



**ASSOCIATION OF
AMERICAN RAILROADS**

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August 3, 2010

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Docket No. AB 1043 (Sub-No. 1), Montreal, Maine & Atlantic Railway, Ltd.—
Discontinuance of Service and Abandonment—In Aroostook and Penobscot Counties,
ME

Dear Ms. Brown:

Pursuant to the Board's July 20, 2010 Decision in the above proceeding, attached please find the Petition for Leave to Intervene under 49 C.F.R. § 1112.4 and Comments of the Association of American Railroads ("AAR") for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Attorney for the Association of
American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

PETITION FOR LEAVE TO INTERVENE UNDER 49 CFR § 1112.4 AND
COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Introduction and Motion for Leave to Intervene

In a decision served July 20, 2010 in the above abandonment proceeding, the Surface Transportation Board (“Board”) requested “briefing from interested parties as to whether provisions of 49 U.S.C. § 10903 and 49 U.S.C. § 10904 would support the imposition of conditions in this case requiring access of any sort, including trackage rights and haulage rights, and the specific terms and conditions thereof...” July 20, 2010 Decision, Slip. Op. at 3. Additionally, “because the terminus of the MMA [Montreal, Maine & Atlantic Railway, Ltd.] line to the north over which the State [of Maine] seeks access is located in Canada,” the Board also sought comment “on its authority to order access over a carrier’s lines into a foreign country.” *Id.*

By this filing, the Association of American Railroads (“AAR”), on behalf of its member railroads, seeks leave to intervene in this proceeding pursuant to 49 CFR § 1112.4 and to file the instant comments. The AAR has not participated as a party to this abandonment proceeding because, until the Board’s July 20, 2010 decision, the AAR was

unaware of the specific access and jurisdictional issues raised in the proceeding. The AAR, however, as informed by the Board's July 20, 2010 decision, has a strong interest in the 49 U.S.C. § 10903 and 49 U.S.C. § 10904 "access" issue raised by the Board. The AAR believes that a mandatory access condition imposed by the Board would be unlawful. The AAR believes that such a condition (1) would be inconsistent with the statutory scheme, (2) would be inconsistent with a long-line of agency precedent, and (3) would add unnecessary complication to the abandonment and OFA processes.

The AAR also has a strong interest in the jurisdictional issue raised by the Board because AAR members routinely engage in international movements. Because the AAR believes that the Board's authority under 49 U.S.C. § 10501 specifically extends only to "transportation in the United States" (49 U.S.C. § 10501(a) (2)) the AAR submits that the Board has no jurisdiction over the northern terminus of the MMA in Canada for which the State of Maine seeks access. The AAR accordingly supports the comments of the Canadian Pacific Railway on the jurisdictional issue and will focus the instant comments on the access issue.¹

Discussion

I. The Board Does Not Have Authority under the Provisions of 49 U.S.C. § 10903 and 49 U.S.C. 10904 to Impose Forced Access Terms as a Condition of Approving an Abandonment Application

A. The Board Has No Statutory Authority under the ICCTA to Impose Trackage Rights as a Condition of Abandonment Approval.

The Board's statutory authority under the ICC Termination Act ("ICCTA") to mandate that a carrier provide physical access to its lines by another carrier pursuant to a

¹ The AAR takes no position on the merits of the abandonment application itself.

grant of trackage rights is extremely limited. As consistently recognized by the Board (and its predecessor, the Interstate Commerce Commission ("ICC")), trackage rights are generally voluntary arrangements between consenting parties for their mutual benefit and generally cannot be compelled by the agency. See *R.R. Consolidation Procedures-Trackage Rights Exemption*, 1 I.C.C. 2d 270 (1985).

The Board has recognized that its authorizing statutes provide that mandatory trackage rights may be imposed upon a carrier *only under specific provisions of the ICCTA expressly authorizing the exercise of such authority*, and only then for the purpose of serving the specific statutory objectives for which the provisions were enacted.

