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218372

January 4, 2007



VIA DHL EXPRESS

Mr. Vernon A. Williams, Secretary
 Surface Transportation Board
 1925 K Street, N.W.
 Washington, D. C. 20006

Re: STB Docket No. AB-290 (Sub. No. 286), Norfolk Southern Railway Company – Adverse Abandonment – In St. Joseph County, IN – Reply Comments of Norfolk Southern Railway Company

Dear Mr. Williams:

Enclosed for filing with the Board in the captioned proceeding are an original and ten copies of the reply comments of Norfolk Southern Railway Company to the adverse abandonment application filed by the City of South Bend, the Brothers of Holy Cross, Inc. and the Sisters of Holy Cross, Inc. on November 21, 2006.

Very truly yours,

James R. Paschall

Enclosures

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Mr. Vernon A. Williams
No. AB-290 (Sub-No. 286)
Letter Page 2 of 2
January 4, 2007

cc w/encl. via DHL Express

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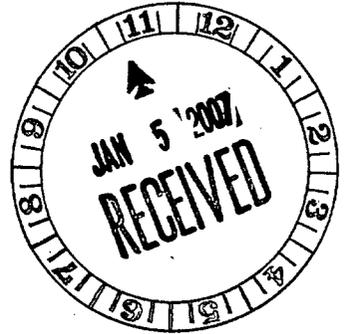
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218372

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. AB-290 (SUB-NO. 286)



NORFOLK SOUTHERN RAILWAY COMPANY
-- ADVERSE ABANDONMENT --
IN ST. JOSEPH COUNTY, INDIANA

REPLY COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY
TO ADVERSE ABANDONMENT APPLICATION OF THE
CITY OF SOUTH BEND, THE BROTHERS OF THE HOLY CROSS, INC. AND
THE SISTERS OF THE HOLY CROSS, INC.

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Dated: January 4, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-290 (SUB-NO. 286)

Norfolk Southern Railway Company
-- Adverse Abandonment --
in St. Joseph County, Indiana

Reply Comments of Norfolk Southern Railway Company
to Adverse Abandonment Application of the
City of South Bend, the Brothers of the Holy Cross, Inc. and
the Sisters of the Holy Cross, Inc.

In accordance with the Board's decision served December 11, 2006 in the subject docket, Norfolk Southern Railway Company ("NSR") submits to the Board the following comments in reply to the adverse abandonment application of the City of South Bend, the Brothers of the Holy Cross, Inc. and the Sisters of the Holy Cross, Inc. (together referred to as Applicants). Applicants seek a determination from the Board that the public convenience and necessity permit the abandonment of approximately 3.7 miles of NSR's line of railroad in two contiguous segments between Milepost UV 0.0 and Milepost UV 2.8 and between Milepost ZO 9.6 and Milepost ZO 10.5, including an

industrial spur stemming from Milepost ZO 9.6, (the "Line") in St. Joseph County, IN.¹

FACTS

Applicants' statement that no traffic has moved over the Line since NSR acquired it and for approximately four or five years prior to that time is generally correct.² The effective date of the Conrail Transaction, pursuant to which NSR acquired the Line was June 1, 1999, not a date in 1998 as the application appears to imply.³

¹The Line once was part of two through branch lines but has been a 3.7-mile dead-end branch line or industrial lead track since at least 1982. The Line has been referred to as the Niles Industrial Track, the South Bend Secondary Track, and in whole or in part, the Notre Dame lead and may have had other names over the years. As noted in more detail below, NSR acquired the Line from Conrail on June 1, 1999. In their original notice of intent to file the application, Applicants had contended that Conrail had abandoned a small segment of the Line in earlier proceedings. NSR could not confirm that Conrail had consummated the abandonment of any of the mileage now included in the application. Thus, Applicants included the additional mileage in their application in order to prevent any controversy or complication that might arise if a small, disconnected segment of the Line were not included in any abandonment of the Line.

²We have written statements, but not definite records, that coal traffic moved over the Line to the University of Notre Dame until about the mid-1990s.

³Norfolk Southern Corporation ("NSC"), parent to Norfolk Southern Railway Company ("NSR"), entered into a Transaction Agreement (the "Conrail Transaction Agreement") among NSC; NSR; CSX Corporation ("CSX"); CSX Transportation, Inc. ("CSXT"), a wholly-owned subsidiary of CSX; Conrail Inc. ("CRR"); Consolidated Rail Corporation ("Conrail"), a wholly-owned subsidiary of CRR; and CRR Holdings LLC, dated June 10, 1997, pursuant to which CSX and NSC indirectly acquired all the outstanding capital stock of CRR. The Conrail Transaction Agreement was approved by the Surface Transportation Board ("STB") in a decision served July 23, 1998 in STB Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corporation*, 3 S.T.B. 196 (1998). Pursuant to the Conrail Transaction Agreement, certain Conrail assets were allocated to *Pennsylvania Lines LLC* ("PRR"), a wholly-owned subsidiary of Conrail. Furthermore, pursuant to the Conrail Transaction Agreement, PRR's assets, in turn, were leased to and are operated by NSR under the terms of an allocated assets operating agreement between PRR and NSR (the "NSR Operating Agreement") with an original term of twenty-five (25) years from the effective date of June 1, 1999, and two optional renewal terms of five (5) years each. The transaction was closed and became effective June 1, 1999.

On June 4, 2003, Norfolk Southern Corporation (NSC), CSX Corporation (CSX), and Consolidated Rail Corporation (Conrail) announced the joint filing of a petition with the STB for approval to establish direct ownership and control by CSX Transportation, Inc. (CSXT) and

The University receives coal for its on-campus power plant via NSR rail movement to a transload facility in the South Bend area for final delivery to the campus by truck. NSR has located no written record that confirms that its representatives ever solicited traffic for movement over the Line to the University or any other party.⁴

In summer 2006, NSR was negotiating a possible sale of the Line to a potential short line operator, the Chicago, Lake Shore & South Bend Railway (CLS&SB). CLS&SB proposed to restore the delivery of coal by direct rail service to the University. NSR was apprised that CLS&SB received a favorable response from the University to the proposed reinstatement of service over the Line for direct delivery of coal to it. While the University may have discussed restoration of service over the Line with CLS&SB, the University apparently made no commitments to request direct coal delivery. The University's public withdrawal of its support for the proposed operation before the NSR and CLS&SB concluded their transaction effectively negated the objective of that

Norfolk Southern Railway Company (NSR), the railroad subsidiaries of CSX and NSC, respectively, of the two Conrail subsidiaries - New York Central Lines LLC (NYC) and Pennsylvania Lines LLC (PRR) that CSXT and NSR had been managing and operating, respectively, since June 1, 1999 under operating agreements approved by the STB in the 1998 decision. The STB approved the petition, subject to certain conditions, in a decision served on November 7, 2003 in STB Finance Docket No. 33388 (Sub-No. 94), *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corporation [Petition for Supplemental Order]*, Decision No. 2. The effect of the supplemental transaction, which was concluded on August 27, 2004 by the merger of NYC and PRR into CSXT and NSR, respectively, was to replace the operating agreements and allow NSR and CSXT to operate the NYC and PRR lines via direct ownership.

⁴NSR may have discussed informally the possibility of reactivating the Line with representatives of the University of Notre Dame (and/or its coal supplier) for the purpose of moving coal directly to the University campus at some time after NSR acquired the Line. However, the only written information on possible reinstatement of service to the University over this Line that we have found to date is a comment from a third party that was noted in an e-mail and that stated that the University might not support abandonment of the Line, without further explanation.

transaction.

NSR denies that the Line has been severed from the national general system of rail transportation because NSR could restore the switch connection from this branch line to NSR's main line if there were a reason to do so.⁵ NSR acknowledges that State or local agencies have paved over certain road crossings along the Line but asserts that NSR has the acknowledged right to restore the railroad line through those road crossings if rail service were to be restored over the Line.

NSR admits that the Line is in poor condition and would need to be rehabilitated in order to restore service over it because of the Line's long period of non-use. However, NSR denies that it would be "impossible" to reinstate service over the Line without incurring costs that would make the restoration of the Line definitely prohibitive inasmuch as CLS&SB was willing to undertake rehabilitation of the Line if it could reach an agreement to provide service over it to the University of Notre Dame. Also, NSR had retained the Line in order to have a sufficient period of time in which to determine whether restored service over the Line might become feasible. NSR would not have done this if future reactivation of the Line appeared to be physically or economically

⁵The mainline switch from NSR's Chicago main line to the Notre Dame lead was intact until some time after June 1, 2004. Track apparently had been disconnected past the clearance point at an earlier date, however. Because there appeared to be no need to maintain a switch for which there was no immediately foreseeable use, the switch was removed. NSR could restore the switch and disconnected track if there was a reason to do so. On the other hand, the Line was severed from the national rail system on the north by two Conrail abandonments. Applicants cite the two ICC proceedings in which the authority for those abandonments was granted in their application *Conrail Abandonment in South Bend Between Milepost 10.5 and Milepost 11.8, St. Joseph County, IN*, ICC Docket No. AB-167 (Sub-No. 407N) (ICC served April 22, 1982) and *Conrail Abandonment in Berrien County MI and St. Joseph County, IN*, ICC Docket No. AB-167 (Sub-No. 672N) (ICC served August 31, 1984).

impossible.⁶

If we understand Applicants' explanation correctly, they state that the Line was a former Michigan Central Railroad Company line. This is only partially correct. NSR's records indicate that the "ZO Line" was the South Bend branch of the Michigan Central Railroad Company.⁷ However, the "UV Line" was the Michigan Central Connecting Track of the New York Central Railroad Company. The New York Central Railroad Company was authorized to lease the property of the Michigan Central Railroad Company in *New York Central Unification*, 150 I.C.C. 278, 290 (1929).

NSR asserts that any ownership rights that it has in any part of the right-of-way and any rights it may have to use any part of the right-of-way for railroad purposes cannot be forfeited and cannot expire by the terms of the deeds, easements or other related agreements due to non-use. Thus, the Brothers' and the Sisters' argument that sole ownership of all rights to the land and right-of-way (of the ZO Line) lies with the Brothers or the Sisters due to non-use alone is incorrect.⁸ Furthermore, it is not obvious to us whether this argument is meant to apply to any of the right-of-way of the Line itself, rather than just to industrial lead tracks on the Brothers' and Sisters' properties.

Regardless of whether the Brothers' and Sisters' argument that a reversion of

⁶NSR acknowledges that it currently has no plans to rehabilitate the Line nor any reason to sell the Line to CLS&SB for such purpose because NSR knows of no potential demand for service over the Line if the University of Notre Dame does not wish to change its current use of rail-truck transload service to receive coal shipments.

⁷The Brothers and the Sisters apparently are only interested in part or all of the "ZO Line."

certain right-of-way property to them has already occurred is correct or not, for purposes of these comments in this proceeding, NSR does not have readily available information to confirm or deny whether the Brothers and the Sisters may possess any reversionary interests in certain segments of the right-of-way.

Notwithstanding the apparently ambiguous status of the Brothers' and Sisters' possible fee or reversionary interests in segments of the right-of-way, in the absence of positive proof that they have no interest, NSR believes that the Board will accept the Brothers' and the Sisters' good faith assertions of an interest in the right-of-way for the purpose of standing in this proceeding. Precedent suggests the Board will not require their interests to be definitely established in this proceeding. In the event the Board grants the application, we would expect the Board to leave the establishment of the real estate interests of the parties to negotiation or court action. Under these circumstances in which NSR sees no need to discuss or resolve the respective real estate interests of the parties, NSR wishes to make clear that NSR does not waive or concede any argument or position that it possesses fee ownership or other interests in part or all of the right-of-way of the subject Line by not contesting the asserted ownership or reversionary interests of other parties in this proceeding. NSR also does not waive or concede any argument, position or interest by not asking that the Board determine, or delay the proceeding until a court determines, the nature of those interests.

