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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

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

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REPLY COMMENTS OF MONTREAL,  
MAINE & ATLANTIC RAILWAY, LTD.  
CONCERNING ACCESS ISSUES

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Dated: August 10, 2010

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INTRODUCTION

In a decision served on July 20, 2010, the Board requested that interested parties file supplemental briefs regarding several issues relating to “access.” More specifically, the Board sought briefing on the question of whether it has the authority to impose, either as a condition of an abandonment order or as a condition of a sale pursuant to the offer of financial assistance (“OFA”) procedures, a requirement that Montreal, Maine & Atlantic Railway, Ltd. (“MMA”), the applicant in these abandonment proceedings, grant access by either trackage rights or haulage over lines that would be retained by MMA in order to enable a new operator of the lines to be abandoned and acquired by the State of Maine (“the State”) to interchange with rail carriers other than MMA.

The Board's July 20 decision called for the filing of supplemental briefs on July 27, with reply briefs due on August 3. By a decision dated July 23, 2010, the Board (at the request of the State and MMA) extended the filing dates to August 3 and August 10, respectively. MMA and various other parties submitted initial comments on August 3.

In their initial comments, abandonment opponents raise various arguments as to why the Board supposedly can and should impose access conditions on the abandonment or as part of the OFA process. Essentially, they argue that the Board has virtually unfettered authority to impose conditions by way of "implementing the public convenience and necessity standard of 49 U.S.C. § 10903," specifically in service of the "rural and community development factor of 49 U.S.C. § 10903(d)." *See, e.g., Supplementary Comments of Irving Woodlands LLC and Irving Forest Products, Inc.* at 2 (filed Aug. 3, 2010) ("*Irving Comments*"). They further argue that the Board would be justified in imposing access conditions here because such an action is not specifically precluded by statute. *See, e.g., State of Maine, Department of Transportation Supplementary Filing on Access Conditions* at 5 (filed Aug. 3, 2010) ("Neither Section 10903 nor Section 10904 includes any limitation on the type of conditions that can be imposed or considered."). Moreover, abandonment opponents argue in general terms that trackage rights are needed to ensure more efficient service, minimize anticipated monopolistic behavior on the part of MMA,<sup>1</sup> and promote the viability of a future

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<sup>1</sup> Implicit in the argument of many abandonment opponents is the suggestion that MMA would deliberately attempt to discourage traffic moving to or from the OFA lines. Such a suggestion has absolutely no basis in fact. In the absence of forced access rights, MMA would have powerful economic incentives to promote joint marketing efforts with the new short line operator. To conclude otherwise would cast doubt on the basic feasibility of end-to-end interchange arrangements that are already prevalent throughout the rail industry.

operator of the abandoned lines. *See, e.g., Irving Comments* at 9-11. Finally, some abandonment opponents include vague suggestions about terms and conditions that might be imposed, though most parties seem to agree that such terms and conditions should be privately negotiated in the first instance. *See, e.g., id.* at 7-9 & 13-14.<sup>2</sup>

What abandonment opponents seem to ignore, however, is that the Board and the ICC have specifically and repeatedly determined that Congress has not granted the agency authority to impose access conditions in the context of abandonment or OFA proceedings. Moreover, while the Board most certainly is empowered to consider whether a proposed abandonment “will have a serious, adverse impact on rural and community development.” 49 U.S.C. § 10903(d), this is but one factor among many that the Board must take into account as part of its public convenience and necessity analysis. *See, e.g., Union Pac. R.R. Co.—Discontinuance of Trackage Rights and Aban.—In Natrona and Converse Counties, Wyoming*, STB Docket No. AB-33 (Sub-No. 113) (STB served Nov. 12, 1997), slip op. at 13 (“In determining whether to grant or deny an abandonment...application, we consider a number of factors, including operating profit or loss, other costs the carrier may experience (including rehabilitation and economic costs), and the effects on shippers and communities. No one factor is conclusive.”).

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<sup>2</sup> In this regard, MMA believes that abandonment opponents have not provided sufficient evidentiary support for the allegations of harm that forced access is intended to ameliorate (for example, anticipated monopolistic behavior or the absence of competitive alternatives), any demonstration that the access conditions would in fact address the alleged harm, or any significant detail regarding specific terms and conditions of access so as to allow for a reasoned response. Consequently, they have failed to meet their burden of justifying the imposition of any such terms or conditions on the abandonment. MMA reserves its right to respond to such issues at the appropriate time or in any subsequent related proceedings.