"While the Board lacks general authority to require an unwilling railroad to permit physical access over its lines to the trains and crews of another railroad, it may direct that result in certain situations: under 49 U.S.C. § 11324(c), as a condition to the incumbent's merger with another railroad; under 49 U.S.C. § 11102 (a), to serve terminal facilities when it would be in the public interest; or, under 49 U.S.C. § 11123(a) to serve any facilities for a limited period of time (not more than 270 days) because of the carrier's inability or failure to provide its shippers with adequate service." STB Ex Parte No. 628, *Expedited Relief for Service Inadequacies*, (served May 12, 1998) (NPR), Slip op. at 3.

As the Board found in Ex Parte 628, the Board's authority under the ICCTA to mandate trackage rights is extremely circumscribed. It is confined to *four* statutory provisions each of which explicitly authorize such authority:

1. 49 U.S.C 11324. Mandatory trackage rights may be imposed upon an applicant to a merger proceeding under the provisions of 49 U.S.C. § 11324. That

section specifically authorizes grants of trackage rights to ameliorate anti-competitive effects of a merger transaction as follows:

“The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board may impose conditions governing the transaction, *including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities*. Any trackage rights and related conditions imposed to alleviate anti-competitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated.”

49 U.S.C. § 11324(c).

The Board’s conditioning authority to impose trackage rights in merger proceedings is expressly directed at ameliorating “anti-competitive effects” and will generally not be imposed unless a potential effect of the transaction is a “significant loss of competition or the loss by another rail carrier of the ability to provide essential services.” See, e.g., STB Finance Docket No. 33556, *Canadian National Railway Company, et al. –Control–Illinois Central Corporation, et al.* (May 21, 1999); See also STB Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation, et al.—Control and Operating Leases and Agreements—Conrail, Inc., et al.* (July 23, 1998). As the Board has stressed, merger conditions, such as mandatory trackage rights, will generally not be imposed “to ameliorate long-standing problems” which were not created by the merger, “and should not be designed simply to put its proponent in a better position than it occupied before the consolidation.” *Id.*

2. 49 U.S.C. § 11102. The Board has specific authority to grant trackage rights under the provisions of 49 U.S.C. § 11102, which limit the Board’s authority to “*terminal facilities, including mainline tracks for a reasonable distance outside of a terminal.*”

Although the language of 49 U.S.C § 11102 is predicated on a Board finding that such

mandatory access be “practicable and consistent with the public interest,” the Board (and the ICC) have long acknowledged the serious operational and financial consequences that mandated physical access through a grant of trackage rights imposes on a non-consenting carrier. The Board has thus appropriately construed the applicability of the “terminal access” provisions to situations where the owning carrier has engaged in anti-competitive conduct and where the mandatory grant of trackage rights would be necessary to redress such anti-competitive conduct. See 49 CFR § 1144.2 (a); *Intramodal Rail Competition*, 1 I.C.C. 2d 822 (1985), *aff’d sub nom. Baltimore Gas & Elec. Co. v. United States*, 817 F. 2d 108 (D.C. Cir. 1987); *Midtec Paper Corp. v. Chicago & N. W. Transp. Co.*, 3 I.C.C. 2d 171 (1986), *aff’d sub nom. Midtec Paper Corp v. United States*, 857 F. 2d 1487 (D.C. Cir. 1988).²

3. **49 U.S.C. § 11123.** The Board has specific authority to grant trackage rights (e.g., “*joint or common use of railroads facilities*”) under the emergency service provisions of 49 U.S.C. § 11123 (for a maximum period of 270 days). Exercise of the Board’s authority under this section is predicated on a Board determination

“that shortage of equipment, congestion of traffic, unauthorized cessation of operations, or other failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier ...cannot transport the traffic offered to it in a manner that properly serves the public...”

49 U.S.C. § 11123 (a); see also 49 U.S.C. § 11123(c).

² With respect to the grant of terminal access rights under 49 U.S.C. 11102, the Board/ICC and the courts have also expressly noted that because of the burden a physical intrusion such as mandatory trackage rights would impose on a carrier, the agency would likely examine the efficacy of lesser intrusions, such as ordering of reciprocal switching under 49 U.S.C. 11102 (b) or prescription of alternative through routes under the criteria of 49 U.S.C. 10705), before finding a grant of mandatory trackage rights necessary. See *Midtec Paper Corp v. United States*, 857 F. 2d 1487, 1501-1503 (D.C. Cir. 1988).