The burden of proof in an adverse application is upon the Applicants, not upon

⁸See *Brock v. B & M Moster Farms, Inc.*, 481 N.E.2d 1106 (Ind. Ct. App. 1985) (easement created by grant generally not lost through mere nonuse); *Union Pacific Railroad Company - Abandonment Exemption - In Rio Grande and Mineral Counties, CO; In the Matter of an Offer of Financial Assistance*, STB Docket No. AB-33 (Sub-No. 132X) (STB served May 24, 2000).

the railroad, which is in effect a respondent in the proceeding. *Yakima Interurban Lines Association - Adverse Abandonment - In Yakima County, WA*, STB Docket No. AB-600 (STB served November 19, 2004); *Seminole Gulf Railway, L.P. -- Adverse Abandonment -- In Lee County, FL*, STB Docket No. AB-400 (Sub-No. 4) (STB served November 18, 2004). Thus, the Applicants must present a convincing case to obtain a favorable ruling from the Board, but any such Board decision would not include a determination of the real estate interests of the party. Unless the Applicants can prove their real estate interests to NSR if they obtain a favorable decision from the Board, they also will have the burden of proving them to a court.

LEGAL ANALYSIS

Serious consequences almost certainly will result from any STB decision finding that the public convenience and necessity permit the adverse abandonment of a line of railroad. The railroad owner or operator of the rail line probably will lose its property interest, through subsequent condemnation or ejection. At least, the railroad would lose the interest that gives it the right to operate over the rail line. In either case, the railroad also will lose its option to increase its capacity for service in the future, at least with respect to the lines that might be the subject of some adverse court decision after an STB decision on the merits of the adverse abandonment application.⁹ Current or potential shippers would lose rail service options or the ability to locate at certain potential rail-served industrial development sites.

⁹See *Kansas City Public Service Freight Operation -- Exemption -- Abandonment in Jackson County, MO*, 7 I.C.C. 2d 216 (1990).

In filing an adverse abandonment application, the applicant seeks a decision that will remove STB jurisdiction over rail lines in order to seek a court decision that would remove the property from the railroad system. Thus, the Board's evaluation of such applications must take into account all the facts that concern the actual and potential use for the rail line on a case-by-case basis. Then, the Board must carefully consider the legal principles that should govern a decision on the merits of each individual case and apply them to the particular facts of the case. Small variations in the facts or even in the application of the relevant legal principles to those facts could change the decision in a particular case. That change could have significant consequences for the parties, especially for the railroad and actual or potential shippers.

Below, we discuss and examine the development of the legal principles that are relevant to the Board's decision on any adverse abandonment application.

Exclusive STB Jurisdiction Over Abandonments of and Discontinuance of Service Over Lines of Railroad, Pre-emption of Other Actions and Remedies

The STB has plenary and exclusive jurisdiction over the abandonment of and the discontinuance of service over lines of railroad. 49 U.S.C. §10501(b) (jurisdiction); 49 U.S.C. §10102(9) ("transportation" defined); 49 U.S.C. §10903 (abandonment authority); *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *City of Creede, CO - Petition for Declaratory Order*, STB Finance

Docket No. 34376 (STB served May 3, 2005).¹⁰ This exclusive STB jurisdiction over abandonment of rail lines precludes condemnation of the right-of-way or other court actions seeking remedies such as quiet title or ejectment with respect to a rail line unless the STB has approved abandonment of the rail line and the abandonment has been consummated.¹¹ However, if the Board finds that the public convenience and necessity permit abandonment of the line in an adverse abandonment case, consummation of the abandonment by the railroad has been deemed unnecessary.

In *Hayfield N. R. Co. v. Chi. & N. W. Transp. Co.*, 467 U.S. 622, 104 S. Ct. 2610; 81 L. Ed. 2d 527 (1984), the Supreme Court stated “the proposition that, as a general matter, issuing a certificate of abandonment terminates the Commission’s jurisdiction.” However, the Court noted that this does not mean State and local government actions cannot be pre-empted by the STB’s abandonment jurisdiction and abandonment decisions in the post-abandonment period. At 467 U. S. 622, 632-633, the Court said at footnote 11:

n11 This does not mean that in the postabandonment period, States are free to undo the very purposes for which the Commission authorized an abandonment. For example, if the Commission authorized an abandonment on the ground that relocation of the track was essential to enable the carrier to provide adequate service elsewhere, pre-emption would almost certainly

¹⁰In 49 U.S.C. §10501(b), Congress expanded the Board’s exclusive jurisdiction over transportation to include the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State. However, in 49 U.S.C. §10906, Congress withheld from the Board authority to exercise its jurisdiction over such tracks under chapter 109 of Title 49. See *Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R.*, 265 F. Supp.2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track).

¹¹See *City of Creede, CO - Petition for Declaratory Order*, STB Finance Docket No. 34376 (STB served May 3, 2005); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp.2d 1009, 1014 (W.D. Wis. 2000)

invalidate a subsequent order by a state court barring such a transfer. Cf. *In re Boston & Maine Corp.*, 596 F.2d 2, 5-7 (CA1 1979); *Texas & Pac. R. Co. Abandonment between San Martine and Rock House in Culberson, Texas*, 363 I. C. C. 666, 678-679 (1980). This problem is absent from the case at bar.

Thus, some State actions concerning abandoned rail lines may be precluded even after a railroad consummates abandonment of a line. But railroad property generally becomes subject to the ordinary processes of State law after, and only after, termination of the STB's jurisdiction over the railroad property. In summary, the Board's jurisdiction over a line of railroad terminates only after (1) a railroad has received STB approval or exemption to abandon a rail line and has consummated the abandonment or (2) the STB has found that the public convenience and necessity permit or require abandonment of or discontinuance of service over a rail line in an adverse abandonment or discontinuance proceeding.

Adverse Abandonment Applications Are Rare, Are Often Denied and Are Not to Be Granted Lightly.

An adverse applicant must meet a heavy burden in order to receive a decision from the Board that the public convenience and necessity permit abandonment of a rail line, even under existing precedent in adverse abandonment cases, which could be viewed as interpreting the abandonment authority set forth in the statute too expansively, as discussed below. The ICC stated in *City of Colorado Springs and Metex Metropolitan District - Petition for Declaratory Order - Abandonment Determination*, ICC Finance Docket No. 31271 (ICC decided March 22, 1989), that "involuntary" (or adverse) abandonment of a rail line "is not an action that we would take lightly." The potential consequences of such action on railroad property, present or

future railroad operations and the shipping public suggest the agency properly exercises such restraint in granting adverse abandonment applications.

Starting with the ICC's decision in *Modern Handcraft, Inc. - Abandonment in Jackson County, MO*, 363 I.C.C. 969 (1981) (*Modern Handcraft*), we have identified ten (10) adverse abandonment cases and twelve (12) adverse discontinuance cases in which the ICC or the STB reached a final decision on the merits. One (1) of the adverse abandonment cases was in substance only a discontinuance case.¹² Two (2) of the adverse discontinuances would have resulted in cessation of all service over the line because the owner of the line intended to abandon the line, not just to remove a tenant or operator.¹³ In these two cases, the agency thus had to consider principles relevant to an adverse abandonment of a rail line, not just to the discontinuance of a tenant's rail service over a line where some service would be continued by the owner or a substitute operator. A third similar, but unusual, adverse discontinuance case in which a rail line

¹²*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 February 1, 2002) (CSX-CN).

¹³*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)(grant). See also *Chicago and North Western Transportation Company - Abandonment and Discontinuance of Trackage Rights - Between Hopkins and Chaska, MN*, Docket No. AB-1 (Sub-No. 206) (ICC served February 10, 1988; ICC served April 5, 1988, ICC decided January 3, 1991)(grant of abandonment and discontinuance but tenant, Soo Line, had right of first refusal to purchase line and was major user; Soo subsidized operation through OFA procedures, ICC decision served April 5, 1988; CNW later applied for abandonment authority to become effective when subsidy ended, ICC decision decided January 3, 1991 authorized the abandonment and Soo discontinuance; Soo had not applied for discontinuance but the decision noted that Soo had filed a notice of exemption for relocation of its rights to another line in a transaction to become effective December 6, 1990, Finance Docket No. 31775, *Soo Line Railroad Company and Chicago and North Western Transportation Company -- Joint Relocation Project Exemption*, no date stated in January 3, 1991 decision). Also see *The Western Stock Show Association - Abandonment Exemption - in Denver, CO*, 1 S.T.B. 113 (1996) (denial).

might have been completely abandoned (but actually where the tenant's service was continued) is also cited in footnote 13.

The ICC and STB have granted four (4) of the (10) adverse abandonment applications. Three (3) of those adverse abandonment applications were opposed.¹⁴ As noted above, one (1) of those three (3) applications was in substance a discontinuance application since the previous owner, which had the right to require reconveyance of the line to it, intended to resume operations on the line.¹⁵ The fourth adverse abandonment application that was granted became unopposed before the decision was served.¹⁶ The ICC and STB have denied, indicated they would have denied if the proper procedure had been used or have been required to deny on court remand six (6) of the (10) adverse abandonment applications that have proceeded to a

¹⁴*Modern Handcraft, supra, Chelsea Property Owners - Abandonment - Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*, 8 I.C.C. 2d 773 (1992) (*Chelsea*) and *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 February 1, 2002 (CSXT-CN) but CSXT-CN really was a discontinuance since CSXT would still use the line after CN-GTW's rights were discontinued. The case involved a 2,952-foot segment of leased track that GTW had originally used as part of an overhead traffic route but had not used for six years. CSXT needed to use the track as part of its Chicago intermodal facility.

¹⁵CSXT-CN, *supra*.

¹⁶*Tri-County Metropolitan Transportation District of Oregon - Abandonment - A Line of Burlington Northern Railroad Company in Washington County, OR*, Docket No. AB-6 (Sub-No. 348) (ICC served May 26, 1993).

decision on the merits.¹⁷ Of the two (2) adverse discontinuance cases in which a favorable decision for the applicant would have led to complete abandonment of the line, the STB granted one (1) of the applications where the trackage rights tenant had not used the line for eleven (11) years, its refusal to discontinue its rights was impeding abandonment of the line and a major public works project, and no shipper would lose service because of the discontinuance or the abandonment.¹⁸ The ICC denied the other such adverse discontinuance application, which involved an active line that was not shown to be operated unprofitably.¹⁹ A third similar case was the unusual case cited in

¹⁷*Wisconsin Department of Transportation -- Abandonment Exemption*, ICC Finance Docket No. 31303 (ICC decided November 23, 1988); *City of Colorado Springs and Metex Metropolitan District - Petition for Declaratory Order - Abandonment Determination*, ICC Finance Docket No. 31271 (ICC decided March 22, 1989); *Salt Lake City Corporation - Adverse Abandonment - In Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No. 183) (STB served March 8, 2002); *Seminole Gulf Railway, L.P. - Adverse Abandonment - In Lee County, FL*, STB Docket No. AB-400 (Sub-No. 4) (STB served November 18, 2004); and *Yakima Interurban Lines Association - Adverse Abandonment - In Yakima County, WA*, STB Docket No. AB-600 (STB served November 19, 2004); *New York City Economic Development Corporation -- Adverse Abandonment -- New York Cross Harbor Railroad in Brooklyn, NY*, STB Docket No. AB-596 (STB served December 15, 2004). See also *Consolidated Rail Corporation - Abandonment Exemption - In Bergen and Passaic Counties, NJ*, STB Docket No. AB-167 (Sub-No. 1151X) (STB served October 30, 1997), which although not an adverse abandonment case, involved the denial by the Board of a petition by a City that attempted to defeat an OFA acquisition in order that the Line might be abandoned and acquired by the City for public use.

