is either silent or ambiguous, a court must decide whether the agency's interpretation is a permissible construction of the statute. The agency's construction of the statute does not have to be the only permissible construction, or even the construction that the court itself would have reached if the question had initially arisen in a judicial proceeding. 467 U.S. at 843, n.11.

As this Court recognized in *Cheney Railroad Company, Inc. v. Interstate Commerce Commission*, where a statute is either silent or unclear, Congress has vested the agency with the discretion to construe the statute and resolve issues that it has not directly resolved.³ 902 F.2d 66, 69 (D.C. Cir. 1990). In particular, attention is invited to this Court's reference (*id.*) to the Supreme Court's "declining to read deletion of explicit extension of Commission authority as bar to exercise of such authority" in *American Trucking Ass'n v. United States*, 344 U.S. 298, 309-10 & n.10 (1953). See *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957); see also *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162 (1972).

Additionally, in *New York Cross Harbor Railroad v. STB*, this Court openly acknowledged the Board's continuing authority to entertain adverse abandonment applications.

³ As the legislative history demonstrates, ICCTA was considered to be "a work in progress" and was hastily pushed forward to avoid having the agency "shut down" on December 5, 1995. Minority Views: H.R. 2539, The ICC Termination Act of 1995, H.R. Rep. No. 104-311, at 523 (1995).

374 F.3d 1177 (D.C. Cir. 2004). The Court observed that “49 U.S.C. § 10903(a)(1) provides that ‘[a] rail carrier providing transportation subject to the jurisdiction of the Board ... who intends to ... abandon any part of its railroad lines ... must file an application ... with the Board.’ Any ‘interest[ed]’ party can also initiate an abandonment proceeding – including ‘adverse’ abandonment – under 49 U.S.C. § 10903. See *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 145, 66 S.Ct. 937, 90 L.Ed. 1132 (1946); *Conrail*, 29 F.3d at 710; *Chelsea Prop. Owners – Abandonment*, 8 I.C.C. 773, 778 (Aug. 28, 1992), *aff.*, *Conrail*, 29 F.3d at 709.” *Cross Harbor*, 374 F.3d at 355, n.4.

And, this is not the only court that has recognized the Board’s continuing authority to entertain and decide adverse abandonment applications. For instance, in *Howard v. S.T.B.*, the First Circuit explained that “[t]he text of section 10903 itself does not distinguish between adverse and direct abandonments, but the case law makes it clear that the STB has authority to hear both types of applications. 389 F.3d 259, 261 (1st Cir. 2004) (citing *Thompson v. Texas Mexican Ry. Co.* and parenthetically quoting “There is no requirement ... that the application [for abandonment to the STB] be made by the carrier whose operations are sought to be abandoned.”)

Although the First Circuit relied in part on this Court’s decision in *Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706, 708-09 (D.C.Cir. 1994), which pre-dated ICCTA’s enactment, its approach is consistent with the Supreme Court’s reasoning and approach in *American Trucking Ass’n*. Given the lack of any manifestation in the language of the Act, or its legislative history, of a clear intent to strip the Board of the ability to entertain adverse abandonment applications, it must be presumed that Congress did not intend to eliminate the use of adverse abandonment applications when it enacted ICCTA.

Equally important, the reasoning in *Howard* and in *Cross Harbor* is consistent with, and supported by, the provisions of 49 U.S.C. § 702, which states: “[e]xcept as otherwise provided in the ICC Termination Act of 1995, or the amendments made thereby, the Board shall perform all functions that, immediately before January 1, 1996, were functions of the Interstate Commerce Commission or were performed by any officer or employee of the Interstate Commerce Commission in the capacity as such officer or employee.” Because the ICC’s functions involving the acceptance and processing of adverse abandonment applications were not modified or eliminated by ICCTA, those functions were carried forward to the STB.

II. The Board’s Procedures For Determining Adverse Abandonment Applications Are Identical To, And Consistent With, The Board’s Procedures Governing Carrier-Initiated Abandonments.

In deciding an adverse abandonment case, the Board follows the procedures in 49 C.F.R. § 1152, *et seq.* These are the same procedures that govern the Board’s disposition of abandonment applications filed by rail carriers. However, as a cursory review of adverse abandonment precedents vividly illustrates, the evidentiary standards applied in adverse abandonment proceedings are far more rigorous than those applied in abandonment proceeding initiated by a rail carrier.