4. 49 U.S.C. § 10907. The Board has specific authority to mandate trackage rights under the forced sale ("feeder line") provisions of 49 U.S.C. § 10907. The feeder line provisions are specifically directed at alleviating situations of deteriorating carrier service over a line before a line is degraded by allowing an interested party to require a forced sale of a line: (1) over which a carrier is providing inadequate service (as determined under the "public convenience and necessity standard") (49 U.S.C. § 10907 ((b)(1) (A) (i)) or (2) which is listed on a carrier's system diagram map as a candidate for abandonment but for which an abandonment application has not been filed (49 U.S.C. § 10907 ((b)(1) (A) (ii)).³ The "feeder line" provisions specifically provide for a mandatory grant of trackage rights as follows:

"In the case of any railroad line subject to sale under subsection (a) of this section, the Board shall, upon the request of the acquiring carrier, *require the selling carrier to provide to the acquiring carrier trackage rights to allow a reasonable interchange with the selling carrier or to move power equipment or empty rolling stock between noncontiguous feeder lines operated by the acquiring carrier*. The Board shall require the acquiring carrier to provide the selling carrier reasonable compensation for any such trackage rights."

49 U.S.C. § 10907 (d).⁴ Subsections 49 U.S.C. § 10907(g) (1) and 49 U.S.C. § 10907 (i) also provide additional inducements to an acquirer under the forced sale provisions by allowing a person operating a line acquired under that section to elect to be exempted from any of the provisions of the ICCTA (except with respect to transportation under a joint rate) and by permitting such person to determine preconditions, such as payment of a subsidy, which must be met by shippers in order to obtain service.

³ As found by the Board, a feeder line application may also be filed by an interested party under the "public convenience and necessity" criteria with respect to a line of railroad that is the subject of a pending abandonment application. See, Ex Parte No. 395 (Sub-No.2), *Revision of Feeder Railroad Development Rules* (served July 24, 1991). Under existing rules, the Board decides on a case-by-case basis whether such an application is appropriate. *Id.*

⁴ The "feeder line" provisions only grant the acquiring carrier limited trackage rights to allow "a reasonable interchange with *the selling carrier*" or to move power equipment and empty cars "between noncontiguous feeder lines operated by the acquiring carrier."

In contrast to the above provisions specifically authorizing the Board to impose trackage rights over an unwilling carrier for specific statutory purposes of *ameliorating anti-competitive effects of a merger*, redressing *anticompetitive conduct or emergency and other inadequate service* concerns, the provisions of 49 U.S.C. § 10903 and 49 U.S.C. § 10904 governing abandonments and Offers of Financial Assistance (“OFA”) do not provide the Board with specific authority to mandate trackage rights (or other access terms).

B. Longstanding Precedent Clearly Establishes that the Agency Lacks the Power to Mandate Trackage Rights in Abandonment Proceedings.

Not only is it clear from the statutory language that the Board does not have authority under these provisions to condition abandonment approval on a mandated grant of trackage rights by the abandoning carrier, but the agency has also repeatedly and specifically held that it lacks the power to impose trackage rights in the abandonment and OFA process.

For example, in Docket No. AB-1 (Sub-No. 205X) *Chicago and North Western Transportation Company—Abandonment Exemption—Mason City, IA—In the Matter of a Request to Set Terms and Conditions* (served November 20, 1987), 1987 WL 99927, the Board denied a request by a purchaser under the OFA provisions to order the selling carrier to also provide it trackage rights. In denying the request for trackage rights, the ICC noted that “in financial assistance proceedings we have refused to impose even voluntarily negotiated trackage agreements as a condition to a purchase.” *Id* at *5.