¹⁸*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).

¹⁹*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)(grant). See also *Chicago and North Western Transportation Company - Abandonment and Discontinuance of Trackage Rights - Between Hopkins and Chaska, MN*, Docket No. AB-1 (Sub-No. 206) (ICC served February 10, 1988; ICC served April 5, 1988; ICC decided January 3, 1991)(grant of adverse discontinuance but tenant had right of first refusal to purchase line, and tenant then subsidized maintenance of line under OFA procedures to retain its overhead trackage rights operation, see footnote 13 for longer statement of unusual history). But see *The Western Stock Show Association - Abandonment Exemption - in Denver, CO*, 1 S.T.B. 113 (1996) (denial).

footnote 13, which did not, but theoretically could have resulted in immediate total cessation of operations on the line.

The ICC and STB have granted opposed adverse abandonment applications or adverse discontinuance applications that would result in abandonment of a rail line only for rail lines that were short in length: *Modern Handcraft*: 422.08 feet (Modern Handcraft application but 7.8 miles after subsequent application of Kansas City Area Transportation Authority was considered); *Chelsea*: 1.45-mile elevated rail line in Manhattan; *NW-GTW*: 1.6 miles; see also *CSXT-CN*: 2,952 feet.

The ICC and STB have granted eight (8) adverse discontinuance applications. In six (6) of these applications, the line owners sought a decision that would enable them to replace lessees or operators in default and continue operations with a new operator or possibly by themselves.²⁰ In one (1) of the other adverse discontinuance cases where the application was granted, the unusual *CNW-Soo Hopkins-Chaska* case, the trackage rights tenant had the right of first refusal to buy the line and in fact ultimately subsidized the maintenance of the line until its overhead trackage rights operation was

²⁰*Fore River Railroad Corporation - Discontinuance of Service Exemption - Norfolk County, MA*, 8 I.C.C. 2d 307 (1992); *Cheatham County Rail Authority. "Application and Petition" for Adverse Discontinuance*, ICC Finance Docket No. 32049, renumbered ICC Docket No. AB-379X n1 (ICC served November 4, 1992); *Jacksonville Port Authority - Adverse Discontinuance--in Duval County, FL*, STB Docket No. AB-469 (STB served July 17, 1996); *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 October 16, 1998 and March 3, 1999); *City of Rochelle, Illinois - Adverse Discontinuance - Rochelle Railroad Company*, STB Docket No. AB-549 (STB served May 27, 1999); and *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). The operator eventually dropped its opposition to the discontinuance in *Rochelle*, which thus became unopposed.

relocated²¹ In one (1) other adverse discontinuance case in which the application was granted, the trackage rights tenant had not used the line for 11 years and was impeding abandonment of the line and major public works projects. This case is also noted above for its similarity to an adverse abandonment case.²² The ICC and STB have denied four (4) of the twelve (12) adverse discontinuance applications. One (1) of the cases in which an adverse discontinuance application was denied was converted to a trackage rights compensation case when the applicant could not support the adverse discontinuance of overhead trackage rights, which would have converted the tenant's single-line overhead traffic to joint-line movements.²³ In the other three (3) cases in which adverse discontinuance applications were denied, the trackage rights tenant whose operating rights were at issue was still operating over the line and would not be replaced. In one (1) of these three (3) cases, the Board determined that the tenant provided competition to the owner-applicant which would continue to operate the line.²⁴

²¹*Chicago and North Western Transportation Company - Abandonment and Discontinuance of Trackage Rights - Between Hopkins and Chaska, MN, Docket No. AB-1 (Sub-No. 206) (ICC served February 10, 1988; ICC served April 5, 1988; ICC decided January 3, 1991)(grant of adverse discontinuance but tenant had right of first refusal to purchase line, and tenant then subsidized maintenance of line under OFA procedures to retain its overhead trackage rights operation, see footnote 13 for longer statement of unusual history).*

²²*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).*

²³*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).*

²⁴*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 3, 2004). Note that this case was styled as an adverse abandonment but the application actually requested a finding that would have permitted adverse discontinuance of trackage rights.*

In the other two (2) adverse discontinuance cases in which the agency denied the applications, the tenants provided the only service on active lines.²⁵ A common thread in all but two (2) of the results in adverse discontinuance cases²⁶ was that rail service would be continued. Service was to be continued over the subject lines by the owner or a replacement operator in six (6) of the eight (8) cases in which the agency granted the application, one (1) of those being the *CNW-Soo Hopkins-Chaska* subsidy case, and in all four (4) cases in which the agency denied the adverse abandonment application. If the four denied applications had been granted, all service would have ended on two of the four subject lines.

Only two (2) court decisions after the ICC's *Modern Handcraft* decision add to the body of law concerning adverse abandonment applications.²⁷

²⁵Although the owners' stated goal in *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) and *The Western Stock Show Association - Abandonment Exemption - in Denver, CO*, 1 S.T.B. 113 (1996), was to abandon the subject Lines, the decisions in both cases appear to imply that the owners may have been satisfied with increased compensation and better terms in the trackage rights agreements with their tenants instead of abandoning the subject lines.

²⁶The case in which tenant operations were continued under OFA subsidy until the trackage rights were relocated to another line was *Chicago and North Western Transportation Company - Abandonment and Discontinuance of Trackage Rights - Between Hopkins and Chaska, MN*, Docket No. AB-1 (Sub-No. 206) (ICC served February 10, 1988; ICC served April 5, 1988; ICC decided January 3, 1991). It is noted in more detail in footnote 13.

²⁷*Consolidated Rail Corporation v. Interstate Commerce Commission*, 29 F.3d 706 (D. C. Cir. 1994) affirming *Chelsea*; and *New York Cross Harbor Railroad v. Surface Transportation Board*, 374 F.3d 1177 (D. C. Cir. 2004) vacating and remanding the original decisions in *New York City Economic Development Corporation -- Adverse Abandonment -- New York Cross Harbor Railroad in Brooklyn, NY*, STB Docket No. AB-596 (STB served May 12, 2003 and August 28, 2003)(NYCEDC). A third court decision *Howard v. Surface Transportation Board*, 389 F.3d 259 (1st Cir. 2004) was issued in response to a petition for review of an STB decision in an adverse discontinuance proceeding. The Court's decision focused mainly on the interplay of the current Bankruptcy Act and the ICCTA and the STB's power to issue a binding final order in the case. Petitioners made no attack on the merits of the STB's decision.

Since ten (10) of the twelve (12) adverse discontinuance decisions did not result in or would not have resulted in the total cessation of rail service over the line at issue, those decisions must be referenced with caution, if at all, for comparison or precedent in either arguments or decisions on the merits in adverse abandonment application cases.

We discuss below the relevant points from Supreme Court decisions²⁸ which sanctioned adverse discontinuance applications and which subsequently have been used as authority to support the availability of adverse abandonment applications and to expand the class of parties able to file such applications. The Supreme Court issued those decisions thirty-five years before the agency began to issue decisions on the merits of adverse abandonment applications in *Modern Handcraft*.²⁹ We refer to the major principles applicable to a decision on the merits of an adverse abandonment application following the review of the Supreme Court decisions.

Legal Background of Adverse Abandonment Cases: Basis of Adverse Abandonment of Rail Lines or Adverse Discontinuance or Rail Service Legal Principles

The concept of third-party or “adverse” abandonment of or adverse discontinuance of service over lines of railroad can be traced to the decision of the United States Supreme Court in *Thompson v. Texas-Mexican Ry. Co.*, 328 U.S. 134

²⁸*Thompson v. Texas-Mexican Ry. Co.*, 328 U.S. 134 (1946) (*Thompson*) and *Smith v. Hoboken Railroad, W. & S. C. Co.*, 328 U.S. 123; 66 S. Ct. 947; 90 L. Ed. 1123 (1946) (*Smith*).

²⁹A couple of intervening ICC decisions touched on the subject of adverse abandonment of rail lines or adverse discontinuance of service over rail lines but did not establish any definite principles or interpretations on the substance or merits of adverse applications.

(1946) (*Thompson*)³⁰ and the companion case of *Smith v. Hoboken Railroad, W. & S. C. Co.*, 328 U.S. 123; 66 S. Ct. 947; 90 L. Ed. 1123 (1946) (*Smith*) and to one case cited as authority in those cases, *Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California*, 283 U.S. 380; 51 S. Ct. 553; 75 L. Ed. 1128 (1931) (*Railroad Commission of California*).

In the *Thompson* case, a railroad company that owned a line of railroad brought suit in state court against a tenant railroad in bankruptcy and its trustee seeking damages and an injunction to prevent the tenant from using its tracks under a trackage rights agreement. The Supreme Court held the owning railroad could not proceed before the courts because of the ICC's jurisdiction over rail line abandonments and discontinuances of service under 49 U.S.C. § 1(18) [now 49 U.S.C. 10903] and because the ICC had the power under 49 U.S.C. § 5(2) to fix a reasonable rental for the use of the facility by the railroad in bankruptcy regardless of the consent of the owning railroad company.

The Supreme Court held that the court below should have stayed and remitted the parties to the Commission for further determinations (1) whether termination of the trackage agreement would interfere with the plan of reorganization to be formulated by

³⁰As noted in the text, the *Thompson* decision cited an earlier decision, *Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California*, 283 U.S. 380; 51 S. Ct. 553; 75 L. Ed. 1128 (1931) (*Railroad Commission of California*), discussed infra., as precedent for its decision. However, the unusual facts and holding of *Railroad Commission of California* appear too narrow to be used to support subsequent expansion of the concepts of adverse abandonment or standing to file applications. The ICC approved an action in that case which seems to have involved merely a relocation of rail lines or at most a discontinuance of service that would be replaced. The Supreme Court said only a constitutional question concerning the state's jurisdiction to order railroads to build a union station was left for the Court's decision. The case involved the intersection or overlap of state commission jurisdiction over certain railroad property or operations and the federal jurisdiction of the ICC under the Interstate

the Commission under §77 of the Bankruptcy Act; (2) whether the Commission should issue a certificate under §1(18) of the Interstate Commerce Act that "the present or future public convenience and necessity" would permit abandonment of operations under the trackage agreement; and (3) what would be a reasonable rental to be allowed, under § 5(2)(a) of the Transportation Act of 1940, if the Commission decided that the trackage rights arrangement should be continued.

The Supreme Court stated at 328 U. S. at 143-148:

We think like reasons make it important that the status quo of this trackage agreement be maintained pending decision by the Commission as to the proper treatment of it in the reorganization plan. The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be allowed. These matters involve not only the interests of the two parties to the trackage agreement but phases of the public interest as well. A court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted. For these and like reasons which we have discussed in *Smith v. Hoboken Railroad, W. & S. C. Co.*, ante, p. 123, we think the court erred in holding that the trackage agreement had been or should be terminated.

(2) The Commission has further functions to perform apart from determining under § 77 whether it would be consistent with the reorganization requirements of the debtor to terminate the trackage agreement.

