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September 3, 2009

VIA Electronic Filing

Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20024

Re: STB Docket No. AB-1044, Indiana Business Railroad, Inc. - Adverse
Discontinuance of Rail Service - Portion of Norfolk Southern Railway
Company's Rockport Branch - Reply of Norfolk Southern Railway
Company to Indiana Business Railroad, Inc.'s Petition for Partial Waiver of
Abandonment Regulations and for Exemptions

Dear Ms. Quinlan:

Enclosed for electronic filing with the Board in the captioned proceeding is
Norfolk Southern Railway Company's reply to Indiana Business Railroad, Inc.'s Petition
for Partial Waiver of Abandonment Regulations and for Exemptions.

Very truly yours,

James R. Paschall

Enclosures

cc: Thomas F. McFarland
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Chicago, IL 60604-1112

Via e-mail attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-1044

INDIANA BUSINESS RAILROAD, INC.

- ADVERSE DISCONTINUANCE OF RAIL SERVICE -

PORTION OF NORFOLK SOUTHERN RAILWAY COMPANY'S
ROCKPORT BRANCH

REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY
TO INDIANA BUSINESS RAILROAD, INC.'S
PETITION FOR PARTIAL WAIVER OF ABANDONMENT REGULATIONS
AND FOR EXEMPTIONS

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Dated: September 3, 2009

Before the
Surface Transportation Board

STB Docket No. AB-1044

Indiana Business Railroad, Inc.
- Adverse Discontinuance of Rail Service -
Portion of Norfolk Southern Railway Company's
Rockport Branch

Reply of Norfolk Southern Railway Company
to Indiana Business Railroad, Inc.'s
Petition for Partial Waiver of Abandonment Regulations
and for Exemptions

Norfolk Southern Railway Company (NSR) submits this reply to Indiana Business Railroad, Inc.'s¹ (IBR or Petitioner) "Petition for Partial Waiver of Abandonment Regulations and for Exemptions" in the subject proceeding. NSR requests that the petition be rejected or denied in its entirety because IBR has used the wrong statutory procedure for the relief it seeks and because the relief requested in the planned application to which the petition relates can not be granted as a matter of law. Even if the relief could be granted, it would not support the subsequent legal action for which IBR intends to use it.

IBR's petition differs from previous petitions for waiver of the abandonment regulations in contemplation of the filing of adverse discontinuance applications. This petition precedes the planned filing of an adverse discontinuance application by a party

¹Indiana Business Railroad, Inc. acknowledges in its petition that it is not an operating railroad and has no authority from the Board to operate any line of railroad at any location at this time.

without a cognizable legal interest in the subject line of railroad or its right-of-way or the service provided over it. This party, IBR, will seek a hybrid form of findings and relief that are inconsistent, illogical, can not be granted in an adverse discontinuance proceeding under the statute² or precedent and conflict with the railroad development (feeder line) acquisition application criteria and procedures and with the Board's exclusive jurisdiction over such acquisitions. NSR does not prematurely address facts not presented in the petition or argue the merits of the application in light of the facts here. We argue that since the petition relates to an application which will use the wrong procedures, which asks for relief that can not be granted as a matter of law and which can not be used for or help achieve the ultimate outcome sought by IBR even if the application were granted, the Board and the parties should not have to work on a proceeding which is fatally defective from the outset.

IBR's petition asks for waivers of certain filing requirements in the Board's abandonment regulations and for certain exemptions for a prospective application for adverse discontinuance of NSR's service over an NSR line of railroad³ (Line) that IBR intends to file with the Board. IBR's petition shows that the application will request the Board to find that NSR's service over the subject line should be discontinued based on NSR's alleged failure to meet its common carrier obligation, despite the absence of any suggestion that there has been a reasonable request for service over the Line, so that IBR can use the STB adverse discontinuance finding as support for a State court action

²Title 49 of the United States Code; Subtitle IV. Interstate Transportation; Part A. Rail; Chapter 109. Licensing.

³IBR describes the location of the subject NSR line as between Milepost 6.5 at or near Chrisney, IN and Milepost 0.0 at Rockport, IN.

where IBR will seek to condemn the right-of-way of NSR's Line of railroad for IBR's own use as a line of railroad. Based at least in part on its requested adverse discontinuance findings, IBR subsequently would make routine notice or petition filings with the Board for authority or exemption to operate the Line. Presumably this authority could be more easily obtained without the usual public convenience and necessity analysis and determination in a feeder line proceeding if NSR was out of the way, IBR was the owner of the Line and IBR was the only party available to provide rail freight service over the Line. We emphasize that IBR's plan, which it does not attempt to disguise, is to obtain the NSR property for its own use for the very same purpose as NSR uses it, holding itself out to provide rail freight service over the Line.

IBR states it will use NSR's alleged failure to fulfill its common carrier obligation as the basis for the requested relief. Since IBR does not contend that it is a railroad customer or that any such customer has made reasonable request for rail service over the line that NSR has failed to provide, IBR has no standing to make this claim, which would not support any award of relief to it in any event. IBR must necessarily base its case solely on the existence of an extended period of time where no traffic moved over the line and an alleged failure to maintain the Line. This would not constitute a violation of NSR's common carrier obligation even if could be proven. Since NSR is not required to maintain the Line at a higher level in the absence of traffic moving over the Line or a bona fide reasonable request for rail service over the Line, this allegation would not show NSR has not met its common carrier obligation with respect to service over the Line, much less provide a rationale for which NSR should forfeit its property and franchise rights in the Line as a result. IBR's own statements thus show that no legal

basis exists for the Board to grant its adverse discontinuance application as a matter of law.

Several legal reasons and logical impediments to the Board's grant of the requested findings and relief to be presented are apparent upon analysis of the petition. These reasons, and applicable precedent cited below, show that the unorthodox, indirect, multiple-step and multiple forum procedure adopted by IBR and the inconsistent and potentially misleading findings and relief that IBR says it will seek from the Board are defective as a matter of law and that the findings and relief can not be granted. Moreover, they would not support a condemnation action even if they were.

IBR seeks to use a procedure that would avoid or shortcut the proper statutory criteria for feeder line acquisitions and effectively cede consideration of some issues within the Board's exclusive jurisdiction to a State trial court. Under these circumstances, the application can not state a claim upon which the Board can award or grant the requested findings or relief. Therefore, the petition in support of that application should be rejected or denied. Proceeding on the application would be a pointless exercise and should be precluded.

Congress has provided a direct procedure and form of relief within the exclusive jurisdiction of the Board and without State tribunal participation for the forced sale of a rail line belonging to a railroad which is not providing adequate service, as defined by the statute, over the line to a third party. The third party must be a party which can provide better service, which means that party at least must show financial responsibility and meet all the statutory criteria for grant of the relief. A third-party railroad which meets the statutory criteria for railroad development, or feeder line acquisition, in 49

U.S.C. § 10907 thus can acquire and operate a line of railroad that the incumbent railroad is not operating in line with the public convenience and necessity standards if the Board grants that party relief. The Board can grant that relief only after finding that the applicant has submitted a complete, proper and persuasive feeder line application. IBR's proposed procedure and truncated criteria are not an authorized substitute.