## ARGUMENT

### I. THE ABANDONMENT OPPONENTS IGNORE CLEAR AND CONSISTENT BOARD AND ICC PRECEDENT FORECLOSING THE IMPOSITION OF ACCESS CONDITIONS IN ABANDONMENT AND OFA PROCEEDINGS.

The conclusion of the Board and the ICC that imposition of involuntary access over another carrier's lines requires a specific grant of statutory authority has remained consistent over time. *See, e.g., Delaware & Hudson Ry. Co.—Discontinuance of Trackage Rights Exemption—In Susquehanna County, Pennsylvania et al.*, STB Docket No. AB-156 (Sub-No. 25X) (STB served Mar. 30, 2005), slip op. at 3 (concluding that the Board “has no general power to require a carrier to grant another carrier the right to use its lines” and that the Board’s “authority to compel trackage rights arises out of specific provisions of the Interstate Commerce Act”); *Consol. Rail Corp.—Aban. Exemption—In Erie County, New York*, STB Docket No. AB-167 (Sub-No. 1164X) (STB served Oct. 7, 1998), slip op. at 10 (concluding that in the absence of a specific grant of statutory authority, the Board “ha[s] no jurisdiction to compel a rail carrier to...grant trackage rights to another carrier”); *Expedited Relief for Service Inadequacies*, STB Ex Parte No. 628 (STB served May 12, 1998) (NPR), slip op. at 3 (“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 the result in certain situations” specifically provided for by statute); *Chi. & N. W. Transp. Co.—Constr. and Operation Exemption—City of Superior, Douglas County, Wisconsin*, ICC Finance Docket No. 32433 (Sub-No. 1) (ICC served Jan. 12, 1996), 1995 ICC LEXIS 332 at \*4 (explaining that “Congress has left, except in certain specifically defined areas, the use of one carrier’s tracks by another up to the voluntary agreement of the carriers”); *Chi. & N. W.*

*Transp. Co.—Aban. Exemption—Mason City, Iowa*, ICC Docket No. AB-1 (Sub-No. 205X) (ICC served Nov. 20, 1987), 1987 ICC LEXIS 48 at \*14-15 (quoting *Conrail Aban. of the Cairo Branch in Illinois*, ICC Docket No. AB-167 (Sub-No. 56N) (ICC served Mar. 4, 1983) (not printed), for the proposition that “[w]e must assume that if Congress wanted us to impose trackage rights...it would have provided us with specific language” to that effect); *Request for an Order Directing the S. Pac. Transp. Co. to Negotiate Trackage Rights with the Great W. Ry.*, ICC Finance Docket No. 30872 (ICC served Oct. 15, 1986), 1986 ICC LEXIS 110 at \*4 (citing *Baltimore & O.R. Co. Operation*, 261 I.C.C. 535 (1945) and *Alabama T. & N.R. Corp. Construction*, 124 I.C.C. 114 (1927) for the proposition that the agency has no general authority “to compel a railroad to grant trackage rights over its lines to another carrier”). As explained in Board and ICC precedent, the Board is not authorized to impose involuntary access conditions in the context of either abandonment or offer of financial assistance (“OFA”) proceedings because 49 U.S.C. § 10903 and 49 U.S.C. § 10904 do not specifically provide the Board with such authority. See *Comments of Montreal, Maine & Atlantic Railway, Ltd. Concerning Access Issues* at 2-6 (filed Aug. 3, 2010).