The disparity in treatment is demonstrated by comparing the ICC’s decision in *Wisconsin Dep’t of Transp.—Abandonment Exemption*, 1988 WL 225048 (I.C.C.)(Nov. 23, 1988), with its later decision in *Wisconsin Central Ltd.—Abandonment Exemption—In Winnebago County, WI.*, 1990 WL 287427 (I.C.C.)(Feb. 22, 1990). In the initial adverse abandonment case, the ICC denied authority to abandon a little-used stretch of railroad over which a solitary shipper received twelve to fifteen rail cars a year. However, after the railroad exacted its pound of flesh from the Wisconsin DOT, the railroad filed a petition for exemption seeking abandonment authority of the same track over the objection of the same shipper. Although the evidence was virtually

identical, the ICC authorized the abandonment. In so doing, the ICC explained that “[i]t is one thing to force an abandonment over the opposition of the carrier providing the service on the line: it is quite another to authorize an abandonment when the carrier which must provide the service and incur the costs supports the action.” *Id. at *4.*

The Board’s procedures govern all aspects of an abandonment application, including required notices, the evidentiary contents of the application, financial assistance, acquisition for public use and trail use. 49 C.F.R. § 1152.22. In appropriate instances, including adverse abandonment applications, the Board will waive inapplicable and unneeded provisions at the request of the potential applicant. *See NapaValley Wine Train, Inc.—Adverse Abandonment In Napa Valley, CA*, STB Docket No. AB-582 (STB served March 30, 2001).

In this case, the Board, by its September 26, 2006 decision, granted a number of waivers, including the requirement that Applicants provide service of the application to significant users of the line and the posting of a copy of the notice of intent at each agency station and terminal on the line to be abandoned.⁴ Given the lack of any shippers, agency stations and terminals, the Board granted the requested waiver. As the September 26 Decision reflects, the Board also denied several waiver requests, including the request for a waiver of the STB’s environmental requirements. As a result, the Applicants prepared a full-scale environmental report. On December 22, 2006, the Board’s Section of Environmental Analysis issued its decision in which it found that “abandonment of the lines will not significantly affect the quality of the human environment.”⁵ That Order has not been the subject of judicial review.

The Board also granted the Applicants’ petition for exemption from the financial assistance provisions of 49 U.S.C. § 10904. As the Board explained, “[a] grant of the exemption

⁴ A copy of the September 26, 2006 Decision is attached hereto for the Court’s convenience.

⁵ A copy of the December 22, 2006 Decision is attached hereto for the Court’s convenience.

from section 10904 does not affect the merits of the application.” Slip op. at 6. This is true whether the Board grants or denies an adverse application. If the Board denies an application because it finds that there is a realistic potential for rail service, the status quo would be maintained and there would be no basis for filing an OFA. If, however, the Board finds that there is no potential for future rail service on the line, an OFA would only serve to disrupt the abandonment process. As the Board also explained, “[i]f the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, it would be fundamentally inconsistent to provide for further Board regulation under section 10904, and thereby negate the Board’s decision.” *Id.* This, of course, was the very situation that caused this Court to reject Conrail’s argument that former § 10905 (now § 10904) “prohibite[d] the ICC from issuing an abandonment certificate if a financially responsible party is willing either to subsidize freight transportation over or to purchase the line”. *Consolidated Rail Corp. v. I.C.C.*, 29 F.3d at 712. As this Court concluded, “[w]e do not believe, however, that section 10905 ... [was] intended to eliminate the ICC’s authority to grant adverse abandonments. Nothing in the language of ... section 10905 suggests such a result”. *Id.*

The next step in the Board’s procedure involves filing the application. Thereafter, the owning railroad and any existing or potential shipper can protest abandonment by submitting evidence of a current or potential need for rail freight service. 49 C.F.R. § 1152.25. As noted above, although testimony of future need may not be sufficient to prevent the abandonment of the subject line in the case of an application brought by an operating carrier, any shipper testimony of a realistic future need will likely doom an adverse abandonment application.