IBR, a new corporation that admittedly is not a railroad although it aspires to become one, has no cognizable legal interest in NSR's service over the Line or in the Line itself, through a present ownership or property interest or a future interest in the line's right-of-way or through a contract permitting NSR's rail freight service operations over the line (or any contract at all). It is not even a shipper or receiver of freight. Thus, IBR has insufficient interest in the subject matter and no standing to bring an adverse discontinuance application with respect to NSR's service over the Line.

IBR also could not file a successful adverse abandonment application were it inclined to make an adverse abandonment application with respect to NSR's ownership and use of the line. Yet, IBR's petition states that the adverse discontinuance application will request the Board to make findings that IBR could present to a State court to show that NSR's right to operate over the line had been terminated. The local court then could allow IBR, as a local corporation formed for the declared purpose of becoming a railroad,⁴ to condemn the right-of-way so that IBR could use it for the same purpose as NSR uses it: holding itself out to provide freight service over the Line. Such

⁴IBR has no STB operating authority and neither provides nor has ever provided any railroad service so it is not a railroad regardless of what it calls itself or how it characterizes its business in its corporate filings with the State. We express no view as to whether IBR would be considered a railroad authorized to exercise the power of eminent domain under Indiana law under its current circumstances. This status is not relevant to the Board's decision.

findings would be inconsistent with the statute and precedent related to findings, approvals or exemptions defining and applying the law concerning formal discontinuance of service over a line of railroad.

IBR's planned request to the Board to find that NSR's ownership interest in and right to provide service over the Line should be permanently terminated so that IBR can condemn the right-of-way for its own use as a line of railroad can not be granted. The Board would be asked to declare or imply that the discontinuance of service finding can be treated as if were an adverse abandonment finding where the Board removes its jurisdiction over a line. Of course, IBR desires this abandonment treatment only for the purpose of its condemnation suit. Clearly, IBR engages in these mental gymnastics because IBR would not want the Board's decision treated as if it were the equivalent of an abandonment decision for all purposes. That would be inconsistent with its plan to take over the Line and ask the Board to find that the public convenience and necessity, probably through exemption, authorizes its service over the Line. The Board should address this issue specifically so that there is no misunderstanding that this mix and match can not be authorized or accomplished.

In any event, in this type of adverse discontinuance proceeding, the Board must take into account the ultimate purpose for which requested adverse discontinuance findings, or adverse abandonment findings in that type of proceeding, will be used. All parties' with cognizable interests must have those interests taken into account in an adverse discontinuance proceeding, although no precedent would include the interest of a third-party that is a stranger without a cognizable legal, property or contract interest in

the line as one of them. These considerations and their interpretation should be addressed in the ordinary Board decision and can not be left to implication. In this case, because an application for relief can not be granted because of the ultimate purpose of the prospective proceedings, the Board must consider this purpose in rejecting or denying the petition and precluding a futile application from the outset.

The hybrid or mixed and matched findings sought by IBR would be inconsistent with the nature of formal discontinuance of service authority and contradict precedent on the limits of discontinuance of service and the limits on any further legal actions that can be predicated on a Board discontinuance of service decision alone. A line of railroad over which service has been formally discontinued pursuant to Board authority or exemption remains within the jurisdiction of the Board until it is abandoned pursuant to further Board authority or exemption. The line's right-of-way can not be condemned unless the Board further authorizes abandonment of the line and the abandonment is consummated. The Board can not grant or facilitate IBR's proposal under which it would obtain the benefits of several findings and forms of relief under several legal principles that can not be compatibly combined, including elements of discontinuance, abandonment, feeder line or OFA or acquisition and operating authority principles and findings, but under which it would not be subject to all of the conditions or burdens that also pertain to those findings, principles and forms of relief.

IBR seeks to achieve a forced sale by NSR and acquisition by IBR itself of a rail line through invented procedures that allow IBR to avoid some or all of the statutory criteria required under the feeder line procedure authorized by Congress and the

Board's regulations. Thus, the petition and the prospective application that it precedes are necessarily defective. IBR cannot achieve indirectly and partly through truncated and divided procedures including State court action what it must pursue and achieve or not achieve directly before the Board in a proceeding under 49 U.S.C. § 10907. Also, the Board can not consider and grant indirectly what it must consider and grant, or not grant, directly in a feeder line application under the facts as described in the petition. Congress prescribed a procedure for feeder line acquisitions. If a party can not meet the criteria specified in the statute in a particular circumstance addressed by the statute, it is entitled to no relief. It can not make up novel, less complete and easier to meet criteria and procedures not sanctioned by the statute and partly outside the Board's exclusive jurisdiction to achieve the same objective which the statute addresses.

The Board withdraws its jurisdiction with respect to a rail line, or the service provided over a rail line when after weighing the various interests in the line or the service, the Board finds that there is no overriding federal interest in continuing to authorize or regulate rail freight service over the line. All such findings in adverse discontinuance proceedings to date have been requested by the owners of rail lines with respect to the operations only of a tenant, an operator on behalf of the owner or a trackage rights licensee with a contract or agreement to provide service over a line of railroad. Except in a few cases in which a finding permitting abandonment of the line was also sought, the owner of the line would continue to provide or to provide for rail freight service over the line. In this novel case where the objective of the adverse application is to install a new owner and operator on the Line to provide regulated,

common carrier rail service, the Board will find it impossible to make such a finding. The Board can not find there is no Federal interest in the line or in NSR's service over the Line when IBR, a stranger, wishes to take over the Line and the service on the Line. Moreover, the Board withdraws its jurisdiction in adverse discontinuance proceedings in order that the respondent railroad, which never has been the owner of the line in an adverse discontinuance case to date, may be subject to the processes of State law. These processes have always been contract enforcement actions. Property or ownership rights also could be involved but these are more likely to be an issue in an adverse abandonment case. IBR has no basis for invoking State law processes since it has no property or contract rights with respect to NSR's service over the Line, much less with respect to the Line itself, and it is not a governmental entity that wishes to condemn a line to be abandoned for alternative public purposes. IBR's only interest is that it would rather own the right-of-way and be a railroad and try to take advantage of business opportunities that may be developing along the Line in place of NSR. If that is a cognizable legal interest at all, it falls within the exclusive jurisdiction of the Board under the feeder line provisions of the statute (or in a proper case, the Offer of Financial Assistance provisions) and the outcome can not be left in part to the decisions of a State court.

Even if IBR's proffered procedure were available as a substitute for a feeder line application (or an OFA) and even if condemnation of a right-of-way were possible after a mere finding or authorization that service over a railroad line should be discontinued, IBR's stated basis for its application also is deficient. Even assuming for the sake of

argument that NSR had not met its common carrier obligation to provide service over the Line upon reasonable request⁵ or to maintain the Line at a higher level, IBR, which is not a shipper or receiver of freight over the Line, has no standing to complain. Moreover, the remedy for the failure of a railroad to meet its common carrier obligation to provide service upon reasonable request is certainly not the confiscation of the railroad's property by a corporation formed to operate a railroad with no other cognizable legal interest in the property under adverse discontinuance and condemnation procedures.