The ICC also referenced its earlier analysis of the statutory scheme in Docket No. AB-167 (Sub-No. 56N), *Conrail Abandonment of the Cairo Branch in Illinois, in the Matter of Financial Assistance*, (not printed, (served March 4, 1983):

“Our examination of 49 U.S.C. § 10905 [the OFA provisions now codified at 49 U.S.C. § 10904] leads us to conclude that we cannot authorize trackage rights as part of a section 10905 transfer. There is no language in section 10905 specifically dealing with trackage rights. By contrast 49 U.S.C. § 10910 [the “feeder line” provisions currently codified at 49 U.S.C. § 10907] which also provides for forced sales to financially responsible persons, allows us, upon the offeror's request, to provide the ‘acquiring carrier trackage rights to allow a reasonable interchange with the selling carrier or to move power equipment or empty rolling stock between noncontiguous feeder lines operated by the acquiring carrier.’ 49 U.S.C. § 10910 (d). We must assume that if Congress wanted us to impose trackage rights in offer of financial assistance proceedings it would have provided us with specific language like that found in section 10910. We note that the language of both these sections was developed in the Staggers Rail Act of 1980.”

Id. at 5-6. See also Docket No. AB-1 (Sub-No. 111F), *Chicago and North Western Transportation Company—Abandonment in Oneida, Villas, Iron, Ashland and Bayfield Counties, WI and Gogebic County, MI* (served Oct. 9, 1981) Slip op. at 8-9 (rejecting a request by an OFA offerer that would impose additional sale and subsidy conditions, including acquisition of additional trackage of the abandoning carrier, under the OFA provisions “pursuant to the Commission’s general conditioning powers in abandonment proceedings” on the grounds that such conditions were beyond the scope of its conditioning authority and would conflict with the Staggers Act statutory scheme); accord, Docket No. AB-1 (Sub-No. 111), *Chicago and North Western Transportation Company—Abandonment in Oneida, Villas, Iron, Ashland and Bayfield Counties, WI and Gogebic County, MI* (served Oct. 9, 1981) (rejecting OFA offerers’ request that abandoning carrier be required to enter into a leasing agreement with another carrier: “[w]e have no authority under 49 U.S.C. § 1090[4] to require the lease arrangement suggested”).

II. Comparison of Feeder Line and Abandonment/OFA Provisions Is Illustrative

The lack of specific language in the OFA provisions authorizing the Board (or the ICC) to impose mandatory trackage rights obligations on the abandoning carrier as a condition of agency abandonment authorization—and the specific inclusion of such language in the “feeder line” provisions of 49 U.S.C. § 10907 (formerly 49 U.S.C. § 10910)—are especially meaningful since both provisions were enacted by Congress at the same time as part of the abandonment related provisions of the Staggers Act. See H. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 124-125; see also, e.g., *Black v. I.C.C.*, 762 F. 2d 106, 114 (D.C. Cir. 1985); *Simmons v. I.C.C.*, 697 F.2d 326, 339-340 (D.C. Cir. 1982). Congress knew how to provide the agency with authority to mandate trackage rights when it wanted the agency to have this power. It did so in the “feeder line” provisions but not in the OFA provisions.

Moreover, ICC decisions construing the scope of the OFA provisions make clear distinctions between the “feeder line” provisions (where mandated trackage rights are available to a purchaser) and the OFA provisions (where mandated trackage rights is not available to a purchaser). See, e.g., See, Ex Parte No. 395 (Sub-No.2), *Revision of Feeder Railroad Development Rules*, 1 I.C.C. 2d 902, 903 (1991) (“The feeder line provisions... have been used only infrequently for acquisitions, notwithstanding the statutory incentives not available to a purchaser under other acquisition procedures (e.g., forced mandatory trackage rights...)”); see also Finance Docket No. 32337, *Sunshine Mills, Inc.—Feeder line Acquisition—Norfolk Southern Line Between Corinth, MS, and Huntsville, AL* (served August 23, 1993) (distinguishing between feeder line and OFA purchases).