Following submission of any reply evidence, the Board reaches its decision. As this Court recognized in *Cross Harbor*, 374 F.3d at 1183, the Board must balance the competing benefits and burdens on all interested parties, including the railroad, the shippers who have used the line, the community involved, and interstate commerce and the rail system in general. In this case, abandonment of the Line will not burden Norfolk Southern, any shipper, the South Bend community or interstate commerce. Moreover, abandonment will benefit the South Bend community, the Brothers and Sisters and Norfolk Southern, which will be relieved of all burdens of ownership of a non-productive line, including the residual common carrier obligation.

Because no shipper opposed the abandonment of the Lines or claimed a need for future service, there can be no finding that abandonment will burden any shipper that may have used the Lines in the past or that might have used it in the future. The record also demonstrates that the current and future needs for freight service are being, and will continue to be, satisfied by alternative means. Hence, there is no realistic overriding Federal interest in preserving this dormant, truncated and dilapidated branch line as there will be no impact on interstate commerce and the national rail network if it is abandoned.

Both before and during the pendency of this case, CLS&SB has had a full opportunity to develop hard evidence of a realistic need for future rail service. Had it done so, the Board could have properly applied its balancing test and denied the application. However, as the record demonstrates, CLS&SB failed to do so. Nevertheless, the Board, departing from precedent *and* from its contemporaneous decision in *Denver & Rio Grande Railway Historical Foundation*,⁶ chose to rely on unsubstantiated speculation to deny the instant application.

⁶ 2008 WL 2154898 (S.T.B.) (May 23, 2008) at 5-9. It should also be noted that the Board in *Denver & Rio Grande* specifically rejected the argument that “rail is the *only* form of transportation that can combat America’s insatiable thirst for oil and its effect on global warming.” *Id.* at 10. Last, the Board in that case also found that “[e]ven in the unlikely event that demand for freight rail service was to materialize at

The Board's action is contrary to sound public policy and congressional intent. As the Supreme Court observed in *Hayfield*, when Congress amended what is now § 10904 as part of the Staggers Act, its intent was to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceeding which are calculated merely to tediously extend the abandonment process".⁷ As the Court also observed, Congress was intent upon "counteract[ing] bad-faith negotiating on the part of carriers." *Id.*

When there is an absence of any shipper who is sincerely interested in improving rail service, delay can be used for various purposes that are contrary to the public interest. As has happened in this case, the Board has effectively blocked a needed public project. Furthermore, it has unwittingly encouraged a form of "greenmail" whereby the public authority can be forced to buy out the interests of a non-carrier in order to proceed with the needed public project. "[I]f a railroad's insubstantial claims about restoring profitable service on a long-unused rail line can block a public project, the railroad has a strong incentive to manipulate the STB's jurisdiction to better its bargaining position with the local public authority." Michael L. Stokes, *Adverse Abandonment: Toward Allowing the States to Condemn or Dispose of Unneeded Railroad Land*, 31 *Transp. L.J.* 69, 86 (2003). As the author concluded, "[e]ven though there is a national policy favoring rail transportation, if resumed service is not realistic, federal jurisdiction over a dead line of rail should not obstruct needed public projects or tie up real estate that could be put to productive use." *Id.*

Plainly, there is no rational or legitimate reason to delay the abandonment of a long-unused line of railroad when no shipper has identified a sincere interest in future rail service. As

some point in the future, the City has demonstrated that shippers would have sufficient alternative transportation options," including the fact that freight could be shipped by truck.

⁷ 467 U.S. at 631 (quoting H.R.Conf.Rep. No. 96-1430, p. 125 (1980), U.S.Code Cong. & Admin.News 1980, pp. 3978, 4157.

this Court has repeatedly recognized, “it is clear that the aim of section [10904] is not simply the maintenance of rail *lines* but the continuance of rail *service*.” *Cross Harbor*, 374 F.3d at 363, n.10 (quoting *Conrail*, 29 F.3d at 712). In the absence of any hard evidence of a future need, the Board should not be allowed to indefinitely delay the abandonment of this dormant line by postulating that Notre Dame, because it once used the Line for coal deliveries, could perhaps desire to use the Line at some indeterminate time in the future.