IBR would complete the process of its acquisition and operation of the Line which it intends to start in the adverse discontinuance proceeding, after this new local entity had condemned NSR's right-of-way property in a local court, through Board authorization or exemption to operate the Line. The Board might have no alternative at that point but to approve IBR's operation if rail service were to remain available over the Line. In this way, the underlying assumption that the new entity (here, IBR) would do a better job in providing rail freight transportation over the Line apparently would not need to be proven or justified and the statutory criteria that would otherwise be applicable to the forced sale and acquisition of a railroad line under such circumstances would not

⁵The petition does not state that a railroad customer has made a reasonable request for service over the line, because there has not been such a request. If there had been, the petition would not base its argument on the allegation that NSR's charges or conditions for providing service are unsatisfactory in petitioner's view. Petitioner does not claim to be a railroad customer which has been denied service upon reasonable request because it is not.

need to be met.⁶ Less drastic and more conventional remedies are available to parties who are actual railroad customers aggrieved by a railroad's failure to meet its statutory obligations to the customers.

If IBR is not seeking abandonment of the Line but IBR wishes to continue to hold out the offer to provide rail freight service over the Line, it can only be because there are developing or potential business opportunities to provide service over the Line, as IBR itself generally suggests. A shortline railroad startup with no property interest or contract interest in the operation of a line of railroad and no current operation over it of its own should not be able to dispossess the owning railroad of the line, on a dubious basis constructed from a period of inactivity on the line at any time, much less at a time just before the potential business for the railroad becomes available. It is just for this reason that potential future business development or opportunities on a dormant line located in an area where business development might be expected that a railroad generally would keep an inactive line of railroad for possible future use rather than abandon it.

There is an overriding Federal interest in the Board seeing that the type of overall transaction proposed in this case is handled in accordance with the standards and procedures established in 49 U.S.C. § 10907 and under the Board's exclusive jurisdiction. The Board can not grant IBR's desired findings and relief or directly or indirectly support the proposed outcome under contrived procedures and standards not

⁶Of course, the aspirational railroad could attempt to achieve this result in a feeder line application proceeding in which such facts, if they existed, would be part of the necessary

fully in accord with applicable statutory criteria and procedures and the Board's regulations thereunder. Moreover, IBR has no standing to request and receive a discontinuance of service finding with respect to NSR's line and a railroad right-of-way can not be condemned based upon a Board finding or decision permitting only a discontinuance of service. The Board and NSR should not be required to work on a proceeding instituted by an application that cannot be supported or maintained and which seeks findings, relief and outcomes that can not be granted as a matter of law and would not support their ultimate intended purpose even if they were to be granted.

ARGUMENT

I. Congress Enacted the Feeder Line Section of the Statute Precisely for This Type of Case; It Can Not Be Circumvented Through IBR's Proposed Application and Procedure.

Pursuant to 49 U.S.C. § 10907, the Board may require a railroad to sell a line of railroad to a financially responsible person at a price not less than the constitutional minimum:

(b) (1) When the Board finds that--

(A) (i) the public convenience and necessity require or permit the sale of a particular railroad line under this section; or

(ii) a railroad line is on a system diagram map as required under section 10903 of this title [49 USCS § 10903], but the rail carrier owning such line has not filed an application to abandon such line under section 10903 of this title....;

IBR requests that the Board make findings that would force NSR to sell a line of railroad to it, but IBR has chosen not to use the procedure and meet the criteria established by Congress. IBR's petition discloses that it precisely involves a feeder line application

presentation.

that is packaged in a truncated, multiple proceeding and multiple-forum form and procedure. This petition and the application that will follow clearly attempt to avoid evaluation of its proposed acquisition and operation of the Line under the standards and procedures prescribed by Congress in 49 U.S.C. § 10907 in favor of an unauthorized procedure partly outside the Board's jurisdiction that would allow IBR to accomplish its objective without meeting the statutory criteria. The Board can not approve such an application. There is an overriding Federal interest in the Board retaining jurisdiction over and fully considering a proposal that seeks an outcome permitted by the railroad development (feeder line) provision of the statute in a proceeding under the exclusive jurisdiction of the Board and pursuant to the statutory criteria prescribed in 49 U.S.C. § 10907.

Not only does IBR have no cognizable interest in NSR's service over NSR's railroad Line or in the Line itself, the remedy IBR seeks and the ultimate outcome of acquiring the NSR line and substituting its own operation of the Line for NSR's operation can not be granted in whole or in part by a State court. Unlike all previous adverse discontinuance applicants, IBR has no property or contract basis on which to maintain a State court action or to seek a State court remedy. Even if the Board were to make the unlikely finding that NSR's service over the line is not required or permitted by the public convenience and necessity, that finding would not mean that IBR's service would be so required. Yet, that is what a State court would be deciding if it installed IBR on the Line and its operation of the Line would be required as a *fait accompli*. The State court can not adjudicate whether the public convenience and necessity requires IBR in

preference to NSR as a substitute owner and operator for a line of railroad. The Board can not defer a decision on this issue over which Congress has given the Board exclusive jurisdiction in whole or in part to the wishes of local interests reflected in a decision in a State court condemnation action after an adverse discontinuance of service finding.

Congress defined public convenience and necessity for the purpose of the railroad development (feeder line acquisition) provision and established the burden of proof for feeder line application proceedings in 49 U.S.C. § 10907(c) as follows:

(c) (1) For purposes of this section, the Board may determine that the public convenience and necessity require or permit the sale of a railroad line if the Board determines, after a hearing on the record, that--

(A) the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line;

(B) the transportation over such line is inadequate for the majority of shippers who transport traffic over such line;

(C) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line;

(D) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line; and

(E) the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.

(2) In a proceeding under this subsection, the burden of proving that the public convenience and necessity require or permit the sale of a particular railroad line is on the person filing the application to acquire such line. If the Board finds under this subsection that the public convenience and necessity require or permit the sale of a particular railroad line, the Board shall concurrently notify the parties of such finding and publish such finding in the Federal Register.

IBR's adverse discontinuance application would circumvent these standards, required showings and procedures in order to achieve by alternate means the very result that Congress has permitted in this section of the statute under procedures within the

exclusive jurisdiction of the STB if the statutory criteria are met.

As the Board has stated in another context, IBR cannot "avoid the obligation of meeting those standards merely by assigning a different label to its request for relief" or as pertinent here, not only by assigning a different label for its request for relief but by inventing new and presumably easier standards and procedures for itself.

The Board stated in a recent decision that: "The primary purpose of the feeder line program is to facilitate the resumption of adequate service on the affected line when the existing carrier has failed to provide that service." *Oregon International Port of Coos Bay - Feeder Line Application - Coos Bay Line of The Central Oregon & Pacific Railroad, Inc.*, STB Finance Docket No. 35160 (STB served November 20, 2008) (*Coos Bay*). Since IBR's declared purpose is the resumption of service on the subject line under allegedly similar circumstances as those found in *Coos Bay*, IBR should follow the proper statutory procedure and make the required statutory showings under 49 U.S.C. § 10907 to achieve that result, if it can.