MMA does not dispute that §§ 10903 and 10904 grant the Board authority to impose a variety of conditions in the context of line abandonments and OFA transactions. This authority, however, is not without limits. Unlike other conditions that the Board previously has imposed in these contexts,<sup>3</sup> conditions relating to involuntary access (such

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<sup>3</sup> See, e.g., *Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp. 's W. 30th Street Secondary Track in New York, New York*, 8 I.C.C.2d 773, 792 (1992) (requiring proponent of adverse abandonment to post surety bond indemnifying railroad for excessive demolition costs); *S. Pac. Transp. Co. Aban. Between Bonita Junction and Seagoville In Nacogdoches, Rusk, Cherokee, Anderson, Kaufman, and Dallas Counties*,

as the granting of trackage rights) are by their nature “highly intrusive,” *id.* at 3, given that they amount to a requirement that one party allow another the use of its property. To glibly suggest that doing so is somehow permissible in the context of an abandonment because it would constitute a condition rather than an absolute requirement is to imply that the Board could achieve something indirectly that it could not achieve directly. *Cf. Mo. Pac. R.R. Co.—Aban. Exemption—In Marion County, Illinois*, ICC Docket No. AB-3 (Sub-No. 77X) (June 21, 1989), 1989 ICC LEXIS 166 at \* 9-10 (explaining that the agency cannot “do indirectly what [it has] no authority to do directly”). The Board has not condoned such indirect results in the past, and there is no basis for doing so here.

Irving Woodlands and Irving Forest Products (collectively, “Irving”) further suggest that the Board’s authority to impose abandonment conditions is “limited only by the requirement that it be exercised to advance the public interest.” *Irving Comments* at 4. Not only does this suggestion ignore Board and ICC precedent specifically holding that it lacks authority to impose access conditions in the context of an abandonment,<sup>4</sup> but also ignores the fact that trackage rights have never been imposed as a condition of an

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*Texas*, 363 I.C.C. 105, 108-09 (1980) (conditioning abandonment on the sale of lines initially included in the abandonment application).

<sup>4</sup> See, e.g., *Union Pac. R.R. Co.—Aban.—In Harris, Fort Bend, Austin, Wharton and Colorado Counties, Texas*, STB Docket No. AB-33 (Sub-No. 156) (STB served Nov. 8, 2000), 2000 STB LEXIS 654 at \*4 (concluding that abandonment proceedings are “not the appropriate forum in which to grant...trackage rights”); *Consol. Rail Corp.*, STB Docket No. AB-167 (Sub-No. 1164X), slip op. at 10 (concluding that the Board “lack[ed] jurisdiction to grant...trackage rights relief” in that proceeding because such relief had not been specifically provided for by statute); *Or., Cal. & E. Ry. Co.—Aban. Exemption—In Klamath County, Oregon*, ICC Docket No. AB-338 (Sub-No. 1X) (Nov. 13, 1991), 1991 WL 244451 at \*7-8 (rejecting suggestion that the ICC “should condition approval of the abandonment exemption on fulfillment of OC&E’s promise to offer Sessler access to BN over OC&E property” because OC&E had not “voluntarily agreed to the imposition of such a condition”).

abandonment—and most certainly were not at issue in the cases upon which Irving relies for its claim of virtually unlimited conditional authority.<sup>5</sup>

For example, Irving cites *Chi. & N.W. Transp. Co.—Aban. Between Ringwood, Illinois and Geneva, Wisconsin*, 363 I.C.C. 956 (1981), for the proposition that the ICC “left open the possibility of attaching a trackage rights condition to an abandonment decision.” *Irving Comments* at 7. First of all, the trackage rights at issue in that case were raised as part of the OFA process rather than as a potential condition to the underlying abandonment. See *Chi. & N.W. Transp. Co.—Aban. Between Ringwood, Illinois and Geneva, Wisconsin*, 363 I.C.C. at 957 (“This is the first proceeding in which the Commission has been requested to set the purchase price and terms of sale pursuant to 49 U.S.C. 10905.”). More important, however, is that the agency in *Chicago & North Western* specifically questioned whether it even had jurisdiction to impose trackage rights as part of the OFA process. *Id.* at 962-3. (“If C&NW and GLA cannot reach agreement on this matter, trackage rights may be considered as part of any request for the establishment of conditions and compensation on that line. The parties should at that time discuss the Commission’s jurisdiction to order the trackage rights.”). In various subsequent decisions, the agency has answered that question in the negative. See, e.g., *Ill. Cent. Gulf R.R. Co.—Aban.—Between Tuscaloosa and Maplesville, Alabama*, ICC Docket No. AB-43 (Sub-No. 101) (Aug. 7, 1984), 1984 ICC LEXIS 555 at \*2-3 (quoting

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<sup>5</sup> For the most part, the proponents of trackage rights have been implicitly requesting overhead rights to enable a short line operator to reach interchanges with carriers other than MMA. Irving, however, has gone well beyond overhead rights by suggesting that the short line should have direct access to MMA customers located on the line between Madawaska and St. Leonard, which is not scheduled for abandonment. The potential intrusive nature of such rights further demonstrates the wisdom of the Board’s refusal to impose forced access in abandonment cases.