By § 1 (18) of the Interstate Commerce Act it is provided that "no carrier by railroad subject to this chapter 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." Carriers being reorganized under § 77 of the Bankruptcy Act are not exempt from that provision. § 77 (o), 11 U. S. C. § 205 (o); *Warren v. Palmer*, 310 U.S. 132, 137-138. Whatever may be the powers of the Commission under the Interstate Commerce Act, rather than § 77, over the terms of the trackage agreement (*Abandonment of Chicago, R. I. & P. R. Co.*, 131 I. C. C. 421; *Kansas City Southern R. Co. v. Kansas City Terminal R. Co.*, 211 I. C. C. 291), it is clear that the Commission

Commerce Act as it then was written. Such state commission jurisdiction no longer exists under the ICCTA.

has jurisdiction over the operations. Sec. 1 (18) embraces operations under trackage contracts, as well as other types of operations. See *Chicago & Alton R. Co. v. Toledo, P. & W. R. Co.*, 146 I. C. C. 171, 179-181. And the fact that the trackage contract was entered into in 1904 prior to the passage of the Act is immaterial; the provisions of the Act, including § 1 (18), are applicable to contracts made before as well as after its enactment. See *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 482. Though the contract were terminated pursuant to its terms, a certificate would still be required under § 1 (18). Brownsville or its trustee could, of course, make the application for abandonment of operations. But the fact that they might be content with the existing arrangement and fail or refuse to move does not mean that Tex-Mex would be burdened with a trackage arrangement in perpetuity. Tex-Mex might invoke the Commission's jurisdiction under § 1 (18) and make 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. n8 See *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 283 U.S. 380, 393-394. An application by a city and county for abandonment of a part of the Colorado & Southern line was indeed entertained. *Colorado & Southern R. Co. Abandonment*, 166 I. C. C. 470. Tex-Mex has even a more immediate interest in the operations over this line. Its property is involved; and the amount being paid for the use of its property is deemed by it insufficient. The Commission is as much concerned with its financial condition as it is with that of Brownsville. Tex-Mex therefore has the standing necessary to invoke § 1 (18).

----- Footnotes -----

n8 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.

----- End Footnotes-----

.....

(3) The jurisdiction of the Commission is not restricted, however, to determining whether or not operations of Brownsville over the tracks of Tex-Mex should be abandoned. Prior to the Transportation Act of 1940 the Commission had some jurisdiction over trackage agreements of the character involved in this case. *Transit Commission v. United States*, 289 U.S. 121. But by that Act the Commission received new, explicit powers over trackage rights. Sec. 5 (2) (a) (ii) provides: "It shall be lawful, with the approval and authorization of the

Commission, as provided in subdivision (b) . . . for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto." Trackage rights acquired without the consent and approval of the Commission are unlawful. § 5 (4).

Thompson's companion Supreme Court decision, *Smith v. Hoboken Railroad, W. & S. C. Co.*, 328 U.S. 123; 66 S. Ct. 947; 90 L. Ed. 1123 (1946), had similar facts except the bankrupt railroad tenant operated over the railroad owner's line under a lease rather than a trackage rights agreement.³¹ The Court further said in *Smith*:

Whether the public interest requires that the line be operated by the lessee rather than the lessor presents a question for the Commission under § 1 (18) of the Interstate Commerce Act. The lessor is not at the mercy of the lessee in this situation. For the lessor, as well as the lessee, has the standing necessary to invoke § 1 (18) on the question of abandonment. *Thompson v. Texas Mexican R. Co.*, *supra*.

In *Modern Handcraft, Inc. - Abandonment in Jackson County, MO*, 363 I.C.C. 969 (1981), the ICC expanded the concept of adverse applications under 49 U.S.C. § 1a, the successor section to 49 U.S.C. § 1 (18), to applications seeking a finding that public convenience and necessity that would lead to complete abandonment of a rail line, not just to discontinuance of service by a tenant, regardless of the wishes of the line's owner. Moreover, the Commission extended the class of persons with standing or the right to file adverse abandonment or adverse discontinuance applications to include third parties other than State commissions or the owners of the lines. The additional parties permitted to file applications in *Modern Handcraft* were a local government

transit agency, which was not a regulatory agency, and an adjoining landowner with an asserted reversionary interest in the railroad right-of-way. The Commission's conclusions were based solely on the following language from *Thompson* at 328 U.S. 134, 145, not a full analysis of the case and the statute:

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. n8 [Emphasis supplied.] See *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 283 U.S. 380, 393-394. An application by a city and county for abandonment of a part of the Colorado & Southern line was indeed entertained. *Colorado & Southern R. Co. Abandonment*, 166 I. C. C. 470. Tex-Mex has even a more immediate interest in the operations over this line. Its property is involved; and the amount being paid for the use of its property is deemed by it insufficient. The Commission is as much concerned with its financial condition as it is with that of Brownsville. Tex-Mex therefore has the standing necessary to invoke § 1 (18). [Emphasis supplied.]

Colorado & Southern R. Co. Abandonment, 166 I. C. C. 470 (1930) actually provided little, if any, authority for an interpretation of the scope of § 1(18). Before the Commission reached a decision on the merits, the City and County of Denver had amended their joint application to request the ICC's approval only for the relocation of the subject line, at the city's expense. Moreover, the ICC also had before it the C&S application for approval to abandon a much larger segment of line than the City included in its application. The ICC did not decide whether the City had standing to file the application with the Commission, whether the ICC had jurisdiction to consider the City's application or whether the ICC had the authority to grant the relief requested by the City.

³¹Referring to the *Thompson* decision, the Court stated in *Smith* at 328 U.S. at 130: "That case is, of course, different from the present one because it entailed complete abandonment of operations by one company over another's lines. Here the question is whether the lessee or the lessor shall perform the service." That distinction did not really exist, however, because the owning carrier, Texas-Mexican Railway Company, was operating over the line that

The Commission only referred to the City's application in the decision, at 166 I.C.C. at 473, as follows:

Assuming the power of this commission to permit or require a railroad to change its line, in the interest of interstate commerce, the facts before us do not justify our granting the application of the city of Denver to require the Colorado & Southern Railway Company to change its line in order to afford the city opportunity to construct a water system.

The Commission denied the C&S application on the merits, but granted a renewed application to abandon 170 of the 185 miles at issue in the case six years later.

The Court's decision in *Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California*, 283 U.S. 380; 51 S. Ct. 553; 75 L. Ed. 1128 (1931) (*Railroad Commission of California*) at first reading appears to have supported the *Thompson* decision's conclusion that adverse discontinuance applications could be filed by third parties generally through the following language at 284 U.S. at 393-394:

Second. The appellants further insist that the certificates of the Interstate Commerce Commission are void. The point is that the certificates were not issued upon the application of the Railway Companies but in proceedings adverse to them and over their protest. It is urged that paragraphs 18 to 20 of § 1 of the Interstate Commerce Act give the Commission no power to issue such certificates except upon application of the carriers, and that the certificates were also unauthorized under paragraph 21 of that section.

The provisions of these paragraphs (18 to 21) contain no such limitation as that suggested. While they relate "to the construction, acquisition, extension and abandonment of a railroad," and "deal primarily with rights sought to be exercised by the carrier" (*Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. United States*, 275 U.S. 404, 408) these paragraphs do not exclude appropriate action by the Commission upon applications by those who have a proper interest in the subject matter, although they are not carriers. If the State could be deemed to have no authority to compel the building of such a union terminal as that here involved, the question would not arise. But if the State originally had this authority, and the federal legislation has not superseded it, but has required, as this Court has held, a certificate of public convenience and necessity from the

was the subject of the *Thompson* decision and did not wish to abandon the line, merely to end the bankrupt tenant's trackage rights operations over its line.

Interstate Commerce Commission as a condition precedent to the validity of any order on the part of the State Commission, we find no warrant for construing the statute as precluding the application which is necessary to obtain such a certificate. In its first opinion, this Court said that it was advised that the City of Los Angeles had filed a petition with the Interstate Commerce Commission and that the Court thought that the course taken by the City "was the correct one." 264 U.S. pp. 347, 348. While the statement was *obiter*, it intimated an opinion which has been confirmed by further consideration of the purpose and terms of the statute. Nothing was said in the second opinion contrary to that view. The approval of the Interstate Commerce Commission and the issue of its certificate of public convenience and necessity being indispensable under the Act, application could properly be made by the authorities of the State, assuming that with such certificate they were entitled to require the establishment of the station.

The general applicability of this language to various types of third parties (with interests in the subject matter) may have been unintended because the third party in *Railroad Commission of California* was a State regulatory commission, which at the time the case was decided had some jurisdiction over local, intrastate railroad facilities and transportation. The Supreme Court was concerned in that case with harmonizing State regulatory authority and Federal regulatory authority in a case where those jurisdictions intersected or overlapped. The Court obviously considered the State commission to be among the parties who "have a proper interest in the subject matter," where the State commission needed to secure approval of a minor part of its plan from the ICC under § 1 (18) (because the railroads opposed the plan) or else be thwarted in the application of its own authority over most of a project as to which it had jurisdiction. In fact, in the *Railroad Commission of California* case, the State commission had secured the ICC finding, which became the subject of court review, but which the Supreme Court stated presented only limited questions for the Court to answer under the circumstances, at 284 U.S. at 390-391 as follows:

The questions presented are solely those of constitutional authority. All questions

of fact as to public convenience and necessity, and as to the practicability of the proposed plan, have been resolved against the Railway Companies by the proper tribunals. This Court has held that the State Commission could not require the construction of the proposed station, and the relocation of connecting tracks, without the approval of the Interstate Commerce Commission. That approval has been given. This Court has also decided that the Interstate Commerce Commission has not been empowered to require the building of the station. That Commission has not attempted to exercise any such authority. The question now is as to the authority of the State Commission, in view of the action of the Federal Commission, to require the construction of the station with the incidental arrangement of tracks and facilities. The decision of the state court is conclusive so far as the constitution and laws of the State are concerned. The State Commission has acted within the power conferred upon it. The only questions before us are those arising under the Federal Constitution and the Interstate Commerce Act.

Since State regulatory law was subject only to limited preemption in the Interstate Commerce Act at the time, the Court apparently did not want the State commission jurisdiction to be stymied by an apparently minor overlap with ICC jurisdiction when it could allow the State commission itself to apply for an ICC decision that would prevent a conflict. (At least the conflict would be prevented if the ICC viewed the State's application favorably, which it had already done in that case.) Furthermore, the decision suggests that all the ICC was asked to approve was a minor relocation of main line track, or at most discontinuance of service over existing track that would be replaced by alternate track into the union station that the State commission had ordered the railroads serving Los Angeles to build. Today, this action would be considered to be only a relocation, not an abandonment or discontinuance of service.

The Supreme Court appeared to have limited, if not reversed, the scope of the interpretation of the language of § 1(18) of the Act in the *Railroad Commission of California* case, although in a case that did not involve a rail line abandonment or discontinuance but ICC-ordered construction of a lengthy rail line upon an application of

a State regulatory commission, also included in § 1(18) of the Act, in *Interstate Commerce Com. v. Oregon-Washington R. & Navigation Co.*, 288 U.S. 14, 53 S. Ct. 266; 77 L. Ed. 588 (1933) (*Oregon-Washington R. & Navigation Co.*). The Court stated:

The terms of paragraph 18, by contrast, throw light on the meaning of paragraph 21. The former presupposes voluntary action by a carrier, and provides that no company shall undertake "the extension of its line of railroad, or the construction of a new line of railroad, . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require" the construction and operation thereof. The difference of phraseology in the two paragraphs emphasizes the distinction between extensions and new lines. The diversity is significant.

Nonetheless, the Supreme Court returned to an apparently broader reading of *Railroad Commission of California* as precedent for its decision in *Thompson*.