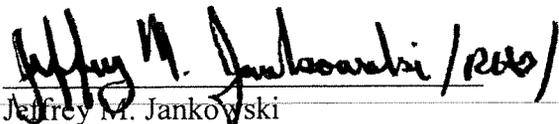
Conclusion

The Court should find that the Board’s exclusive jurisdiction over the abandonment of lines of railroad continues to include the authority to entertain and decide adverse abandonment applications. In addition, the Court should find that, because the Board’s procedures provide an ample opportunity to prove a need for future rail service, they are consistent with the provisions of 49 U.S.C. § 10903 and § 10904. Last, the Court should find that because the Board failed to balance properly the relative burdens and benefits associated with the abandonment of this long-unused line of railroad, its decisions must be reversed.

Respectfully submitted,



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STB BRIEF

**ARGUED: ISSUE NOT RAISED IN UNDERLYING PROCEEDING
THEREFORE ISSUE WAS WAIVED**

***TEX - MEX* / PRECEDENT SAYS STB HAS JURISDICTION**

PERMANENT

MAR - 5 2009 ORAL ARGUMENT HELD ON FEBRUARY 19, 2009
Nos. 08-1301 & 08-1150 (Consolidated)

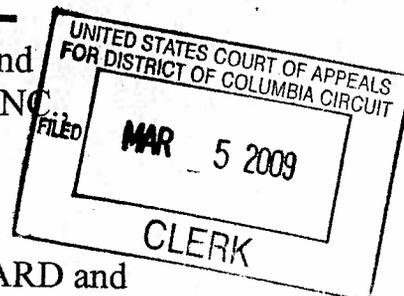
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF SOUTH BEND, IN, and
BROTHERS OF HOLY CROSS, INC.
Petitioners

v.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA,
Respondents



**ON PETITION FOR REVIEW OF ORDERS OF
THE SURFACE TRANSPORTATION BOARD**

JOINT SUPPLEMENTAL BRIEF OF RESPONDENTS
SURFACE TRANSPORTATION BOARD and
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March 5, 2009

TABLE OF CONTENTS

| | PAGE |
|------------------------------|-------------|
| TABLE OF AUTHORITIES | ii |
| BACKGROUND..... | 1 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT | 5 |
| CONCLUSION | 10 |
| CERTIFICATE OF SERVICE | 12 |

TABLE OF CONTENTS

| | PAGE |
|------------------------------|-------------|
| TABLE OF AUTHORITIES | ii |
| BACKGROUND..... | 1 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT | 5 |
| CONCLUSION..... | 10 |
| CERTIFICATE OF SERVICE | 12 |

TABLE OF AUTHORITIES*

| | PAGE |
|---|---------------|
| CASES | |
| Alliant Energy Corp. v. FERC, 253 F.3d 748 (D.C. Cir. 2001) | 6 |
| Birt v. STB, 90 F.3d 580 (D.C. Cir. 1996)..... | 9 |
| BNSF Ry. v. STB, 453 F.3d 473 (D.C. Cir. 2006)..... | 6 |
| Consolidated Rail Corp. v. ICC, 29 F.2d 706 (D.C. Cir. 1994) | 3 |
| Hayfield N. R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622 (1984) | 9 |
| HolRail, L.L.C. v. STB, 515 F.3d 1313 (D.C. Cir. 2008) | 7 |
| Howard v. STB, 389 F.3d 259 (1st Cir. 2004)..... | 5, 7 |
| Lorillard v. Pons, 434 U.S. 575 (1978)..... | 6 |
| *Thompson v. Texas Mexican Ry., 328 U.S. 134 (1946)..... | 2, 5, 6 |
| AGENCY DECISIONS | |
| *Modern Handcraft, Inc.—Abandonment in Jackson County, MO, 363 I.C.C. 969 (1981)..... | 2, 3, 6, 7, 9 |
| Seminole Gulf Railway, L.P.—Adverse Abandonment— in Lee County, STB Docket No. AB-400 (Sub-No. 4) (STB served Nov. 18, 2004)..... | 4 |
| Yakima Interurban Lines Ass’n—Adverse Abandonment in Yakima County, WA, STB Docket No. AB-600 (STB served Nov. 19, 2004)..... | 4 |

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES (cont.)