Finally, the D.C. Circuit has confirmed the difference between the feeder line process and the abandonment and OFA process. “A purchaser under Section 10905 [the OFA provisions] [recodified in current 49 U.S.C. § 10904] ...does not receive the same benefits as a purchaser under the feeder program. Under the feeder line statute, the Commission can require the selling carrier to provide the buyer with certain trackage rights and reasonable joint rates. A feeder program purchaser may elect to be exempt from Title 49 except as to joint rates, and may determine preconditions to be met by shippers who want service over the acquired line. *These benefits are not available to a purchaser under Section 10905.*” *Cisco Co-op. Grain Co. v. I.C.C.*, 717 F.2d 401, 403-404 (7th Cir. 1983) (emphasis added).

For the Board to now construe 49 U.S.C. § 10903(e) as granting such authority in the context of a potential OFA application would ignore the important distinction between the two provisions. A decision that the Board has the power to impose trackage rights in an abandonment context would be inconsistent with Congress’s clear intent in enacting that provision *not* to include the same forced access rights to OFA offerers as it provided under the “feeder line” provisions. The result would be Board authority expanded beyond the limits of the statute.⁵ The Board should not attempt an “end-run around the statutory scheme” governing abandonments that Congress specifically enacted by attempting to improperly graft the “feeder line” forced access provisions onto the provisions of 49 U.S.C. § 10903 and 49 U.S.C. § 10904. See *Burlington N. R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 693-694 (D.C. Cir. 1996); see also *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F. 3d 523, (6th Cir. 2002) (Board may not

⁵ The forced access conditions the Board is considering under its general conditioning authority would apply only in connection with an OFA. The effect would be to provide rights to an OFA acquirer that it could not obtain under the OFA provisions specifically enacted by Congress.

construe abandonment/OFA statutory scheme as providing for a “rebuttable presumption” regarding scope of allowable OFA purchase where no textual support in the statutory provisions).

Importantly, if the Board were able to impose trackage or haulage rights as a condition of an abandonment and OFA, it would put the potential purchaser in a better position than a purchaser under the feeder-line provisions.⁶ That outcome would be indefensible given the statutory scheme.

III. Even If the Board Had Authority to Impose Trackage Rights As a Condition to an Abandonment/OFA, It Would Be Bad Policy.

The STB does not have the statutory authority to impose trackage rights as a condition to an abandonment or OFA. However, even if the Board did have such authority, its exercise of that authority would be administratively burdensome and excessively complicated. The Board would be required to conduct an analysis of anti-competitive conduct in every abandonment case, and tailor its decisions to the specific facts of the abandoning carrier, OFA offeror, and geographical situation. Such tasks are not only outside of the Board’s statutory purview, but would be inconsistent with Congress’ stated desire to simplify and streamline the abandonment process.

First, any Board conditioning of abandonment approval upon the grant of mandatory trackage rights (or other forced access provisions) would seriously complicate the abandonment process. Under the OFA provisions, the Board is required to set the terms and conditions (including compensation) for the purchase of the line to be abandoned in the absence of agreement of the parties within an expedited time period of

⁶ As noted at footnote 3 supra, under the “feeder line” provisions an acquiring carrier is only granted limited trackage rights to allow “a reasonable interchange with the *selling carrier*” and to move equipment and cars between non-contiguous feeder lines. In the instant proceeding, the forced access rights sought under the abandonment/OFA provisions would be over the selling carrier to a third carrier.

30 days so that an otherwise authorized abandonment is not unduly postponed. 49 U.S.C. § 10904 (f). If, in addition to the purchase price under the OFA, the parties were required to negotiate (and the Board determine in the absence of agreement), the terms and conditions pertaining to a mandatory grant of trackage rights – including (1) whether such a grant would even be practicable or impose undue operational burdens on the owning carrier; (2) the attendant terms and operating protocols of forced access; and (3) the compensation due to the abandoning carrier pertaining to the mandated trackage rights – it would be virtually impossible that the expedited statutory time frame under the abandonment/OFA provisions could be met.