The Supreme Court did not define or identify "those who have a proper interest in the subject matter," in the *Railroad Commission of California*, *Thompson* and *Smith* cases. The types of parties that were applicants in those cases, State commissions with intersecting regulatory jurisdiction and the owners of the rail lines seeking to terminate the operations of and the agreements with bankrupt tenants, clearly had such interests. Nonetheless, these cases, the Act itself, and the legislative history of the Act do not provide any obvious basis for extending the adverse application concept to adverse abandonments. They also provide no obvious basis for considering other types of third parties without current interests in a rail line's right-of-way or in the regulation of the railroad's right-of-way and facilities to be considered as having a "proper interest in the subject matter."

The only brief explanation of the *Smith* and *Thompson* decisions before the ICC's *Modern Handcraft* decision was Judge Fullam's statement in *In the Matter of Penn*

Central Transportation Company, Debtor; In re Pennco Settlement Agreement, 358 F. Supp. 154, 180 (E. D. Pa. 1973) as follows:

In each case, affirmance by the Supreme Court would have resulted in the termination of rail services by the debtor, without Commission participation. The Court held that Commission approval was required, in order to prevent interference with the Commission's obligation to structure an adequate transportation system, and in order to avoid a departure from the strictures of § 1(18) of the Interstate Commerce Act.

Judge Fullam's statement cannot be read to say that the *Smith* and *Thompson* precedents could be used to support adverse abandonment applications or the extension of standing to file such applications to other types of third parties. Also, he recognizes that reconciliation of the interplay between the ICC's Bankruptcy Law and Interstate Commerce Act duties influenced the *Smith* and *Thompson* decisions.

The language of the *Smith* and *Thompson* decisions show that the Supreme Court granted certiorari in those cases mainly to clarify the relationship of the Bankruptcy Act with the Interstate Commerce Act and to reconcile the role of the ICC with respect to administering each law. The Court obviously wanted to be sure the Commission was left with sufficient flexibility to devise a successful reorganization plan for a bankrupt railroad without landlords, trustees, reorganization courts or other courts with jurisdiction being able to take actions to prevent the ICC from devising or approving a potentially successful reorganization plan for a tenant railroad.³² The Court's decision kept all actions affecting the status quo for a debtor tenant railroad before the

³²It is clear that the only precedent that provides any support for the *Smith* and *Thompson* decisions, *Railroad Commission of California*, also involved a case in which the Court was attempting to clarify the relationship between possibly overlapping or conflicting State and Federal law concerning regulation of railroads and only actually involved a relocation or at most a discontinuance of service.

Commission, while trying to harmonizing the goals and directives of the Bankruptcy Act and the Interstate Commerce Act. This included some effort by the Court to recognize the conflicting rights of railroad owners with financially suspect tenants to the extent possible by substituting a remedy (adverse discontinuance applications) before the Commission for the court action options lost under the Court's decision or a prerequisite for those actions. The fact of the cases before the Court and the Court's objectives in *Smith* and *Thompson* were limited. The concept of permitting adverse abandonment of a rail line so that a third party with no current right or interest in the railroad right-of-way might put the property to presumably better use goes much beyond them. In *Thompson* and *Smith*, the Court only attempted to harmonize conflicting statutory goals by protecting the jurisdiction of the ICC and preserving remedies of owners of rail lines.

Both the facts of the *Smith* and *Thompson* cases and the reference in *Thompson* to railroads "whose operations are sought to be abandoned" show that those cases concerned "abandonment of operations," as discontinuances were then generally called, not total physical abandonment of the subject railroad lines. The Court does seem to broadly state the principle that the third parties can file adverse applications, at least when one or two sentences are read standing alone. The ICC relied on the Court's broadly worded statement in *Thompson* for the Commission's extensions of the adverse application concept and of the types of parties with standing to file an adverse abandonment or discontinuance application in *Modern Handcraft*. However, the Court provided no explanation of who the third parties with a proper interest in the subject matter, other than the types of parties in the *Smith* and *Thompson* cases, would be or any real basis to include more remote parties in the class of proper adverse applicants.

The Expanded Concepts of Adverse Abandonment and Standing of Third Parties in the ICC's Modern Handcraft Decision

Except for a few brief mentions in ICC reports between 1946 and 1981,³³ the subject of adverse abandonment of rail lines or adverse discontinuance of service over rail lines remained dormant for the 35-year period after the Supreme Court's decision in the *Thompson* case until the ICC issued the decision in *Modern Handcraft, Inc. - Abandonment in Jackson County, MO*, 363 I.C.C. 969 (1981).

As noted above, in *Modern Handcraft*, the Commission cited a broadly-worded sentence from the *Thompson* decision that may seem to support a broad interpretation of 49 U.S.C. § 1 (18)³⁴ as authority for permitting the filing of adverse abandonment applications, not just applications for the adverse discontinuance of service by tenant railroads. Yet, the *Thompson* decision involved only "abandonment of operations" (discontinuance of service) and the applicants were owners of the subject lines, not true

³³See *Delaware & H. R. Corp. Trackage Agreement Modification*, 290 I.C.C. 103 (1953) and *Baltimore and Annapolis R. Co. Abandonment*, 348 I.C.C. 678, 704 (1976). Shortly before the *Modern Handcraft* decision discussed at length in the text, the ICC issue a similar decision in AB-71 (Sub-No. 1), *Anne Arundel County and The City of Annapolis -- Abandonment over the Baltimore and Annapolis Railroad Company From Glen Burnie to The City of Annapolis* (not printed), decided February 27, 1980. This decision has had little citation or quotation possibly because it was unprinted and the printed decision in *Modern Handcraft* was issued the following year. In the *New York Cross Harbor* case, the ICC cited *State of Oklahoma ex. rel Dep't of Highways, Abandonment and Construction*, 324 I.C.C. 666 (1965) to support the notion that adverse abandonment of active track with active shippers was permissible. The Court stated that: "In *Oklahoma*, however, none of the protesting shippers was deprived of direct rail service and the ICC required other connecting tracks to be constructed as an offset to the protesting carrier. See 324 I.C.C. at 675-78."

³⁴Congress amended § 1 (18) of the Interstate Commerce Act and placed the ICC's abandonment authority in a new and revised § 1a in the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act). Congress codified this section in 1978 as 49 U.S.C. § 10904, which later became 49 U.S.C. § 10903, as amended.

third parties.³⁵ The ICC did not further examine the decision or discuss the statutory language or the statutory purpose in reaching this expansive conclusion.

The ICC and the STB have stated clearly that while abandonment authority is permissive, and only may be exercised (or consummated) by the railroad owner of the line being abandoned, adverse abandonment could be accomplished in a two-step process. After a third party (with a proper interest in the subject matter) received a finding by the agency that the public convenience and necessity permitted abandonment of a rail line, the third party could bring a court action to condemn the railroad property or to enforce contract or property rights. Otherwise, such court actions would be preempted as long as the Board retained its plenary and exclusive jurisdiction over the property as a line of railroad, as referenced above.

Thus, the ICC's interpretation in *Modern Handcraft* of the language quoted from *Thompson* to support adverse physical abandonment of a rail line and to support the expansion of the class of third parties who may be considered to have a proper interest in the subject matter expanded the adverse application concept beyond the facts, and quite likely beyond the intended scope, of the Supreme Court's *Thomson* and *Smith* decisions and apparently beyond the scope of the statutory language.³⁶

Of course, Kansas City Public Service Freight Operation (the short line that

³⁵At one time, discontinuances of service often were referred to as abandonments of operations, as the Supreme Court used that phrase in *Thompson*, but this potentially confusing term now is not often used, if it is used at all.

³⁶Ironically, a State court ultimately found that the adjoining landowner applicant, Modern Handcraft, Inc., had no reversionary interest in the short line's (Freight Operation's) property. See *Kansas City Public Service Freight Operation -- Exemption -- Abandonment in Jackson County, MO*, 7 I.C.C. 2d 216 (1990).

owned the rail line in *Modern Handcraft*) had created a worst case scenario. Its use of the railroad property (only 422 feet of line insofar as the adjoining landowner, Modern Handcraft, Inc., was concerned), for parking and billboards, its failure to solicit traffic or appear to be interested in reinstatement of service, the apparent unlikelihood that service ever could be reinstated, the long period of time (12 years or more) of inactivity with respect to the line and the alternate public uses that could be made of the line showed that it had no intention to keep the property available for rail service, much less to use it for such service.³⁷

The Court of Appeals did not review whether the expansion of the concept of adverse applications under 49 U.S.C. 1a, as codified in 49 U.S.C. 10904, to physical abandonment of a rail line or the expansion of the class of third party applicants were proper and consistent with the statute because the short line dropped its appeal of the ICC's *Modern Handcraft* decision when the parties in interest reached a settlement agreement.³⁸ For all that appears in the reported decision in *Modern Handcraft* itself, the ICC may not have been presented with arguments on the questions and issues concerning the proper parameters of the *Thompson* and *Smith* decisions or the proper parties to file an adverse abandonment application.

³⁷The ICC was concerned not to "allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law," in *Modern Handcraft*. Neither the *Thompson* decision nor the statutory language provides clear support for permitting adverse abandonment applications to further this objective. If this statement represents a viable rationale for permitting adverse abandonment applications, its application must be strictly limited to clear and extreme cases.

³⁸On May 12, 1982, the United States Court of Appeals for the District of Columbia Circuit granted Freight Operation's voluntary motion to dismiss the petition for review it had filed in *Kansas City Public Service Freight Operation v. Interstate Commerce Commission and United States of America*, U.S.C.A., D.C. Cir., No. 82-1002.

A few years after the *Modern Handcraft* decision was served, the ICC considered an argument that *Modern Handcraft* stood for the proposition that *de facto* abandonments could occur, without Commission approval or exemption, in *State of Vermont and Vermont Railway, Inc. -- Discontinuance of Service Exemption -- In Chittenden County, VT*, 3 I.C.C. 2d 903 (1987). The petitioners argued that the ICC should cede jurisdiction over a line that had been dormant for a long time and thus was abandoned under State law. The petitioners even appear to have argued that the line should be considered abandoned retroactively to the date of the *de facto* abandonment (assuming the date could be determined). The ICC rejected the argument and clarified the reference to *de facto* abandonment in the *Modern Handcraft* decision as follows:

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 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).

Modern is further distinguishable from the instant proceeding because here there remain overriding federal interests embodied in the Trails Act: the development of trails and the preservation of railroad rights-of-way. Significantly, the Supreme Court recognized in *Hayfield*, 467 U.S. at 633, that the attachment of post-abandonment conditions to a certificate of abandonment could preclude termination of our jurisdiction. That is precisely the situation here, due to our imposition of Trails Act conditions.