PAGE

STATUTES

49 U.S.C. 10501(b) 9

*49 U.S.C. 10903..... 2, 3, 4, 5, 7, 8

*49 U.S.C. 10903(d)..... 3, 7

49 U.S.C. 10904 2, 3, 4, 7, 9

49 U.S.C. 1a (1976)..... 2

OTHER AUTHORITIES

H.R. 2539, 104th Cong. (1st Sess. 1995)..... 8

H.R. Rep. No. 104-311 (1995), *reprinted in* 1995
U.S.C.C.A.N. 793 9

Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473,
§ 3(a), 92 Stat. 1337..... 2

Transportation Act of 1920, 41 Stat. 456..... 1

At oral argument, the Court asked for supplemental briefing on the following question: whether the Surface Transportation Board (STB or Board) continues to have the statutory authority to authorize an “adverse” abandonment of a rail line—that is, the removal of a rail line from the national rail system at the request of someone other than the incumbent rail carrier—after the statutory revisions made to the abandonment provision in the ICC Termination Act of 1995 (ICCTA).

Respondents respectfully submit that (1) the Court may resolve this case without having to rule on that question, and (2) if it were to rule on the question, the Court should find that ICCTA did not divest the Board of that authority.

BACKGROUND

Pre-ICCTA

Beginning with the Transportation Act of 1920, 41 Stat. 456, 477-78, Congress vested in the Board’s predecessor, the Interstate Commerce Commission (ICC), authority over the abandonment of rail lines in section 1(18) of the then-uncodified Interstate Commerce Act. Section 1(18) provided:

[N]o carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

In 1946, in *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 144 (1946) (*Thompson*), the Supreme Court construed this passively worded language as permitting a party other than the incumbent railroad to file an application for abandonment authorization.

In 1978, Congress recodified the Interstate Commerce Act¹ “without substantive change” to the law.² In the recodification, Congress addressed the ICC’s authority over rail line abandonments in 49 U.S.C. 10903 and the procedures for seeking abandonment authorization in 49 U.S.C. 10904. Section 10903(a) provided that:

[a] rail carrier providing transportation subject to the jurisdiction of the [ICC] under subchapter I of chapter 105 of this title may—

- (1) abandon any part of its railroad lines; or
- (2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance.

In 1981, relying on its power to authorize abandonments under 49 U.S.C. 10903 as it then existed and on the Supreme Court’s decision in *Thompson*, the ICC first authorized an adverse abandonment in *Modern Handcraft, Inc.—Abandonment in Jackson County, MO*, 363 I.C.C. 969 (1981) (*Modern Handcraft*).

¹ In the meantime, Congress had moved the Board’s abandonment authority to a new section 1a, which had retained, with some minor revisions, the basic passive wording of the former section 1(18). *See* 49 U.S.C. 1a (1976).

² Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466.

The ICC explained that the purpose of the adverse abandonment procedure is to remove the protective shield of the Board's preemptive jurisdiction that would otherwise preclude condemnation, eminent domain, or quiet title actions in state court involving rail property that is no longer used or needed for rail purposes.³ Between 1981 and 1995, the ICC considered a number of other applications for adverse rail line abandonments and service discontinuances, granting some and denying others.⁴

ICCTA

In enacting ICCTA in 1995, Congress abolished the ICC, replaced it with the STB, and continued earlier efforts to modernize regulation of the rail industry, including streamlining the abandonment process. Congress also reorganized the abandonment provisions, essentially combining former sections 10903 and 10904 into a single new section 10903. In doing so, Congress inverted the order of these provisions in the new, combined section 10903. The agency's general power to authorize the abandonment of a rail line (upon a showing that the public convenience and necessity requires or permits it) was moved from what had previously been subsection (a) to what is now subsection (d) of section 10903.

Section 10903(d) currently reads:

³ *Modern Handcraft*, 363 I.C.C. at 972.

⁴ *See, e.g., Consolidated Rail Corp. v. ICC*, 29 F.2d 706 (D.C. Cir. 1994) (and cases cited therein).

[a] rail carrier providing transportation subject to the jurisdiction of the Board under this part may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance.

Congress also rearranged and reworded the provision dealing with the filing of abandonment applications. Specifically, Congress replaced the passive-voice language in what had been section 10904(a)(1)—that before a rail line may be abandoned, an application “must be filed”—with the following language in current section 10903(a)(1): “A rail carrier . . . who intends to [abandon a rail line] must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.” (It is this new language that prompted the Court’s inquiry about the agency’s continuing ability to authorize an adverse abandonment.)