*Conrail Aban. of the Cairo Branch in Illinois*, ICC Docket No. AB-167 (Sub-No. 56N) (ICC served Mar. 4, 1983) (not printed)).

Irving and other parties also rely on Vice Chairman Mulvey's separate comment in *Wis. Cent. Ltd.—Aban.—In Ozaukee, Sheboygan and Manitowoc Counties, Wisconsin*, STB Docket No. AB-303 (Sub-No. 27) (STB served Oct. 18, 2004), slip op. at 25, in their attempt to justify the imposition of access conditions on the abandonment. Again, this comment does not support the sort of forced access proposed here. In that case, Vice Chairman Mulvey suggested only that the carrier should be required to "enter into negotiations with any successor operator," necessarily implying that such negotiations may or may not result in a final agreement that may or may not include some form of access. *Id.*<sup>6</sup> Furthermore, even this negotiation requirement would have depended upon a demonstration by the successor operator that "such rights are necessary for its operations to be feasible." *Id.* Vice Chairman Mulvey's comment in *Wisconsin Central*, therefore, is simply a suggestion that negotiations might be required if a successor operator could meet a particular evidentiary prerequisite; it is not a suggestion, much less a mandate, regarding forced access at all.<sup>7</sup>

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<sup>6</sup> As the Board is aware, MMA and the State have been negotiating in an effort to reach a settlement pursuant to which the lines in question would be sold to the State. MMA has consistently stated that it would be willing to grant access rights in connection with any such settlement with the State. MMA has also consistently maintained that the Board does not have authority to grant such access in the absence of a settlement and over MMA's opposition. Given this context, it is incorrect for abandonment opponents to suggest that MMA has made "representations" in this proceeding that it would grant access rights unconditionally, and that MMA therefore should be "held" to such alleged "representations." See, e.g., *Supplemental Comments of Louisiana-Pacific Corporation* at 7 (filed Aug. 3, 2010).

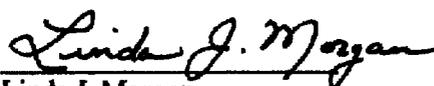
<sup>7</sup> Other abandonment opponents have suggested that the Board's decision in *Union Pac. R.R. Co.—Discontinuance of Trackage Rights and Aban.—In Natrona and Converse*

## CONCLUSION

Abandonment opponents ignore a clear line of Board and ICC precedent concluding that the Board lacks the authority to impose access conditions as part of an abandonment decision or in connection with an OFA transaction. MMA continues to believe that access over any of MMA's lines should be resolved by voluntary discussions between the parties.

Respectfully submitted,

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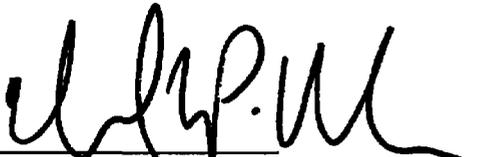
Dated: August 10, 2010

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Counties, Wyoming, STB Docket No. AB-33 (Sub-No. 113) (STB served Nov. 12, 1997), "indicated that [the Board's] interpretation of its authority under § 10904 is not as settled as the applicant suggests." Supplemental Comments of Twin Rivers Paper Company LLC and Fraser Timber Limited at 4 (filed Aug. 3, 2010). That case, however, suggested "novel issues of law and statutory interpretation" because it involved the question of whether Union Pacific, as part of an OFA transfer, could voluntarily convey its trackage rights over the lines of another rail carrier (BNSF) that was not a party to that proceeding. Union Pac. R.R. Co.—Discontinuance of Trackage Rights and Aban.—In Natrona and Converse Counties, Wyoming, slip op. at 14.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Reply Comments of Montreal, Maine & Atlantic Railway, Ltd. Concerning Access Issues this 10<sup>th</sup> day of August, 2010 by causing copies to be sent to the parties of record in these proceedings either by overnight delivery service or by United States mail, postage prepaid.

  
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Charles H.P. Vance