Further cases in the development of the adverse abandonment law are noted again in the footnote³⁹ and quoted to the extent necessary in the sections on various

³⁹*Wisconsin Department of Transportation -- Abandonment Exemption*, ICC Finance Docket No. 31303 (ICC decided November 23, 1988) (adverse abandonment cannot be granted by exemption; ICC would have denied application on merits); *City of Colorado Springs and Metex Metropolitan District - Petition for Declaratory Order - Abandonment Determination*, ICC Finance Docket No. 31271 (ICC decided March 22, 1989) (adverse abandonment cannot be granted by exemption or declaratory order; ICC would have denied application on merits); *Chelsea Property Owners - Abandonment - Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*, 8 I.C.C. 2d 773 (1992) (*Chelsea*) (application granted); *The Western Stock Show Association - Abandonment Exemption - in Denver, CO*, 1 S.T.B. 113 (1996) (adverse discontinuance that would have cleared the abandonment of the line denied); *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) (adverse discontinuance that would clear the abandonment of the line granted); *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 February 1, 2002 (CSX-CN)(application granted but CSX-CN really was a discontinuance since CSXT would still use the line after CN-GTW's rights were discontinued); *Salt Lake City Corporation - Adverse Abandonment - In Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No. 183) (STB served March 8, 2002)(application denied); *Seminole Gulf Railway, L.P. - Adverse Abandonment - In Lee County, FL*, STB Docket No. AB-400 (Sub-No. 4) (STB served November 18, 2004) (application denied); and *Yakima Interurban Lines Association - Adverse Abandonment - In Yakima County, WA*, STB Docket No. AB-600 (STB served November 19, 2004) (application denied); *New York City Economic Development Corporation -- Adverse Abandonment -- New York Cross Harbor Railroad in Brooklyn, NY*, STB Docket No. AB-596 (STB served December 15, 2004) (application dismissed after court remand). See also *Chicago and North Western Transportation Company - Abandonment and Discontinuance of Trackage Rights - Between Hopkins and Chaska, MN*, Docket No. AB-1 (Sub-No. 206) (ICC served February 10, 1988; ICC served April 5, 1988, ICC decided January 3, 1991) and *Consolidated Rail Corporation - Abandonment Exemption - In Bergen and Passaic Counties, NJ*, STB Docket No. AB-167 (Sub-No. 1151X) (STB served October 30, 1997), which although not an adverse abandonment case, involved the denial by the Board of a petition by a City that attempted to defeat an OFA acquisition in order that the Line might be abandoned and acquired by the City for public use.

topics that must be considered in evaluating an adverse abandonment application that follow.

Adverse Applicants Must File Applications; Availability of Waivers of Some Application Regulations

In the interest of a comprehensive presentation, we note that the ICC and the STB have ruled that adverse applicants cannot use petitions for exemption or notices of exemption to obtain the required STB public convenience and necessity findings. Third party adverse applicants can request a decision from the Board under 49 U.S.C. § 10903 only by filing an application for a finding that the public convenience and necessity permit abandonment of, or discontinuance of service over, a railroad line.⁴⁰

Although the Board's regulations require that abandonment applications conform to the requirements of 49 CFR 1152, Subpart C, in appropriate instances, such as the filing of a third-party or adverse abandonment application, the Board will waive inapplicable and unneeded provisions. See *Napa Valley Wine Train, Inc. - Adverse Abandonment - In Napa Valley, CA*, STB Docket No. AB-582 (STB served Mar. 30, 2001), and cases cited therein and the decision of the Board in this proceeding served October 26, 2006.

⁴⁰See *Seminole Gulf Railway, L.P. - Adverse Abandonment - In Lee County, FL*, STB Docket No. AB-400 (Sub-No. 4) (STB served June 9, 2004 and June 15, 2004); *Southern Pacific Rail Corporation - Abandonment Exemption - in Garfield, Eagle, and Pitkin Counties, CO*, STB Docket No. AB-12 (Sub-No. 190X) (STB served June 10, 1996); *Massachusetts Bay Transportation Authority - Exemption - Discontinuance of Service in Arlington, Bedford, and Lexington, MA*, ICC Finance Docket No. 31269 (ICC decided August 22, 1990), citing *Brae Corp. v. United States*, 740 F.2d 1023, 1056-1057 (D.C. Cir. 1984) and *Wisconsin Department of Transportation - Abandonment Exemption* (not printed), ICC Finance Docket No. 31303 (ICC served December 5, 1988).

Standing; Basis for Adverse Abandonment v. Adverse Discontinuance

The Supreme Court stated in the decision in *Thompson v. Texas-Mexican Ry. Co.*, 328 U.S. 134, 145 (1946) that persons "other than carriers 'who have a proper interest in the subject matter'" may file an abandonment application to the ICC under § 1 (18) of the Interstate Commerce Act, not just "the carrier whose operations are sought to be abandoned," as follows:

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. n8 [Emphasis supplied.] See *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 283 U.S. 380, 393-394. An application by a city and county for abandonment of a part of the Colorado & Southern line was indeed entertained. *Colorado & Southern R. Co. Abandonment*, 166 I. C. C. 470. Tex-Mex has even a more immediate interest in the operations over this line. Its property is involved; and the amount being paid for the use of its property is deemed by it insufficient. The Commission is as much concerned with its financial condition as it is with that of Brownsville. Tex-Mex therefore has the standing necessary to invoke § 1 (18).

We already have discussed that before the ICC issued the *Modern Handcraft* decision, the only identifiable "persons other than carriers with a proper interest in the subject matter" were the applicants in the cases that had reached the Supreme Court, (1) a state regulatory commission which had jurisdiction over certain local activities or facilities of railroads but whose jurisdiction may have been stymied without ICC approval of a minor track relocation or discontinuance and (2) owners of rail lines attempting to remove a bankrupt lessee and trackage rights tenant in situations where termination of the tenants in bankruptcy actions may have conflicted with the ICC's role in administering both § 77 of the Bankruptcy Act and the Interstate Commerce Act.

The ICC expanded the class of third parties that can file adverse applications, as

well as expanding the adverse application concept to include total abandonment of a line of railroad, in its decision in *Modern Handcraft*. As we have explained, these expansions find little support in the Supreme Court decisions in *Thompson* and *Smith* or in the statutory language. Since the petition for review of the *Modern Handcraft* decision to the United States Court of Appeals was dropped after the parties reached a settlement, these issues were not presented to the Court of Appeals, which reached no decision on the merits of the petition for review of the *Modern Handcraft* decision.

In the next case to reach court, *Consolidated Rail Corporation v. Interstate Commerce Commission*, 29 F.3d 706 (D. C. Cir. 1994) (*Highline Appeal*), the Court of Appeals accepted the expanded concepts from *Modern Handcraft* of adverse abandonment and of the standing of third party applicants with more remote interests in the subject matter than those in the Court cases by simply citing the ICC's decision in that case, and the *Thompson* decision upon which it relied, without further analysis.

In the *Highline Appeal*, the Court of Appeals summarily rejected Conrail's argument that it was illogical to grant an adverse abandonment over a carrier's objections. But Conrail apparently did not present an argument based on an interpretation of *Thompson* or the statutory language to support their conclusion. Conrail seems to have relied upon the Trails Act and the OFA provisions of the ICA to argue that Congress established a statutory presumption in favor of maintaining rail lines that adverse abandonments contravened. While this may have been a reasonable argument, Conrail may have made a better argument by supporting it with references to (1) the limited facts (adverse discontinuances) and limited parties that definitely had standing under the *Thompson* and *Smith* decisions (and the *Railroad Commission of*

California decision, were it not superseded by preemption under 49 U.S.C. § 10502(b)), (2) the ICC's expansion of those concepts based merely on a single sentence from *Thompson*, and (3) the standards set by the Railroad Transportation Policy. As it was, Conrail presented a somewhat different argument, and the Court of Appeals did not further address the questions or issues discussed in this analysis.

As the law concerning adverse abandonments has developed, and especially in view of the decision of the Court of Appeals in *New York Cross Harbor Railroad v. Surface Transportation Board*, 362 U.S. App. D.C. 352; 374 F.3d 1177, 1182 (D.C. Cir. 2004), the Board would be justified in re-examining the basis for the expanded concepts of adverse abandonment and of standing for additional third parties with more remote interests to file adverse applications that was adopted in *Modern Handcraft*. In particular, the Board would be justified in concluding that the ICC had expanded the adverse application concept and the class of parties "with a proper interest in the subject matter" beyond the facts and apparent intent of the Supreme Court's decisions in *Thompson* and *Smith* or beyond the scope of the statutory language.

In *Thompson* and *Smith*, all of the parties had an interest - meaning an ownership interest or some sort of tenancy or operating rights - in the railroad line. The parties were all railroads. There is no real basis in these decisions or in the statute for extending the class of parties who can file adverse abandonment applications to third parties who simply think they can make better use of the railroad's property or franchise. As *Oregon-Washington* and other cases show, third parties cannot file adverse construction or operating rights or trackage rights or other such applications that once were covered by the same section of the Interstate Commerce Act as line

abandonments. It is not clear why they should be able to file adverse abandonment applications under the same language, except to resolve conflicts of jurisdiction or conflicts between owners and tenants.

Under traditional tests of statutory interpretation, the language of the statute must be consulted to see if it clearly supports the interpretation being given to it. The statute here does not clearly give third parties without a direct interest in the operation of the railroad line or a current ownership interest in the line a clear right to file for a finding that would lead to the abandonment of the line. Furthermore, we have found no legislative history that supports the *Modern Handcraft* interpretation of the scope of the adverse application concept or the class of parties who can file such applications. We believe that a reconsideration of the *Thompson* and *Smith* precedents show that they also do not support those expanded concepts.

Without a clear conclusion from the statutory language, we go on to consider the purposes of the statute. Here too, it does not appear that the interests of reversionary interest holders or adjoining landowners in possible alternate uses of a railroad right-of-way, and even the interests of governmental bodies with proposed alternate uses of property that is already considered to be devoted to a public interest for railroad use, are within the zone of interests that ICCTA's licensing provisions are aimed to protect or regulate. General approval for third parties to initiate STB licensing, including abandonment, proceedings appears apt to generally hamper railroad transportation service and frustrate the implementation of the Railroad Transportation Policy. Third party applicants other than railroad line owners or operators or railroad customers in their capacity as shippers or receivers of freight are not with the class for whose benefit

the statute was enacted. Thus, there is no reason to imply from such bases that such parties have a right to file adverse abandonment applications or that the Board's granting of such applications is consistent with the underlying purpose of the statute.⁴¹

Standards for Evaluation of Adverse Abandonment Applications

The standards or principles for evaluation of the merits of adverse abandonment applications have evolved consistently since the *Modern Handcraft* decision with one exception, *New York City Economic Development Corporation -- Adverse Abandonment -- New York Cross Harbor Railroad in Brooklyn, NY*, STB Docket No. AB-596 (STB served May 12, 2003)(*NYCEDC*), petition for reopening denied by decision served August 28, 2003, which was vacated and remanded by the Court of Appeals in *New York Cross Harbor Railroad v. Surface Transportation Board*, 362 U.S. App. D.C. 352; 374 F.3d 1177, 1182 (D.C. Cir. 2004) (*New York Cross Harbor*), and then dismissed for want of further prosecution in a decision served *New York City Economic Development Corporation -- Adverse Abandonment -- New York Cross Harbor Railroad in Brooklyn, NY*, STB Docket No. AB-596 (STB served December 15, 2004). To the extent the Court of Appeals in *New York Cross Harbor* addressed principles and standards for evaluation of adverse abandonment applications, further STB decisions on the merits of such applications must be consistent with the principles and standards set forth in that decision and with ICC and STB decisions that are consistent with that decision.

⁴¹ Without a re-examination of the basis for the development of the adverse application principles and the standing of certain classes of parties to file such applications, however, it is apparent that recent STB decisions continue to provide support for the expansion of the class of parties which may file adverse abandonment applications under the *Modern Handcraft* decision.