IBR can not use its invented procedure to avoid the statutory procedures and criteria and the presentation of some or all of the information that would be required under the statute and the Board's regulations in order to convince the Board to force the sale of the subject NSR Line to it under the feeder line section of the statute and the Board's regulations thereunder. In *Dr. Daniel R. Fiehrer - Feeder Line Application - Line of BNSF Railway Company Between Helena and Great Falls, MT*, STB Finance Docket No. 34947 (STB served August 29, 2007), the Board stated:

The information required in a feeder line application is significant because it

seeks to ensure that the sale of the line will advance the fundamental purpose of the statute—to provide an alternative to inadequate rail service or abandonment and an opportunity to preserve feeder lines.

Although we believe the Board would not and could not do so, if under IBR's proposed standards and procedure the Board were to permit the adverse discontinuance of NSR's service over the Line on the basis of little more than some period of time without traffic on the Line and some decline in maintenance for the currently unused Line, and that would permit the condemnation of the right-of-way by IBR, a State court could award ownership of the Line to IBR if it qualified as a railroad under Indiana law on little more than that basis alone.⁷ The Congressionally established feeder line acquisition criteria would not need to be met and taken into account. Congress surely did not intend that the Board permit this alternate procedure and result.

Thus, the Board can not allow an alternate multiple proceeding procedure that ignores the procedures and criteria of 49 U.S.C. § 10907 to accomplish exactly the same result that the statutory section is designed to allow if the criteria are met and to do so in part by ceding part of the process to the decision of a State court. IBR should not be permitted to evade the statutory criteria or the Board's authority over the proposed forced sale of line of railroad for continued rail use of the rail line for railroad transportation purposes under 49 U.S.C. § 10907 through the adverse discontinuance

⁷Or could it? Could NSR, as an actual railroad, condemn the property back on the some theory concerning lack of consideration of the statutory standards in awarding the property to a small startup company? The Board will not delve into such State law questions but this is where a matter committed to the Board's exclusive jurisdiction could go if IBR's proposal progresses.

procedure and the subsequent separation of various parts of a single transaction or plan so that a State Court would rule on and value the forced sale of the Line from NSR to IBR based on State law considerations alone.

The State court action contemplated in adverse discontinuance decisions is the enforcement of the applicant's "interest in the subject matter," which would be its contract, or possibly an existing property interest, in the service of a tenant on the Line or in the Line itself. IBR has no such interest in NSR's line or NSR's service over the Line.

IBR's claims and requests for relief are cognizable, if at all, only under the feeder line application provisions of the statute. IBR has filed this petition in contemplation of filing an application using the wrong process and procedure for the ultimate relief and outcome which it seeks. Therefore, the petition should be rejected and denied and the application consequently should be precluded.

II. IBR Has No Interest in the Subject Line of Railroad or Its Right-of-Way and No Standing to File An Application For Adverse Discontinuance of NSR's Service.

IBR has no cognizable legal interest in the right-of-way or NSR's service over the right-of-way and thus has no standing to file an adverse discontinuance application or to obtain the findings, relief or remedies that it seeks. In *Thompson v. Texas-Mexican Ry. Co.*, 328 U.S. 134 (1946) (*Thompson*), the U. S. Supreme Court stated at 328 U.S. at 146 that:

Tex-Mex might invoke the Commission's jurisdiction under § 1 (18)⁸ and make

⁸Former 49 U.S.C. § 1 (18) has been reenacted as amended and recodified in 49 U.S.C. § 10903. Because the request for relief in the petition and in the contemplated adverse

application for abandonment of operations by Brownsville or its trustee. There is no requirement in § 1 (18) that the application be made by the carrier whose operations are sought to be abandoned. It has been recognized that persons other than carriers **"who have a proper interest in the subject matter"** may take the initiative. ⁸ See *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 283 U.S. 380, 393-394....*Tex-Mex* has even a more immediate interest in the operations over this line. Its property is involved;.... (emphasis supplied)

⁸ Cf. *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U.S. 266, 273, which holds that a party in interest who is opposed to construction of an extension may not "initiate before the Commission any proceeding concerning the project," his remedy being to appear in opposition if application is made or to seek an injunction under § 1 (20) if no application is made. And see *Powell v. United States*, 300 U.S. 276.

IBR does not have a sufficient interest in NSR's Line of railroad to maintain an adverse discontinuance concerning NSR's service over the Line. Indeed, it has no cognizable legal interest in the Line of railroad or in NSR's service over it, at all. IBR does not own or have easement rights or any sort of property rights or ownership interest in the subject property; NSR does. IBR has no contract in which it permits NSR's service over the line. IBR is not a shipper. IBR is not even a railroad but simply a recently formed corporate entity that aspires to be a railroad. Since IBR wishes to put the right-of-way to the same use that NSR puts it, as a line of railroad, it would be immaterial in this proceeding whether or not IBR was an adjoining landowner or a public entity which wished to recover its property upon termination of a contract for NSR's use

discontinuance application can be decided on the basis of obvious and elementary principles and precedent without an examination of the proper scope of adverse discontinuance or adverse abandonment proceedings under the statute, we leave aside but expressly reserve and do not waive any argument in support of denial of any adverse discontinuance application, or adverse abandonment application, based on whether the current, revised language of the statute actually does not allow for such applications or for some expanded standing to file them with the Board.

of the property or under a future interest if the property were to be abandoned.⁹ IBR is admittedly a private entity which wishes to put the property to the same use to which it is now devoted. Thus, IBR's legal interest in NSR's Line and its service over the Line is that of a mere stranger, an intermeddler which would like to have NSR's line of railroad so that it can take advantage of developing or potential business opportunities that would be NSR's right to develop to the advantage of its own property and franchise in the normal course of business.

Without introducing new facts not in the petition, we simply restate what IBR states in its petition and clearly restate the obvious conclusion. Unless potential or developing business opportunities existed along this segment of NSR's Line, IBR would have no reason to attempt to gain possession of the property and put it to the same railroad use for its own purposes and profit. But IBR has no legal interest in the right-of-way or its operation and thus has no legal right or basis under the statute and precedent to obtain such an outcome.

In *Thompson*, and in the companion case *Smith v. Hoboken Railroad, W. & S. C. Co.*, 328 U.S. 123 (1946) (*Smith*), the party with a proper interest in the subject matter was a landlord and owner railroad which wished to evict a tenant or user/licensee railroad which was in breach of its lease or trackage rights agreement. In one (1)¹⁰ of

⁹It is not a public entity with an interest in putting a dormant property over which there will be no further rail service at all if it were abandoned to what it believes is a more productive public use.

¹⁰*Minnesota Commercial Railway Company - Adverse Discontinuance - In Ramsey County, MN*, STB Docket No. AB-882 (STB served June 16, 2008), embracing MT Properties,

the thirteen (13) adverse discontinuance applications filed with the ICC or STB after the ICC's *Modern Handcraft* decision¹¹ that reached a decision on the merits by the agency and in the one (1)¹² adverse discontinuance proceeding that was settled, the proceeding also included an adverse abandonment application. Those two (2) adverse discontinuance proceedings must be considered incidental to the adverse abandonment proceedings. Both of those combined application proceedings were initiated by governmental entities which desired to use the right-of-way of the line to be abandoned for alternate public purposes. In the twelve (12)¹³ of the (13) adverse discontinuance

Inc. - Adverse Abandonment - In Ramsey County, MN, STB Docket No. AB-884. The City of New Brighton, MN filed an application under 49 U.S.C. 10903 asking the Board to find that the public convenience and necessity required or permitted the third-party, or adverse, abandonment and discontinuance of service over an approximately 0.69-mile line of railroad. Neither the Line's owner nor its operating railroad opposed the City's application.

