

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1043 (Sub-No. 1)

**MONTREAL, MAINE & ATLANTIC RAILWAY, LTD –
DISCONTINUANCE OF SERVICE AND ABANDONMENT –
IN AROOSTOOK AND PENOBSOT COUNTIES, MAINE**

**SUPPLEMENTAL REPLY COMMENTS OF
IRVING WOODLANDS LLC AND IRVING FOREST PRODUCTS, INC.**

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Irving Woodlands LLC and Irving Forest Products, Inc. (collectively, “Irving”) hereby file these Supplemental Reply Comments with the Surface Transportation Board (“Board” or “STB”) in response to the Comments of the Montreal, Maine & Atlantic Railway, Ltd. (“MMA”) and other railroad parties that were submitted to the Board on August 3, 2010 (collectively the “Railroad Comments”).

- I. The Railroad Parties Have Not Cited Any Legal Authority That Prohibits The Board From Attaching A Trackage Rights Condition Under 49 USC § 10903**
 - A. The Board has Broad Statutory Authority to Attach the Requested Trackage Rights Condition

The Supplemental Comments from Irving, the State of Maine, and other shipper interests firmly establish that the Board has broad authority under 49 USC § 10903 to adopt a trackage rights condition in any decision approving the MMA’s proposed abandonment, as long as the Board determines that such condition is required by the public convenience and necessity. The expansive scope of the Board’s conditioning authority under § 10903 was recognized by the Court of Appeals for the D.C. Circuit in *Consolidated Rail Corporation v. Interstate Commerce*

Commission, 29 F.3d 706, 714 (D.C. Cir. 1994) (As long as the condition is “required by the public convenience and necessity,” the authority to attach conditions to abandonment decisions has been found to have “no restriction.”). Significantly, the *Consolidated Rail* decision appeared less than two years before the Interstate Commerce Commission Termination Act of 1995, P.L. 104-88 (“ICCTA”). Congress completely revamped the national rail regulatory scheme in ICCTA, abolishing the ICC and fundamentally transforming many rail regulation statutes. However, the conditioning authority was left intact, though moved from former 49 USC § 10903(b)(1)(A) to current 49 USC § 10903(e)(1)(B). Congress’ failure to narrow the abandonment conditioning authority in the aftermath of the *Consolidated Rail* decision evidences its intent for the conditioning authority to remain unrestricted. “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 (n. 66) (1982), quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

MMA and other railroad parties have asserted that a trackage rights condition cannot be attached to an abandonment decision because 49 USC § 10903(e) does not specifically state that trackage rights conditions are authorized. MMA Supplementary Comments (“Supp. Comments”) at 5; Association of American Railroads (“AAR”) Supp. Comments at 8; Canadian Pacific Railway (“CP”) Supp. Comments at 7. However, no railroad party has identified any Board or ICC precedent that directly supports such a proposition. Virtually all precedent relied upon by the railroads concerns the OFA or feeder line process, which are governed by separate statutory provisions and policies. The sole abandonment decision which was cited is distinguishable because it does not specifically address the Board's authority to issue a trackage rights condition. See *Union Pacific Railroad Company – Abandonment – In Harris, Fort Bend*,

Austin, Wharton and Colorado Counties, TX, STB Docket No. AB-33 (Sub-No. 156), slip op. at 2 (served Nov. 8, 2000). Moreover, in that case, the track to be abandoned between Bellaire Junction and Chesterville connected with the BNSF Railway at Wallis, TX, such that any subsequent purchaser would not be captive to Union Pacific. In other words, there was no public interest justification for trackage rights as exists in this case.

Further, the Railroad Comments flatly ignore the plain language of the statute, which includes no restrictions on the conditions that can be attached other than adherence to the public convenience and necessity. *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and, if that is plain...the sole function of the courts is to enforce it according to its terms”). Indeed, the railroads argue for an overly narrow interpretation of § 10903(e) which would prevent the Board from attaching any conditions to an abandonment decision that are specifically mentioned in other ICCTA provisions but not in § 10903(e). This absurd result is obviously not what Congress intended, because it would render the conditioning authority in § 10903(e) meaningless.¹

B. The Abandonment Statute in Section 10903 is Distinguishable from the OFA Statute in Section 10904

As noted, the case authorities cited by the Railroad parties against the imposition of the trackage rights condition primarily address the Board’s conditioning authority under the Offer of Financial Assistance (“OFA”) statute at § 10904(e) and (f), and not the Abandonment statute at §

¹ Congress obviously knows how to remove options from the Board’s authority. *See, e.g.*, 49 USC § 11701(b) (the Board may dismiss complaints unwarranted for investigations, but “the Board may not dismiss a complaint...because of the absence of direct damage to the complainant”). *Cf.* 49 USC § 10907(g)(1) (person acquiring rail line under the feeder line process may elect to be exempt from any of the rail statutes, “except that such a person may not be exempt from the provisions of chapter 107 of this title with respect to transportation under a joint rate”).