Since the *New York Cross Harbor* decision, the Board has addressed and applied most of the relevant standards in a comprehensive manner 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) (*Seminole Gulf*).⁴² The *Seminole Gulf* decision shows that an adverse applicant must meet strict requirements to receive a favorable decision upon an adverse abandonment application. The Board stated that a favorable adverse abandonment decision would not be granted to an applicant even if there was no current traffic on a railroad line, if there was even reasonable potential for future railroad use of the line. In *Seminole Gulf*, the County seeking the adverse abandonment determination argued that it could save considerable costs for road construction by using part of the currently dormant railroad right-of-way for the road but the Board indicated that the STB must give primary consideration to the current and future need or potential need for rail service over the line. Since the Board's discussion and conclusions section in the *Seminole Gulf* decision presents a reasonably comprehensive statement of the principles to be applied in evaluating an adverse abandonment application, they are worth quoting in their entirety as follows:

Under 49 U.S.C. 10903(d), the standard governing any application to abandon or discontinue service over a line of railroad, including an adverse abandonment or discontinuance, is whether the present or future PC&N require or permit the proposed abandonment or discontinuance. In implementing this standard, we must balance the competing benefits and burdens of abandonment or discontinuance on all interested parties, including the railroad, the shippers on the line, the communities involved, and interstate commerce generally. See *New York Cross Harbor R.R. v. STB*, 374 F.3d 1177, 1180 (2004) (*Cross Harbor*); *City of Cherokee v. ICC*, 727 F.2d 748, 751 (8th Cir. 1984). And we must take the

⁴²The Board also discussed and applied these standards, reaching a similar result as the *Seminole Gulf* decision, in *Yakima Interurban Lines Association - Abandonment Exemption - In Yakima County, WA*, STB Docket No. AB-600 (Sub-No. 1X) (STB served October 31, 2006) (*Yakima*).

goals of the Rail Transportation Policy (RTP), set forth at 49 U.S.C. 10101, into consideration in making our public interest determinations.

We have exclusive and plenary jurisdiction over abandonments, including adverse abandonments, in order to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See *Modern Handcraft, Inc. - Abandonment*, 363 I.C.C. 969, 972 (1981) (*Modern Handcraft*). Accordingly, we preserve and promote continued rail service where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. See *Chelsea Property Owners - Abandonment - Portion of the Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, NY*, 8 I.C.C.2d 773, 779 (1992) (*Chelsea*), *aff'd*, *Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994) (*Conrail*). On the other hand, we do not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where no overriding Federal interest exists. See *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).

If we conclude that the PC&N do not require or permit continued operations over the track by the carrier in question, our decision removes that shield, thereby enabling the applicant to pursue other legal remedies to force the carrier off the line. *Conrail*, 29 F.3d at 709; *Modern Handcraft*, 363 I.C.C. at 972. But in applying our balancing test, we note that significant weight has been given to the fact that there is a potential for continued operations and the carrier has taken reasonable steps to attract traffic. See *Cross Harbor*, 374 F.3d at 1186; *Conrail*, 29 F.3d at 711, *aff'g Chelsea*, 8 I.C.C.2d at 778. In abandonment cases, the applicant (in this case the third party) has the burden of proof. Here, after considering the arguments and balancing the interests of all concerned, we conclude that Lee County has failed to demonstrate that the adverse abandonment of the portion of the Baker Spur meets the PC&N test.

PC&N Analysis

The record here does not support a finding that the PC&N require or permit the abandonment of this line. Although Seminole Gulf will lose its only current shipper on this line in the near future, the railroad continues to operate over the line at the present time. This is not a line that is inoperable or needs major repairs, and unlike many cases where adverse abandonment applications have been granted, this case involves a line that is presently carrying traffic. Cf. *Modern Handcraft*, 363 I.C.C. at 971-72.

Moreover, Seminole Gulf has shown that it is actively seeking new business for the line and presents evidence of potential new shippers and new uses for the line. We have historically denied adverse abandonment applications

if there is a potential for continued operations and the carrier has taken reasonable steps to attract traffic. *Salt Lake City Corporation--Adverse Abandonment - in Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No. 183), slip op. at 8 (STB served Mar. 8, 2002). Even though Seminole Gulf's efforts to attract new shippers to the line have not yet proven successful, they demonstrate some prospects for continued rail service. Given Seminole Gulf's efforts, we cannot say that there is no potential for continued rail service over this line.

In weighing the competing interests, we emphasize that the abandonment of this line is not required for Lee County to complete its planned expansion of Alico Road. Indeed, the record shows that Lee County negotiated the right to improve the crossing over Alico Road in a 1988 crossing agreement. Moreover, the evidence indicates that Lee County fully intended to construct a new crossing until it learned that J.J. Taylor was planning to move its facility. Thus, while abandonment may be convenient for Lee County, the Baker Spur does not stand in the way of the public benefits to be realized by the widening of Alico Road. Rather, Lee County's interest here is to complete its planned highway project at the lowest possible cost. But given the evidence before us, we cannot conclude that the relief Lee County seeks outweighs the public interest in potential rail service on this line. See *Cross Harbor*, 374 F.3d at 1183.

We are mindful of the effect that this decision will have on a public agency, Lee County, specifically that this decision will increase the cost that the taxpayers of that region must pay for a public improvement to a highway there. However, under the Interstate Commerce Act as interpreted by this agency and the courts, we may grant adverse abandonments only in limited circumstances.

In reaching a decision in an adverse abandonment proceeding, we must carefully consider the interests of interstate commerce and the rail system in general. Here, the record indicates that denial of the proposed abandonment will be consistent with the goals of the RTP, particularly 49 U.S.C. 10101(4), which is to ensure the development and continuation of a sound rail transportation system. 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.

In sum, in balancing the respective interests in this proceeding, we find that Lee County has not established that the PC&N require or permit the abandonment of this line. For the reasons discussed above, we conclude that the public is best served by denying the adverse abandonment application.

Railroad Use That Overrides Applicants' Proposed Use of Right-of-Way; Active Lines; Length of Out of Service Period

In *New York Cross Harbor Railroad v. Surface Transportation Board*, 362 U.S. App. D.C. 352; 374 F.3d 1177, 1182 (D.C. Cir. 2004); based in large part on the Board's own precedents such as *Salt Lake City Corp. - Adverse Abandonment - In Salt Lake City, UT*, 2002 STB LEXIS 150, 2002 WL 368014 (I.C.C.) (Mar. 6, 2002), the United States Court of Appeals for the District of Columbia Circuit emphasized that:

For starters, just two years ago, the STB succinctly stated: "Neither the Board, nor the [ICC] before it, has ever granted an adverse abandonment when the carrier was operating over the line." *Salt Lake City*, 2002 STB LEXIS 150, 2002 WL 368014, at *5 (emphasis added).

After the Court of Appeals' *New York Cross Harbor* decision and the Board's *Salt Lake City*, *Seminole Gulf* and *Yakima* decisions, an applicant is unlikely to be able to present any convincing argument that the public convenience and necessity permit abandonment of an active line, or even of an inactive line with some apparent potential for future railroad use. The significant requirements for approval of an adverse abandonment application to some extent ameliorate the seemingly unsupported expansion in *Modern Handcraft* of the adverse abandonment concept and of the class of third parties which can file adverse applications. These strict requirements also are in accord with the Board's statutory mission and jurisdiction and with the policies and objectives of the ICCTA.

If the Board does not reconsider the underlying basis for granting adverse abandonment applications and restrict adverse applications under 49 U.S.C. § 10903 to adverse discontinuances, the Board should not grant adverse abandonment applications until a line has been dormant for a very long period of time. This is in fact

consistent with the decisions in the only cases in which the agency has granted adverse abandonment applications that have been opposed. In each case, the subject rail line was unused for periods of time in excess of ten years between the date rail operations over the line ceased and the date the adverse application was filed. The length of time that the subject line had remained dormant in each case where the agency granted opposed adverse abandonment or discontinuance applications were: at least 12 years (*Modern Handcraft*), at least 10 years (*Chelsea*) and at least 11 years (*NW-GTW*).

In some cases, railroad lines have been reactivated for operating purposes for a variety of reasons long after operations over those lines had been discontinued or the lines became inactive. Thus, the Board must not consider the passage of time, especially a short period of years, as a certain indication that an unused right-of-way has no value to the railroad or potential for future railroad use. For example, in *Buffalo & Pittsburgh Railroad, Inc. - Acquisition and Operation Exemption - CSX Transportation, Inc.*, STB Finance Docket No. 34410 (STB served November 19, 2003), the Board approved BPR's acquisition and operation of a 16.82-mile CSXT line between Creekside and Homer City, PA that had been out of service for ten (10) years, since November 1993, and even had been the subject of a discontinuance of service proceeding by CSXT as owner and BPR as lessee of the line. In its petition to acquire and operate the line, BPR stated that after June 2004, it expected to operate 60 to 65

coal trains a year over the line to a utility located at Homer City.⁴³

In properly evaluating an adverse abandonment application, the STB should consider all railroad uses of a line of railroad and all railroad-related purposes to retain a rail line to be active use of the line which supersedes the interests of adverse applicants. Such active uses would include, but not necessarily be limited to, pickup or delivery; storage of loaded or empty cars; set out of cars in need of repair; passing, waiting or detour use; use of track to turn trains; head or tail room needed for a train to serve a shipper; or non-revenue movements of cars or material to company facilities.

The Board has recognized that adverse abandonment applications should not be granted if there is even a potential for future rail service over a subject line.⁴⁴ Potential for rail service certainly includes situations where traffic has been recently solicited or specific traffic appears to be available or possibly available to the railroad. However other potential uses, including those noted in the previous paragraph, are equally valid and support leaving property with the railroad. The Board should give full consideration to any possibility for future rail service over or rail uses of a dormant line, especially if

⁴³See also *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc. -- Abandonment and Discontinuance Exemption -- Between Albany and Dawson, in Terrell, Lee, and Dougherty Counties, GA*, STB Docket No. AB-389 (Sub-No. 1X) (STB served May 16, 2003) (reactivation of a 13.62-mile rail line from trail use almost seven years from abandonment decision date); *Texas Mexican Railway Company - Purchase Exemption - Union Pacific Railroad Company*, STB Finance Docket No. 33914 (STB served December 11, 2000) (purchase of long dormant line for reactivation); STB Finance Docket No. 33611; and *Union Pacific Railroad Company - Petition for Declaratory Order - Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, 3 S.T.B. 646 (1998) (rehabilitation of line 10 years after grant of abandonment authority).

⁴⁴ See *Yakima, supra*, *Seminole Gulf, supra*, *City of Colorado Springs and Metex Metropolitan District -- Petition for Declaratory Order*, ICC Finance Docket No. 31271 (ICC served March 31, 1989) and *Wisconsin Department of Transportation - Abandonment Exemption*, ICC Finance Docket No. 31303 (ICC decided November 23, 1988).

the line has been inactive for only a few years and insufficient time has passed to make the future need for the use of the line clearer. The types of potential rail service that should prevent adverse abandonment of a line of railroad might include potential for reactivated service if previously rail-served industries reasonably might provide rail traffic again in the future; potential new service to new industries whether definitely identified or whether there is a feasible opportunity for industries to locate on industrial development sites along the line; potential to use the line for storage of loaded or empty cars depending on yard and shipper track capacity and other track available in an immediate area; potential use of the line for detour movements; potential use of the line as passing track or as additional through track to increase capacity for routes through the area, especially if the track is located on or immediately off a main line or heavily used through branch line; and similar uses that we may not have considered.

If the Board continues to entertain and grant adverse abandonment applications, the Board should consider whether all of the above actual or potential uses of the line are absent and whether the reactivation or alternate use of the line for railroad operating purposes is extremely infeasible, if not impossible, before granting an adverse application that could result in the railroad losing its property or its easement and operating rights over a line and the resultant loss of options for the railroad and its current or potential future customers.