Second, in the absence of specific statutory authority or guidance, the Board would be required to determine the employee labor force that would be entitled to perform operations and services under any mandatory trackage rights provisions. Under the feeder line provisions, the Board must “require, to the maximum extent practicable, the use of the employees who would normally have performed work in connection with a railroad line subject to a sale under this section.” 49 U.S.C. § 10907 (e). There is no such statutory directive or guidance in the abandonment/OFA provisions as to whether the OFA purchaser must be required “to the maximum extent practicable, ...use ... the employees who would normally have performed work in connection with a railroad line subject to a sale under this section” for mandated trackage rights (because the Board does not in fact have the authority to mandate trackage rights under that section). The Board would thus be compelled to create authority to determine allocation of employee responsibilities in the context of a mandatory grant of trackage rights under the abandonment/OFA provisions. This is not a task that Congress intended the Board to

engage in pursuant to the abandonment/OFA provisions, and the Board should recognize the clear limitation of Board authority under those provisions.

Third, since the enactment of the 4-R Act in 1976 and the Staggers Act in 1980, it has been the purpose and intent of Congress to *facilitate, simplify and expedite* the abandonment process to provide timely relief to rail carriers from financially unprofitable operations, not to saddle an abandoning carrier with additional burdens such as mandated trackage rights obligations as a condition of relief from unprofitable service obligations. See, e.g., *Chicago and North Western Transportation Company v. I.C.C.*, 582 F. 2d 1043, 1045-1046 (7th Cir. 1978) (discussing legislative history of 4-R Act); H. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 125 (Sept. 29, 1980) (Staggers Act); see also, e.g., *Black v. I.C.C.*, 762 F. 2d 106, 114 (D.C. Cir. 1985) (discussing legislative history of Staggers Act); *Simmons v. I.C.C.*, 697 F.2d 326, 339-340 (D.C. Cir. 1982) (same).⁷

IV. The Board Has No Authority to Require a Carrier to Enter Into a Haulage Agreement (Another Form of Forced Access) as a Condition of Abandonment Approval

Just as the Board lacks authority to impose trackage rights as a condition of abandonment approval because it conflicts with the abandonment/OFA statutory scheme, the Board similarly lacks authority to impose haulage rights (another form of forced access) as an abandonment condition.

Haulage arrangements are voluntary agreements between carriers with privately negotiated terms and conditions outside of the Board's authority, and thus, the Board has no authority to impose such voluntary arrangements. See, e.g. ICC Finance Docket No. 30918, *KNRECO, Inc., d/b/a Keokuk Junction Ry. Acquisition and Operation Exemption-*

⁷ It is also important to keep in mind that granting trackage rights in these instances may not only be a burden on the abandoning carrier, but also on other stakeholders as well. Depending upon the circumstances, the abandoning railroad's remaining customers and employees may also be affected.

The Atchison, Topeka & Santa Fe Ry. Co., mem. op. at 2 (Apr. 12, 1988) (“[a haulage] agreement is merely a business arrangement pertaining to the movement of cars of one carrier by another. As such, it does not require our approval”); *Waterloo Rwy Co.—Adverse Abandonment – Lines of Bangor & Aroostook RR Co. and Van Buren Bridge Co. in Aroostook County, Maine; Canadian Pacific Rwy – Adverse Abandonment – Lines of Bangor & Aroostook RR Co. and Van Buren Bridge Co. in Aroostook County, Maine*, STB Docket No. AB-124 (Sub-No. 2), STB Docket No. AB-279 (Sub-No. 3) (May 6, 2003) (“Haulage agreements are not subject to our jurisdiction”); see also *Simmons v. I.C.C.*, 871 F2d 702, 712, 713 (7th Cir. 1989) (affirming an I.C.C. decision finding that a carrier arrangement was a haulage agreement and not a grant of trackage rights and that “the ICC was not required to impose labor protective conditions ... because of the car haulage contract”).

Moreover, as with Board imposition of mandated trackage rights under the abandonment/OFA provisions, if the Board were to mandate haulage, the Board, in addition to setting the terms and conditions of the purchase of the line to be abandoned under the OFA in the absence of party agreement, would also be required to set the terms, conditions and compensation for haulage agreements in the absence of the parties’ agreement. It is again virtually impossible that such a task could be completed within the expedited 30 day time period established pursuant to 49 U.S.C. § 10904 (f) during which an abandonment may be postponed.