¹¹*Modern Handcraft, Inc. - Abandonment in Jackson County, MO*, 363 I.C.C. 969 (1981); ICC Finance Docket No. 29330, Decided August 19, 1981.

¹²*East St. Louis Junction Railroad Company - Adverse Abandonment - In St. Clair County, IL*, STB Docket No. AB-838 (STB served February 14, 2008); *Union Pacific Railroad Company - Adverse Discontinuance - In St. Clair County, IL*, STB Docket No. AB-33 (Sub-No. 199).

¹³*City of Peoria and the Village of Peoria Heights, IL - Adverse Discontinuance - Pioneer Industrial Railway Company*, STB Docket No. AB-878 (STB served November 19, 2007); 2007 STB LEXIS 684, Decided November 16, 2007, reversing *City of Peoria and the Village of Peoria Heights, IL - Adverse Discontinuance - Pioneer Industrial Railway Company*, STB Docket No. AB-878 (STB served August 10, 2005); *Waterloo Railway Company - Adverse Abandonment - Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine*, STB Docket No. AB-124 (Sub-No. 2) (STB served May 4, 2004), embracing *Canadian National Railway - Adverse Discontinuance - Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine*, STB Docket No. AB-279 (Sub-No. 3); *City of Rochelle, Illinois - Adverse Discontinuance Rochelle Railroad Company*, STB Docket No. AB-549 (STB served May 27, 1999); *The Kansas City Southern Railway Company - Adverse Discontinuance Application - A Line of Arkansas and Missouri Railroad Company*, STB Docket No. AB-103 (Sub-No. 14) (STB served March 26, 1999); *Tacoma Eastern Railway Company - Adverse Discontinuance of Operations Application -*

cases, the ones that only involved adverse discontinuance applications, that were decided by the ICC or STB on the merits, in the two (2)¹⁴ adverse discontinuance applications that are in process at the Board, in the one (1)¹⁵ adverse abandonment case which actually seems to have been an adverse discontinuance proceeding and in

A Line of City of Tacoma, In Pierce, Thurston and Lewis Counties, WA, STB Docket No. AB-548 (STB served October 16, 1998); 1998 STB LEXIS 790, Decided October 15, 1998, petition to reopen denied *Tacoma Eastern Railway Company - Adverse Discontinuance of Operations Application - A Line of City of Tacoma, In Pierce, Thurston and Lewis Counties, WA*, STB Docket No. AB-548 (STB served March 3, 1999); *Grand Trunk Western Railroad Incorporated - Adverse Discontinuance of Trackage Rights Application - A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH*, 3 S.T.B. 124 (1998); STB Docket No. AB-31 (Sub-No. 30) (STB served May 13, 1998); *Jacksonville Port Authority - Adverse Discontinuance - In Duval County, FL*, STB Docket No. AB-469 (STB served July 17, 1996); *Western Stock Show Assn. - Aban. Exemption - In Denver, CO*, 1 S.T.B. 113 (1996); the Western Stock Show Association - Abandonment Exemption - In Denver, CO, Docket No. AB-452 (Sub-No. 1X) (STB served July 3, 1996) petition to reopen denied; *Denver Terminal Railroad Company - Adverse Discontinuance - In Denver, CO*, Docket No. AB-446 (Sub-No. 2) (STB served January 9, 1997), also originally embracing No. AB-6 (Sub-No. 374) *Burlington Northern Railroad Company - Adverse Discontinuance - In Denver, CO* and Docket No. AB-33 (Sub-No. 92) *Union Pacific Railroad Company - Adverse Discontinuance - In Denver, CO*; *Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance*, ICC Finance Docket No. 32049 Renumbered Docket No. AB-379X (ICC served November 4, 1992); *Elgin, Joliet and Eastern Railway Company - Abandonment - Hammond Branch In Hammond, IN*, ICC Docket No. AB-117 (Sub-No. 5B) (ICC served July 22, 1992), embracing *Indiana Harbor Belt Railroad Company - Discontinuance - Hammond Branch In Hammond, IN*, ICC Docket No. AB-317 (Sub-No. 2); *Fore River Railroad Corporation - Discontinuance of Service Exemption - Norfolk County, MA*, 8 I.C.C. 2d 307 (1992); ICC Docket No. AB-359 (ICC served and decided March 10, 1992) (Initially filed as an exemption proceeding but redocketed as an application); *Chicago and North Western Transportation Company - Abandonment and Discontinuance of Trackage Rights - Between Hopkins and Chaska, MN*, ICC Docket No. AB-1 (Sub-No. 206) (ICC served February 10, 1988, decided February 4, 1988).

¹⁴*Lake County, Oregon - Adverse Discontinuance of Rail Service - Modoc Railway and Land Company, LLC and Modoc Northern Railroad Company*, STB Docket No. AB-1035 (STB served August 19, 2009); *Boston and Maine Corporation, Inc. and Springfield Terminal Railway Company - Adverse Discontinuance - New England Southern Railroad Co., Inc.*, STB Docket No. AB-32 (Sub-No. 100) (STB served July 16, 2009).

¹⁵*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) (STB served Feb. 1, 2002).

the one (1)¹⁶ other adverse discontinuance proceeding that did not proceed beyond the petition for waiver stage¹⁷, the adverse applicant was the owner of the line and the respondent was the owner's operator which the owner wished to replace or a lessee or a trackage rights tenant. The owner merely wished to enforce its contract rights with respect to the tenant's operations on the line and when the Board granted an application, it terminated its jurisdiction only with respect to the tenant's operations.

Thus, in all adverse discontinuance applications that have been brought before the ICC and the STB that did not also involve an adverse abandonment application, and in the *Thompson* and *Smith* cases themselves, the applicant was the owner of the line of railroad over which the respondent tenant railroad was or had been operating. Not only did the owners have an ownership interest in the line but an interest in enforcing

¹⁶*Maine Central Railroad Co., State of New Hampshire - Adverse Discontinuance - Line Between Whitefield, New Hampshire and St. Johnsbury, Vermont*, STB Docket No. AB-848 (STB served July 1, 2003). See *New Hampshire Central Railroad, Inc. - Lease and Operation Exemption - Line of the New Hampshire Department of Transportation*, STB Finance Docket No. 35022 (STB served December 11, 2007).

¹⁷In one other early adverse discontinuance proceeding, *Southern Pacific Transportation Company - Discontinuance of Service - In San Francisco County, CA*, ICC Finance Docket No. 31486 (ICC decided September 7, 1989), a non-carrier owner of a right-of-way filed a declaratory order that a trackage rights tenant had abandoned its rights over a line about two city blocks in length. The owner also filed a backup petition for exemption for the adverse discontinuance of the trackage rights operation. The owner bought the line from the previous owner, Western Pacific Railroad Company, which had abandoned the line, or its successor by merger, Union Pacific Railroad Company. Southern Pacific had trackage rights over the line but the new owner argued that those rights were terminated under the terms of the trackage rights agreement by the WP abandonment. SP contended that it needed the line to serve several customers since its own access track to those customers was being taken out of service and removed. The ICC held that the WP abandonment did not automatically terminate the STB trackage rights and that an adverse discontinuance case could be brought only by application,

their contracts with their operators, tenants or licensees.