The Board consistently permits railroads to exercise business judgment concerning the current and future use of their property for railroad purposes. Absent a compelling adverse abandonment case, a railroad should not be deprived (even if indirectly) of property on which active railroad operations are occurring or that the

railroad credibly believes may be needed in the future for reactivated service to existing customers, industrial development purposes and service to new customers, alternate or detour routes, additional capacity or storage or car repair purposes or other purposes mentioned above.

De Facto Abandonment Misconceptions

Adverse abandonment applicants have been confused and falsely encouraged by the ICC's "de facto abandonment" reference to the status of the line that was the subject of the *Modern Handcraft* case. Applicants have interpreted this to mean that if operations over a rail line have ceased, at least for some number of years, the line has been "de facto" abandoned and they are entitled to a favorable determination from the Board based on the non-use of the railroad line alone. This interpretation is incorrect as the ICC clarified in the decision in *State of Vermont and Vermont Railway, Inc. -- Discontinuance of Service Exemption -- in Chittenden County, VT*, 3 I.C.C. 2d 903 (1987), as noted above, and in later cases, including *Yakima*, explained below.

After the Board has authorized rail operations over a right-of-way on which a line of railroad is located, the STB retains jurisdiction over the rail line until the Board approves or exempts the line's abandonment. *Atchison, Topeka & Santa Fe Ry. -- Abandonment Exemption -- in Lyon County, KS*, Docket No. AB-52 (Sub-No. 71X), slip op. at 4 (ICC served June 17, 1991). A railroad line cannot be abandoned under State law, and the property cannot revert or be forfeited to a reversionary interest holder or other landowner, even if there has been no traffic on the line for a long period of time. See *Phillips Co. v. Denver & Rio Grande Western R. Co.*, 97 F.3d 1375, 1376-78 (10th

Cir. 1996), cert. denied, 521 U.S. 1104 (1997). See also, *City of Creede, CO - Petition for Declaratory Order*, STB Finance Docket No. 34376 (STB served May 3, 2005).

Thus, the characterization of a line of railroad as *de facto abandoned* because of some period of non-use cannot provide conclusive support for granting an adverse abandonment application. Non-use of a line for a lengthy period of time is only one factor that the Board must consider when evaluating an adverse abandonment application. As indicated above, the Board must also consider all railroad uses and the potential for future rail service when making a decision on an adverse abandonment application. We believe the Board would not use this “*de facto* abandonment” terminology with reference to a dormant line today, unless the line had been severed from the national rail network and could not possibly be reconnected to it. The more precise use of the term *de facto* abandonment is shown in the Board’s recent decision in *Yakima Interurban Lines Association - Abandonment Exemption - In Yakima County, WA*, STB Docket No. AB-600 (Sub-No. 1X) (STB served October 31, 2006), where the Board stated:

We also reject Kershaw’s claim that the Board does not have jurisdiction over the rail line in question because the line has been de facto abandoned. Kershaw is incorrect. According to RLTD,⁴⁵ 166 F.3d at 810, 812, a de facto abandonment occurs when a rail line is no longer “linked to and part of the interstate rail system.” In the case at hand, the evidence shows that the YILA line is, in fact, still connected to the interstate rail system and that it has never been severed therefrom: specifically, YILA has established that BNSF never abandoned the lead connecting the line at issue to the BNSF main line, and in fact, leased that lead to Central Washington Railroad Company within the past 2 years.

The Board must continue to reject adverse applicants’ characterizations of

⁴⁵*RLTD Railway Corp. v. Surface Transportation Board*, 166 F.3d 808 (6th Cir. 1999) (RLTD).

unused lines as *de facto* abandoned and thus subject to summary adverse abandonment determinations in the applicants' favor. To receive a favorable decision based only on non-use of a rail line, such applicants must show the circumstances concerning the rail line fit the stricter test of having been severed from the national rail system without possibility of restoration. Adverse abandonments based on the status of the line should be granted, if at all, only if the applicant proves that restoration of service on all or part of the rail line would be clearly physically or economically impossible and that the railroad can have no actual or reasonable potential use, as defined above, for all or part of the line.

Overriding Interest in Rail Service

The ICC's statement that an adverse abandonment will be permitted "where there is no overriding Federal interest in interstate commerce" in continued rail service over a line has resulted in the mistaken argument that the Federal interest in continued rail service must be "overriding," that is, that the need for rail service must outweigh the interests of the adverse applicants or otherwise be "overriding." The *New York Cross Harbor* court decision and *Salt Lake City*, *Seminole Gulf* and *Yakima* STB decisions show that the STB will not engage in some balancing act to decide whether third parties could use a railroad right-of-way more profitably or to better serve the public than through railroad use based on some broad definition of the public interest beyond the ICCTA policies. Under these decisions, any active railroad use or any potential railroad use of a rail line, as explained above, will be a federal interest in interstate commerce that will "override" the State or local government interests or the private interests of non-

governmental, non-railroad adverse applicants. As the Court of Appeals explained in the *Highline Appeal*, the Board's decision in *Chelsea* rested on the fact that no active use or feasible potential use for the Highline existed at all, not just that the applicants presented a better plan to use the property.

In the *New York Cross Harbor* case, the Court pointed out that the Board's citation of *NW-GTW* as authority for the proposition that the Board should consider whether there was an "overriding need" for rail service was inapposite to a case where traffic was moving over the line. No GTW traffic had moved over the line for 11 years in the *NW-GTW* case and, due to the destruction of a bridge, GTW was physically unable to reach the only destination that its trackage rights permitted it to reach through its operation over the line. Thus, GTW could not possibly use its operating rights and the interests of the owner of the line, and indirectly, the interests of the governmental parties, could take precedence over GTW's nominal, but not actual, remaining interest.

The Board should weigh the reasons that adverse applicants want the railroad operation to be permanently terminated and the right-of-way property made available for third party use (if a court later finds in favor of the third party, of course) only, if at all, when there is no actual or feasible potential railroad use for a right-of-way to override the applicants' interest. Even then, if the adverse applicants can achieve their goals through alternatives to taking the railroad property and do not present a compelling case for terminating the railroad's interest and taking the railroad property for public (much less private) use, the Board should deny their application. The railroad should be able

to use or dispose of the property in the future in the railroad's business judgment.⁴⁶

In *Salt Lake City*, the Board also stated that it would not substitute its judgment for UP's business judgment that a line was needed for routing traffic when an alternate route may have been available. Thus, the Board should not weigh such business judgment factors in making an adverse abandonment determination.

In several cases, including the *Wisconsin DOT* case cited in the previous footnote, *Chelsea, supra*, *New York Cross Harbor, supra*, *Salt Lake City, supra*, and *Seminole Gulf, supra*, the ICC and the STB have stated that impediments to State and local government projects, although entitled to some weight, are nevertheless required to give way to the Board's duty to preserve and promote continued rail service.

It necessarily follows that only in the most extreme case, if at all, should a private party's preferred use of railroad right-of-way for other purposes supersede the railroad's interest in the property, especially since it is doubtful at best that the interests of such parties are within the zone of interests with which 49 U.S.C. § 10903 is concerned.

The Board stated in *Salt Lake City* that it would not permit the PC&N test to be rewritten to fit the local government's need or allow the burden of proof in an adverse abandonment case to be shifted to the railroad. *New York Cross Harbor* cited *Salt Lake*

⁴⁶ In *Wisconsin Department of Transportation - Abandonment Exemption*, ICC Finance Docket No. 31303 (ICC decided November 23, 1988), the Commission stated "Here, the railroad has expressed its confidence in the availability of future traffic and has submitted evidence to support that confidence. It has also chosen to forego any opportunity costs that it may incur continuing to operate this line. We are reluctant to substitute our judgment for that of the railroad on these issues. More importantly, there is nothing in the rail transportation policy that directs the Commission to force an abandonment because a line may be presently unprofitable. Indeed, unprofitability and opportunity costs have little weight in the context of a forced abandonment. A railroad may have good business reasons for continuing an unprofitable service, i.e., it may anticipate increasing traffic and profits."

City with approval and the decision showed that the interest of the shipping public and the railroad in continued rail service in interstate commerce outweighs the public interest claims of State and local governments. The Board cannot elevate the interests of State and local governments to premier status when the railroad has an actual or feasible potential interest in the right-of-way. This is especially true when the State and local, or private, interests are vague and indefinite, as they were in the *New York Cross Harbor* case.

Offers of Financial Assistance, Public Use Conditions, Trail Use Conditions.

Again, in the interest of a comprehensive legal analysis of adverse abandonment issues, we quote the decision served October 26, 2006 in this proceeding, for the Board's concise statement of the applicable precedent and policy concerning the availability of offers of financial assistance, public use conditions and trail use conditions in adverse abandonment proceedings, as follows:

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 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).

We need not, as CLS&SB suggests, resolve the merits of the case before

we address the request for an exemption from 49 U.S.C. 10904. A grant of the exemption from section 10904 does not affect the merits of the application. We merely find, as we did in St. Clair, that, under the circumstances presented here, a grant of an adverse abandonment or discontinuance would be frustrated if section 10904 could be invoked in an effort to continue active rail service. If the application fails, the exemption would be mooted.

We will also grant an exemption from the public use provisions of 49 U.S.C. 10905 and a waiver of the implementing regulations at 49 CFR 1152.28. Should we decide to withdraw our primary jurisdiction over the Lines, we should not then allow our jurisdiction to be invoked to impose a public use condition.

Petitioners also ask us to waive the trail use provisions of 49 CFR 1152.29 for a portion of the Lines. In Chelsea Property Owners - Abandonment - Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track In New York, NY, Docket No. AB-167 (Sub-No. 1094)A (Chelsea), the issue of whether the issuance of a certificate of interim trail use (CITU) in an adverse abandonment would be inconsistent with the grant of such an application was discussed and debated at a public hearing held in New York City on July 24, 2003. Briefs were subsequently requested and filed on the issue. Ultimately, the third party applicant, the railroads, and the prospective trail user agreed to the issuance of a CITU. The Board granted the CITU request stating,

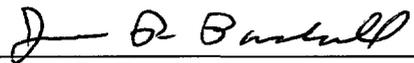
Given this change in circumstances, we need not decide whether the Trails Act applies to lines that are the subject of adverse abandonments. The posture of this proceeding at this point is not materially different from other cases where trail conditions have been imposed. . . . interim trail use in this proceeding should now be viewed as a voluntary arrangement Chelsea, STB served June 13, 2005, slip op. at 8.

Because the Board has not yet had occasion to resolve this issue, because we can address the issue, if need be, in a later decision, and because petitioners themselves state that they are interested in acquiring a portion of the right-of-way for interim trail use, we will deny the request for a waiver of the regulations at 49 CFR 1152.29.

Conclusion

NSR requests that the Board evaluate the subject application and reach a decision on the merits in accordance with the facts, as set out by the Applicants and corrected or otherwise amended by NSR and any other credible presentation, and with the law, principles and discussion set forth above.

Respectfully submitted,



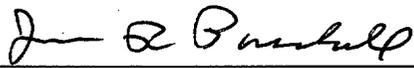
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Dated: January 4, 2007

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply comments in STB Docket No. AB-290 (Sub-No. 286) has been served on Mr. Jeffrey M. Jankowski, Deputy City Attorney, 227 West Jefferson Blvd., South Bend, IN 46601 and Mr. Richard H. Streeter, Barnes & Thornburg, LLP, 750 17th Street, N.W., Suite 900, Washington, D.C. 20006, Attorneys for the Applicants and Mr. John D. Heffner, 1920 N Street, NW, Suite 800 Washington, DC 20036, Attorney for the Chicago, Lake Shore and South Bend Railway Company, an interested party, on January 4, 2007, by DHL Express.



James R. Paschall

Dated: January 4, 2007