Since ICCTA, the Board has continued to consider adverse abandonment applications.⁵ No party has questioned the Board’s continued authority to

⁵ See, e.g., *Yakima Interurban Lines Ass’n—Adverse Abandonment in Yakima County, WA*, STB Docket No. AB-600 (STB served Nov. 19, 2004); *Seminole Gulf Railway, L.P.—Adverse Abandonment—in Lee County*, STB Docket No. AB-400 (Sub-No. 4) (STB served Nov. 18, 2004).

authorize an adverse abandonment, and the Board has assumed that it continues to have such authority, as have this Court and another Circuit.⁶

SUMMARY OF ARGUMENT

The Court can and should decide this case without deciding whether ICCTA repealed the agency's pre-existing authority to authorize adverse abandonments. But in any event, the Board's authority to authorize an adverse abandonment comes from current section 10903(d). That provision closely tracks its predecessor provisions, back to original section 1(18) of the Interstate Commerce Act. Because the Supreme Court in *Thompson* found that section 1(18) gave the Board that power, and because nothing in ICCTA curtailed that power, the Board continues to have the authority to authorize adverse abandonments.

ARGUMENT

1. The Court need not rule on the question it raised at oral argument. No party raised it as an issue before either the Board or this Court.⁷ Thus, the Court could follow its general practice of declining to reach issues not timely raised below—a practice that extends to claims that an agency acted in excess of its

⁶ See *New York Cross Harbor R.R. v. STB*, 374 F.3d 1177, 1180 n.4 (D.C. Cir. 2004); *Howard v. STB*, 389 F.3d 259, 261 (1st Cir. 2004) (*Howard*).

⁷ Norfolk Southern Railway Company raised questions in the proceeding under review about who has standing to seek an adverse abandonment, but it did not argue that the Board has no power to authorize an adverse abandonment. See S.A. 20-37.

statutory authority.⁸ Or, if the Court finds that the Board acted reasonably in denying the requested adverse abandonment, it could simply deny the petition for review on that basis, without reaching the question of whether the Board has the authority to *grant* an adverse abandonment—which the agency did not do here.⁹

2. If the Court were to rule on the question, however, it should find that ICCTA did not disturb the agency’s ability to authorize an adverse abandonment. When Congress re-enacts a statute without change, Congress is presumed to be aware of and to adopt an administrative or judicial interpretation of that statute.¹⁰ Here, ICCTA did not change the relevant statutory language upon which *both* the Supreme Court in *Thompson* and the ICC in *Modern Handcraft* based the agency’s adverse abandonment authority.

In *Thompson*, the Supreme Court made clear that the ICC’s authority to consider adverse abandonment requests came from the language of what was then section 1(18), which provided in relevant part that “no carrier . . . shall abandon all or any portion of a line of railroad . . . unless there shall first have been obtained from the Commission a certificate that the present or future public convenience

⁸ See *BNSF Ry. v. STB*, 453 F.3d 473, 479 (D.C. Cir. 2006).

⁹ See *Alliant Energy Corp. v. FERC*, 253 F.3d 748, 754 n.7 (D.C. Cir. 2001) (declining to address issue of agency’s power to order party to refund certain charges where Court determined agency’s explanation for declining to order refund was reasonable).

¹⁰ *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

and necessity permit of such abandonment.” In 1981 in *Modern Handcraft*, the ICC, relying on *Thompson*, determined that its adverse abandonment authority derived from the nearly identical language of what was then section 10903, the statutory successor to old section 1(18).¹¹ In 1981, section 10903(a) provided in relevant part simply that “[a] rail carrier . . . may . . . abandon any part of its railroad lines . . . only if the [ICC] finds that the present or future public convenience and necessity require or permit the abandonment.” That language, which is now in section 10903(d), remains substantively unchanged by ICCTA. Like former sections 1(18) and 10903(a), current section 10903(d) gives the Board authority generally to authorize an “abandonment,” without specifying who may initiate the process. The term “abandonment” in each of those provisions is broad enough to encompass adverse abandonments.¹²

The language that is now in section 10903(a)(1), about which the Court inquired at oral argument, must be construed in relation to the other abandonment provisions.¹³ Instead of addressing the same subject matter as section 10903(d) (i.e., the Board’s general authority over abandonments), that language, which replaces the procedures provision of former section 10904, addresses the more

¹¹ *Modern Handcraft*, 363 I.C.C. at 971.