Imposition of any forced access condition under the abandonment/OFA provisions would thus necessarily unduly complicate the abandonment/OFA process and conflict with Congress’s intent that the abandonment process be simplified and expedited,

rather than burdened by such extra-statutory regulatory requirements as the complexity of determining the terms of forced access requirements not contemplated or authorized by the statutory scheme.⁸ Moreover, in filing an application for an otherwise fully justifiable abandonment with the Board, a carrier should not be inhibited by the prospect, in so doing, that it could be subjected to forced access provisions that would otherwise burden its remaining common carrier operations.

V. There Is No Need for the Board to Impose Forced Access Conditions in an Abandonment/OFA proceeding

The AAR further submits that an alleged need for forced access because of concerns over the level of service or rates on the abandoning carrier's retained lines provide no basis for imposition of a forced access condition in an abandonment/OFA proceeding even if the Board had such conditioning authority (which it does not).⁹

Prior to an actual purchase and commencement of operations under the abandonment/OFA provisions, any allegation of post-OFA inadequate service is wholly hypothetical. Moreover, the Board has ample authority to address any post-OFA purchase service problems. Any "inadequate service problems" that may be found to actually occur subsequent to a purchase of the line proposed for abandonment under the OFA provisions may be dealt with by the Board at that time. As specifically noted by the Board, "Shippers who believe that a rail carrier is not providing adequate service due to the conditions of its lines or certain other service problems have recourse before the Board, including, among other things, the emergency and alternative service rules, the feeder

⁸ See, e.g., *Simmons v. I.C.C.*, 871 F2d 702, 707 (7th Cir. 1989) ("The Staggers Act was meant to lift the industry's regulatory burden and generally to allow market mechanisms to play a larger role in governing such matters as railroad rates, mergers, acquisitions and line abandonments.")

⁹ Moreover, it would be intuitively counterproductive for an abandoning carrier to engage in service or rate conduct which discourages the interchange of traffic with the OFA line since the result would simply be to deprive the abandoning carrier of such interchange traffic which it could profitably handle.

line provisions, and enforcement of the statutory common carrier obligation.” STB Ex Parte No. 575, *Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League* (served Oct. 30, 2007), Slip op. at 11.

With respect to concerns of post-purchase carrier conduct pertaining to rates or rate divisions—again a wholly hypothetical issue in the context of an abandonment/OFA purchase proceeding—the Board has ample authority to address such a concern if and when it arises, including by enforcing the common carrier obligation and determining issues of maximum rate reasonableness under its rate review authority pursuant to 49 U.S.C. § 10707 if “market dominance” is found to exist.

The Board thus has ample *specific* authority under the ICCTA to address any rate or service issues without the need for imposing intrusive (and extra-statutory) “forced access” conditions. Moreover, if forced access provisions were to be imposed in an abandonment/OFA proceeding based on hypothetical concerns by an OFA purchaser or “protestant”, there would be significant consequences to the expedited and simplified statutory abandonment scheme that Congress enacted in the Staggers Act. Indeed, unlike the feeder line provisions, which do not allow forced sales to be compelled by Class I or Class II carriers (49 U.S.C. § 10907 (a)), forced sales under the OFA provisions are open to any “financially responsible person.” 49 U.S.C. § 10904(c). Any extra-statutory—and unauthorized-- expansion of the abandonment/OFA process would thus transform the simplified abandonment/OFA process that Congress intended into a complex proceeding with potentially broad and unforeseeable consequences.

Conclusion

The Board does not have the authority under the provisions of 49 U.S.C. § 10903 and 49 U.S.C. § 10904 to impose mandatory trackage rights or mandatory haulage rights as a condition of an abandonment/OFA approval. Further, the Board's jurisdiction under 49 U.S.C. 10501 (a) (2) extends only to "transportation in the United States" and the Board does not have jurisdiction over the northern terminus of the MMA in Canada for which mandatory access rights are sought.

Respectfully Submitted,



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