In each such previous agency adverse discontinuance case that involved only an adverse application for discontinuance of service, the applicant sought the agency action and findings in order for that applicant owner to enforce its property and contract rights with respect to rail freight operations on the subject railroad line. Moreover, the applicant had an existing primary obligation and right to provide service over the line. When the agency ruled in favor of the applicant, it withdrew its jurisdiction only over the tenant railroad's service, not over all service over the line or over the right-of-way. The processes of State law that this type of decision permitted were contract and eviction actions, not eminent domain actions. The Board did not give up jurisdiction over the owner/applicant's service over the line or make findings or reach a decision that could be used to support a condemnation action in a State court. The following language is instructive. In *Tacoma Eastern Railway Company - Adverse Discontinuance of Operations Application - A Line of City of Tacoma, In Pierce, Thurston and Lewis Counties, WA*, STB Docket No. AB-548 (STB served March 3, 1999); denying petition to reopen decision served October 16, 1998, the Board stated:

The Board's action here, following a long line of precedents and consistent with the relief sought by the City, allows a court of competent jurisdiction, which alone can adjudicate the rights and obligations of TE and the City, to take action in light of the Board's decision that the public convenience and necessity does not **require continued operations by TE.** (emphasis supplied)

TE was a tenant and the City still had an obligation and intention to provide rail service

not by petition for exemption. We could find no report involving a later application for adverse discontinuance of the SP service over the line.

over the line.

There is no precedent for a stranger with no property or contract interest in the right-of-way of a railroad line or in the rail freight service provided over that right-of-way to apply for the adverse discontinuance of the owning railroad's service over a rail line in which that owner has the property rights and the primary operating rights and obligations. Unlike the line owners who have filed all the adverse discontinuance applications with the agency to date and which already had a legal obligation to provide service over the line or to arrange to have such service provided, the stranger (IBR, here) has no cognizable legal interest upon which to base an adverse discontinuance application against a line owner and operator's service or to support a condemnation action against the right-of-way as if it had. Unlike all previous adverse discontinuance applicants before the agency, IBR has no property or contract or other legal basis for seeking a remedy from a State court based on an adverse discontinuance finding by the Board.

While the stranger to the service on a railroad line and to an interest in the line itself logically should have no legal standing at all to attempt to gain possession and operation of a railroad's unabandoned right-of-way in any type of proceeding, Congress has provided a procedure for the stranger to attempt to accomplish its ultimate goal through the feeder line acquisition application process. If the feeder line applicant can meet the criteria of the statute, that is the only basis on which it can gain an interest in the line and its operation.

III. STB Authorization or Exemption of the Discontinuance of Service Over a Line

of Railroad By the Line's Owner Does Not Remove the Board's Jurisdiction Over the Line or Enable a Third Party to Bring a Condemnation Action to Obtain Ownership of the Right-of-Way.

The Board's approval or exemption for the formal discontinuance of service over a rail line by the owner and operator of the rail line does not remove the Board's jurisdiction over the line or constitute an abandonment of the railroad's property interest and franchise operating rights in the line. Thus, a Board order approving or exempting discontinuance of rail service over a line of railroad can provide no basis for a third party to bring a condemnation action against the railroad property in a State court. Even if IBR could receive an adverse abandonment finding from the Board in this case, it would be useless as support for its desired ultimate outcome of taking over NSR's property and franchise because of the continuing jurisdiction of the Board over the Line and the rail service provided over the Line. Moreover, a condemnation action supported by a discontinuance of service finding, authorization or exemption would be inconsistent with the limited scope of Offers of Financial Assistance under the statute in discontinuance of service proceedings.¹⁸ In *State of Vermont and Vermont Railway, Inc. --*

Discontinuance of Service Exemption -- In Chittenden County, VT, 3 I.C.C. 2d 903 (1987), the ICC stated:

Modern stands only for the proposition that a non-carrier can seek abandonment. It does not establish that the *de facto* cessation of service eliminates the requirement for a Commission order terminating the service obligation. See *Modern*, 363 I.C.C. at 972. To the contrary, a rail carrier may not abandon a rail line without our approval. See *Gibbons v. United States*, 660 F.2d

¹⁸49 U.S.C. 10904(f)(4)(B). See e.g. *Grand Trunk Western Railroad Incorporated - Adverse Discontinuance of Trackage Rights Application - A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH*, 3 S.T.B. 124 (1998).

1227, 1233-34 (7th Cir. 1981). (The fact that a bankrupt carrier was cashless and unable to provide service did not vitiate the legal requirement to seek abandonment authorization to extinguish its common carrier obligation) and *Kansas City Area Transportation v. Ashley*, 555 S.W. 2d 9 (1977) (cited in *Modern*). The Commission's regulation of rail line abandonments is exclusive and plenary. *Chicago and N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981). Thus, the Vermont Court was correct to defer to the Commission's authority in this regard. Unless and until an unconditioned certificate is issued and acted upon, the line remains within our jurisdiction. See *Hayfield Northern v. CNW*, 467 U.S. 622, 633-634 (1984).

Indeed, the very purpose of the *Out of Service Lines* exemption was to lessen regulatory requirements for abandonment of lines over which there had been no service and no request for service for at least two years. If our jurisdiction could be terminated by *de facto* abandonment, then out of service lines could be abandoned without regulatory approval and the exemption would be unnecessary. Even if the track is physically removed, as here, neither the carrier's common carrier obligation or the agency's jurisdiction is terminated. The Commission can, and has on occasion, ordered carriers to restore such lines where there is a request for service. See, e.g., *Akron & B.B.R. Co.-Abandonment of Operation*, 239 I.C.C. 250 (1940).

In *Preseault v. Interstate Commerce Commission*, 494 U.S. 1; 110 S. Ct. 914; 108 L. Ed. 2d 1 (1990), the U. S. Supreme Court stated in footnote at 494 U.S. 1; 110 S. Ct. 914; 108 L. Ed. 2d 1, 5-6:

FN 3 There is an important distinction in the Interstate Commerce Act between "abandonment" of a rail line and "discontinuance" of service. See 49 U.S.C. § 10903 (1982 ed.). Once a carrier "abandons" a rail line pursuant to authority granted by the Interstate Commerce Commission, the line is no longer part of the national transportation system, and although the Commission is empowered to impose conditions on abandonments, see, e. g., 49 U.S.C. §§ 10905(f)(4), 10906 (1982 ed.), as a general proposition ICC jurisdiction terminates. See *Hayfield Northern R. Co. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 633-634 (1984); 54 Fed. Reg. 8011-8012 (1989). In contrast, "discontinuance" authority allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future.

In discussing the effect of the transfer of a railroad right-of-way for interim trail use and railbanking that otherwise would be abandoned, the Court stated in *Preseault* at 494 U.S. 1; 110 S. Ct. 914; 108 L. Ed. 2d 1, 5-6:

Section 8(d) of the amended Trails Act provides that interim trail use "shall not be treated, for any purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d)....By deeming interim trail use to be like discontinuance rather than abandonment, see n. 3, supra, Congress prevented property interests from reverting under state law:

"The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use. This amendment would ensure that potential interim trail use will be considered prior to abandonment." H. R. Rep., at 8-9.