¹² *Cf. Howard*, 389 F.3d at 267 (explaining that the plain meaning of the term “abandonment” in the Bankruptcy Code does not preclude adverse abandonments).

¹³ *See HolRail, L.L.C. v. STB*, 515 F.3d 1313, 1317 (D.C. Cir. 2008).

specific topic of how a *railroad* initiates the abandonment process when it is the one doing so. Thus, the statement that “[a]n abandonment or discontinuance may be carried out only as authorized under this chapter [i.e., 49 U.S.C. 10901–10907],” given its placement within new subsection (a)—which concerns carrier-initiated abandonment applications—should be read as governing the mechanics of how an abandonment may be carried out by a rail carrier, and not as a limitation on the Board’s ability to rule on third-party abandonment requests. And nothing about the agency’s continuing authority under section 10903(d) to authorize an adverse abandonment conflicts with that language, because section 10903(d) is in “this chapter.”

This reading of the statute—that ICCTA did not effect a substantive change of the sort suggested by the Court’s question—is underscored by the absence of any mention of adverse abandonments in ICCTA’s legislative history. Given that the power to grant adverse abandonments was long established and came from a Supreme Court interpretation, Congress presumably would have made clear any intention to take away this power. But ICCTA’s legislative history gives no hint of such an intent. The language in present section 10903(a) on which this Court focused at oral argument originated in the House version of the bill that became ICCTA,¹⁴ which would have changed the agency’s power over abandonments in

¹⁴ H.R. 2539, 104th Cong. (1st Sess. 1995).

certain ways that were not ultimately included in ICCTA.¹⁵ The House Report discussed those proposed changes, but made no mention of any changes to the agency's power over adverse abandonments.

This silence in the legislative history is particularly telling, given the far-reaching effects that such a change would produce. The Board's jurisdiction over the abandonment of rail lines is exclusive and preempts state and other federal laws, 49 U.S.C. 10501(b), and that preemptive jurisdiction continues until there is a lawful consummation of an STB-authorized abandonment.¹⁶ To divest the Board of the power to authorize an adverse abandonment would leave the Board unable to prevent a rail carrier from holding on to unused and neglected rail property indefinitely while enjoying the protective shield of the Board's preemptive jurisdiction, and would leave affected parties with no other way to assert their interests. Thus, a rail carrier could block a government entity wishing to acquire an inactive rail right-of-way for an important public purpose, such as a highway or a civil defense project. Or, as in *Modern Handcraft*, a rail carrier could simply

¹⁵ As explained in the House report accompanying the introduction of this language, under the House bill, the successor agency to the ICC would have been able to enlarge the territorial scope of a proposed abandonment and/or add trackage rights to "afford the best opportunity for [a] line [that would otherwise be abandoned] to be sold and operated as a viable short-line railroad" under the offer-of-financial-assistance provisions of what is now section 10904. H.R. Rep. No. 104-311, at 102 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793.

¹⁶ See *Hayfield N. R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633 (1984); *Birt v. STB*, 90 F.3d 580, 585 (D.C. Cir. 1996).

cease providing rail transportation and use the right-of-way for nonrail purposes, or allow it to become a blight on the adjacent area without any remedy for the affected community. Finally, construing ICCTA as foreclosing adverse abandonments of rail easements could deprive adjacent landowners of the opportunity for their reversionary interests in the easements to vest, even though there may be no current rail service and no foreseeable need for future rail service on the property, thereby raising potential constitutional taking issues. Congress should not be presumed to have silently withdrawn a longstanding agency power recognized by the Supreme Court, the consequence of which would be to significantly intrude on state interests, where no federal purpose would be served by withdrawing that power.

CONCLUSION

In sum, if the Court were to rule on the question, it should defer to the Board's reasonable construction of the statute that it is charged with administering and conclude that ICCTA did not strip the Board of the power to authorize adverse abandonments.

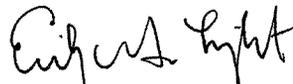
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March 5, 2009

CERTIFICATE OF SERVICE

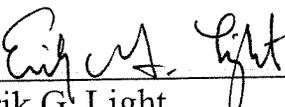
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