The United States Court of Appeals for the District of Columbia Circuit also described the difference between abandonments and discontinuances of service in *New York Cross Harbor Railroad v. Surface Transportation Board*, 374 F.3d 1177, 1182 (D.C. Cir. 2004); 362 U.S. App. D.C. 352,

5 The "public convenience and necessity" standard applies to both abandonments and discontinuances. 49 U.S.C. § 10903. Abandonment allows (or forces) the carrier to cease service and terminates the STB's jurisdiction of the tracks. Discontinuance, meanwhile, allows (or forces) a carrier to cease service but maintains the right-of-way and STB's jurisdiction of the tracks.

Of course, the Board does not force a carrier to cease service as a result of its approval, exemption or findings in a discontinuance proceeding, even if the findings are made in a decision in an adverse discontinuance proceeding. In *City of Peoria and the*

Village of Peoria Heights, IL - Adverse Discontinuance - Pioneer Industrial Railway

Company, STB Docket No. AB-878 (STB served August 10, 2005) reversed on other grounds by decision served November 19, 2007, the Board stated:

At the same time, adverse discontinuance authority is permissive, which means that the operator can continue to operate until there is an adverse state court judgment against it or until it voluntarily ceases operations. *Modern Handcraft* at 972. Thus, if the Cities failed to evict PIRY in state court after the Board granted an adverse discontinuance application, PIRY could continue to operate on the line.

Unlike the owner of the rail line in a proceeding against a tenant, a stranger with no real estate interest and no contract rights in the right-of-way or service over the line would have no basis on which seek an "adverse state court judgment" enforcing rights with respect to operations on the right-of-way, much less to condemn the right-of-way of the rail line over which the service of the owner and operator of the line has been discontinued. This is why IBR wants the Board to make some sort of statement that imbues the adverse discontinuance finding with the complete termination of STB jurisdiction over the right-of-way that an adverse abandonment finding carries, or perhaps not to address the issue so that it can argue that this is what the Board's adverse discontinuance finding would mean.

IBR can not ask for an adverse abandonment finding, of course, because these are only made when the public convenience and necessity require or permit abandonment of the line so it can be put to a different use, almost always a public use, not including rail service. As the Board has noted, it would be inconsistent to allow

OFA to acquire railroad lines after a finding that the public convenience and necessity required or permitted abandonment of the subject line in adverse abandonment cases.

OFA can only be made in discontinuance of service proceedings to subsidize the operating railroad's service. It would be even more inconsistent as well as illogical to permit a stranger to bring a condemnation action against a railroad right-of-way for the purpose of substituting the stranger for the current owner and rail service operator of the line after the Board made a mere adverse discontinuance of service finding than it would after the Board made an adverse abandonment finding.

The Board has already addressed the limited nature of an adverse discontinuance finding and the unavailability of forced sale of a line after the discontinuance finding by stating that the OFA procedures are not consistent with such a finding in an adverse discontinuance proceeding. In *Denver & Rio Grande Railway Historical Foundation - Adverse Abandonment - In Mineral County, CO*, STB Docket No. AB-1014 (STB served May 23, 2008), the Board stated:

In the October 2007 Decision, *slip op.* at 4-5, the Board pointed out that it does not permit OFAs for lines as to which adverse abandonment has been granted because an OFA would be inconsistent with the reasons for granting the adverse abandonment in the first place. As we noted in that decision, "should the Board ultimately find that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, the OFA, feeder line, and public use provisions would be fundamentally inconsistent with the purpose of the Board's adverse abandonment decision."¹⁹

¹⁹See also *Norfolk Southern Railway Company - Adverse Abandonment - St. Joseph County, IN*, STB Docket No. AB-290 (Sub-No. 286) (STB served October 26, 2006) where the Board stated:

The petition for exemption from 49 U.S.C. 10904 and waiver of the related regulations at 49 CFR 1152.27 will be granted. In a third party abandonment proceeding, the Board withdraws its primary jurisdiction to permit state, local or other federal law to apply where

The Board also stated in *City of Peoria and the Village of Peoria Heights, IL - Adverse Discontinuance - Pioneer Industrial Railway Company*, STB Docket No. AB-878 (STB served August 10, 2005); reversed on other grounds by decision served November 19, 2007, in addition to the statement concerning the permissive nature of an adverse discontinuance finding quoted above, as follows:

Because this decision will authorize a discontinuance of service and not an abandonment, under our precedent OFAs to take over the line are not entertained. See *City of Rochelle, Illinois--Adverse Discontinuance--Rochelle Railroad Company*, STB Docket No. AB-549 (STB served May 27, 1999); *Tacoma*. Moreover, there is no need here for an OFA, as CIRY is authorized to provide rail service over the line. Therefore, the Cities' motion to reject PIRY's notice of intent to file an OFA will be granted. Similarly, interim trail use/rail banking requests under the Trails Act, and public use requests under 49 U.S.C. 10905 are not appropriate and will not be entertained.

The continuing jurisdiction of the Board over the rail freight service on a line of railroad and over the line itself is not confined to decisions in ordinary discontinuance of service cases but applies to adverse discontinuance application decisions as well. The overriding Federal interest in the line and service over the line thus continues with respect to service on the line after an STB adverse discontinuance of service finding as well as after a similar Board decision approving or exempting discontinuance of service

there is no overriding federal interest in interstate commerce. See *Kansas City Pub. Ser. Frgt. Operations - Exempt - Aban.*, 7 I.C.C.2d 216, 225 (1990); *Modern Handcraft, Inc. - Abandonment*, 363 I.C.C. 969, 972 (1981). Absent an exemption, section 10904 could provide a vehicle for someone to invoke agency processes that the Board has determined are not necessary or appropriate. If 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. See *East St. Louis Junction Railroad Company - Adverse Abandonment - In St. Clair County, IL*, STB Docket No. AB-838 et al. (STB served June 30, 2003) (*St. Clair*).

in the usual case. Since OFAs to acquire a subject rail line are not available in adverse discontinuance proceedings, State court condemnation proceedings to achieve the same result similarly can not be maintained.

IBR seeks the permanent cessation of NSR service over the Line and ultimately the condemnation of NSR's right-of-way so that IBR can provide service over the Line itself. The permanent cessation of service over a railroad line by the line's owner and primary operator is in substance an abandonment of the rail line, not a discontinuance of service over the line where the owner and operator can later resume its service. Moreover, it is an abandonment with an OFA as part of the process. IBR would have the Board skip the part of the process where the Board evaluates the OFA, just as it would have the Board skip the part of the feeder line process where the Board would make a determination whether IBR met the statutory standards and proceed directly to IBR's acquisition of the Line in a State court condemnation proceeding. NSR would be out, the State court would install IBR as the Line's owner and presumably under this scheme the Board would be presented with no alternative but to approve IBR's application, petition or notice for authority or exemption to operate the Line. Not only is that not the statutory scheme established by Congress under the feeder line acquisition section, it includes an erroneous assumption that the Board will give up jurisdiction over the Line in order to permit a local startup corporation to condemn it in a State court action for continued use as a line of railroad, contrary to all precedent in discontinuance of service proceedings concerning the parameters of discontinuance findings or

authorizations. IBR could not use a discontinuance of service finding to support a State court condemnation action even if it could obtain one from the Board.

IV. A Railroad Is Not Required to Maintain An Inactive Rail Line to the Same Standards As an Active Rail Line; The Remedy For a Railroad's Failure to Provide Service Upon Reasonable Request Is Not the Forfeiture of Its Property Interest and Franchise in the Line Over Which the Service Has Not Been Provided.

While the foregoing points are sufficient to show that IBR has used and contemplates using the wrong procedure, that it can not obtain a discontinuance of service finding and that it cannot achieve its ultimate result after a mere discontinuance of service finding even if it could, we show here that IBR could not prevail in an adverse discontinuance proceeding based on its allegation that NSR has not maintained the line and has not met its common carrier obligation to provide service over the Line. It has no other basis for its prospective application because it has no present or future interest in the real estate comprising the right-of-way of the Line and it has no contract that can be enforced to terminate NSR's service over its own Line. IBR does not actually allege that there has been a reasonable request for rail service over the Line that NSR has failed to honor. Its allegation is that NSR will not offer service over the Line to a prospective customer under reasonable terms. While this charge provides even less support for IBR's adverse discontinuance application, common carrier obligation decisions show that service failures (if they even exist) provide no basis for adverse discontinuance findings. It also does not make an adverse discontinuance application the proper procedure to achieve IBR's purpose and the forfeiture of the NSR's property

interest in the right-of-way and its franchise to operate over the Line the proper remedy for a common carrier obligation violation even if there had been one.

In *The Kansas City Southern Railway Company - Abandonment Exemption - Line in Warren County, MS*, STB Docket No. AB-103 (Sub-No. 21X) (STB served February 22, 2008), the Board stated:

To the contrary, a carrier is not required to repair or replace missing or damaged track over a portion of line that is not currently needed for rail service.[14] We have even held that a carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service.

In *Decatur County Commissioners, et al. v. The Central Railroad Company of Indiana*, STB Finance Docket No. 33386 (STB served September 29, 2000), the Board stated:

n34 As the Supreme Court has found, "it is well settled that a carrier cannot legitimately be required to expend money to rehabilitate a line where it will lose money on the operation." *Purcell v. United States*, 315 U.S. 381, 385 (1942). See also *Kalo Brick*, 450 U.S. at 325.

See also *Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad*, STB Finance Docket No. 34337 (STB served January 31, 2007) (denying complaint seeking damages for failure to maintain line in the absence of a reasonable request for rail service over the line).

As these decisions and others concerning the failure of a railroad to meet its common carrier obligation upon reasonable request show, the remedy for such failure is different and far less draconian than that proposed by IBR. See also

General Railway Corporation d/b/a Iowa Northwestern Railroad Company - Operation Exemption - Line of Dickinson Osceola Railroad Association, STB Finance Docket No. 34037 (STB served June 15, 2007), where a party sought revocation of an exemption for acquisition and operation of a railroad line six years after the new party began its operations. The Board stated:

There are administrative remedies for failure to provide service that could be pursued if a party wants the Board to consider service-related claims. But the revocation of operating authority that is sought in this proceeding at this late date is not justified here. Therefore, DORA's petition will be denied.

Similarly, the revocation of NSR's operating authority over the Line and the forfeiture of its property to a shortline startup company that desires to use the property for the same purpose as NSR uses it can not be justified by such thin allegations.

CONCLUSION

Congress established the feeder line acquisition procedures so that parties could accomplish the results sought by IBR if they used the proper procedures and met reasonably strict criteria. Congress recognized that railroad property, franchises and business opportunities should not be lightly and easily forfeited to strangers to the service and the property, such as startup shortlines, and that there were other remedies for service failures. The Board has recognized this as well. In *Seminole Gulf Railway, L.P. -- Adverse Abandonment -- In Lee County, FL*, STB Docket No. AB-400 (Sub-No. 4) (STB served November 18, 2004), the Board stated:

Finally, in its comments, ASLRRRA raises concerns that the grant of adverse abandonment requests such as this 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 and threatening shortlines. These concerns also weigh in favor of our denying the adverse abandonment application here.

The same policy considerations apply to the possible opening of the floodgates of the availability of adverse discontinuance proceedings to a torrent of strangers and opportunists who desire to chip away parts of Class I railroads' property and franchises under abbreviated and truncated procedures and criteria ill-suited to making the determinations that Congress entrusted the Board to make when they allowed third parties to file any sort of application leading to the result desired by IBR, the force sale of a railroad line.

IBR is using the wrong procedure and criteria to accomplish a feeder line acquisition. Artful pleading or labeling can not change its substance. The Board has an overriding Federal interest in determining and regulating the party or parties which provide service over a railroad line. The Board has a particular interest when a stranger without a property or contract interest in the line, and no statutory rights except possibly under the railroad development (feeder line) section of the statute if it can meet the criteria, seeks to replace the owner and operator with the primary common carrier obligation to provide service over the line upon reasonable request.

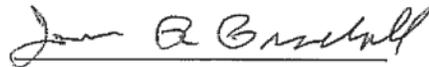
IBR, a party that has no present or future property interest in the Line's right-of-way and no contract permitting the operator's service over the Line, and is not even a shipper or an operating railroad, has no standing to maintain an adverse discontinuance proceeding, much less to receive any findings or relief from the Board after filing an adverse discontinuance application. Adverse discontinuance findings are made in order

to permit line owners to enforce their contract or property rights against tenants or licensees, not for strangers to oust the railroad owner and primary operator or party with the primary operating responsibility without meeting the feeder line acquisition criteria of the statute. The Board does not give up jurisdiction over a line of railroad or in the case of an adverse discontinuance over the owner and primary operator and its operations when the Board makes findings that permit the applicant in an adverse discontinuance proceeding to pursue State legal actions. These State legal actions include existing property or contract interests but can not include condemnation of the line as if the discontinuance findings had attributes of adverse abandonment findings that would permit such condemnation of the right-of-way of the railroad line. Condemnation actions could not be filed for the purpose of acquiring the line in order to provide continued rail service outside the processes of the Board in any event. Such a procedure would usurp in part the Board's exclusive jurisdiction. Thus, IBR could not use Board discontinuance of service findings to accomplish its desired outcome even if it could persuade the Board to issue them.

Discontinuance of the right to provide service over a line of railroad and forfeiture of the railroad owner and operator's property interest, franchise and business opportunities pertaining to the line is not a remedy for failure to maintain an inactive line or failure to provide service upon reasonable request, much less for failure to meet all the desires of strangers for favorable terms and rates for rehabilitating and providing future service over the line.

For all these reasons, IBR's petition should be rejected or denied and it should not be permitted to pursue an adverse discontinuance proceeding concerning NSR's service over its own Line.

Respectfully submitted,



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Dated: September 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply was served upon Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1890, Chicago, IL 60604-1112, mcfarland@aol.com, by e-mail attachment this 3rd day of September, 2009.


James R. Paschall