10903(e). MMA Supp. Comments at 4; AAR Supp. Comments at 10-12; CP Supp. Comments at 8-11. The railroads' reliance on cases interpreting the OFA statute is misguided and improperly puts the cart before the horse. An OFA only comes into play after an abandonment has been approved, which has not happened in this case. Rather, the Board must first decide whether to approve, deny, or conditionally approve the proposed MMA abandonment under § 10903. This consideration requires adherence to the public interest standard and implementation of the rural and community development factor. 49 USC § 10903(d). Conversely, the OFA conditioning authority is entirely distinct, and is only applied if the railroad and OFA offeror fail to agree on terms of the sale. 49 USC § 10904(e).

Therefore, the request for a trackage rights condition is not an "end-run" around the OFA statute (AAR Supp. Comments at 11), because the Board must first determine if conditional approval of the MMA abandonment is required under § 10903. Irving, the State, and other other shipper parties have clearly established in their supplemental comments that the public interest and rural and community development factors of § 10903 require denial of the MMA application, or at least conditional approval of the proposed abandonment.

C. The Balancing Required by Section 10903 Favors Denial of the Abandonment or, at a Minimum, Attachment of a Trackage Rights Condition

The railroad parties also asserted that the Board has no authority to "force access" in this case via a trackage rights condition. However, conditioning the approval of the abandonment upon the negotiation of trackage rights between MMA and the State is not equivalent to a "forced access" order. Rather, conditional approval of the abandonment would give MMA an option: MMA can go forward with the abandonment if it agrees upon a trackage rights arrangement with the State, or MMA can avoid trackage rights by continuing to operate the rail lines proposed for abandonment ("Abandonment Lines" or "Lines").

Evaluation of the MMA application requires the Board to balance “the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other.” *Chicago & North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311, 321 (1981), citing *Purcell v. United States*, 315 U.S. 381, 384 (1942). See also *People of the State of Illinois v. United States*, 668 F.2d 923, 930 (1981), cert. denied, 102 S.Ct. 1631 (evaluation of an abandonment proposal requires balancing, and the railroad has the burden of proof). Balancing is a fact-specific exercise that is unique to each proposed abandonment. *Id.*, 668 F.2d at 932 (“Absent a clear showing why different treatment is required, each abandonment proceeding must be decided on its own merits.”).

In this case, Irving continues to believe that balancing favors denial of the MMA's proposed abandonment. Irving Protest at 6-8 (filed April 21, 2010). Nonetheless, as explained in depth in Irving's August 3 filing, if the Board is inclined to approve the abandonment, the balancing required by *Kalo Brick* favors imposing a trackage rights condition. In other words, without a trackage rights condition, the harm to Irving and other Northern Maine shippers from the proposed abandonment outweighs the burden on MMA from continued operations. Conversely, a trackage rights condition would operate to mitigate some of the harm resulting in a better balance of the competing interests involved in this proceeding.

II. The Railroads' Purported Policy Concerns Are Without Merit

MMA and other railroad parties claim that imposition of a trackage rights conditions will require the Board to undertake an overly complex factual analysis. MMA Supp. Comments at 10-12; AAR Supp. Comments at 12-14. This is a phantom concern. The voluminous factual record in this case is more than sufficient for the Board to evaluate and adopt the trackage rights condition. No additional evidence is needed. Moreover, any trackage rights terms would be

agreed upon initially by MMA and the State, and the Board would only need to become involved if those parties are unable to reach agreement. In fact, MMA agrees that the terms of the trackage right arrangement should be decided privately between itself and the State. MMA Supp. Comments at 11 (n. 7). Given that there are hundreds if not thousands of trackage rights agreements in effect across the United States, relatively standard terms can be used as a model. If MMA and the State do not reach agreement on terms and Board assistance is requested, there would be nothing unusual about such Board involvement.² The Board may set the terms of numerous other railroad arrangements. *See, e.g.*, 49 USC §§ 10901(d), 11102(c), and 11123(b).

MMA also contended that the Board will be required to engage in a complicated financial analysis of the new rail operator and MMA to determine the effect of any trackage rights condition on MMA. MMA Supp. Comments at 10-11. This assertion is contradicted by MMA's own desire to shed the traffic served on the Abandonment Lines based on its claims of financial hardship. MMA Application at 17 (the "low level of revenues generated by operations on the Abandonment Lines has made it impossible for MMA to maintain the lines"). *See also* MMA Application Verified Statement ("A.V.S.") of Robert Grindrod at 5. Consequently, MMA developed a business plan whereby MMA forgoes the revenues from traffic originating or terminating on the Lines in order to avoid the costs of maintaining and operating the Lines.

² The Board would retain oversight of any conditional abandonment decision as needed. *Lucas v. Township of Bethel*, 319 F.3d 595, 603 (3rd Cir. 2003) ("When an abandonment is conditional, the ICC retains jurisdiction over a railroad right of way until it has been abandoned pursuant to the conditions established by the federal agency."); *Hayfield Northern Railroad Company, Inc. v. Chicago and North Western Transportation Company*, 467 U.S. 622, 633 (1984). Conditions attached to an abandonment remain in place even after consummation of the abandonment. *Baros v. Texas Mexican Railway Company*, 400 F.3d 228, 234-235 (5th Cir. 2005).

Despite MMA's business plan for the future, which includes no revenue from Abandonment Lines traffic³, future rail operations by the State on the Lines would mean that MMA would be able to compete for additional revenue. Thus, MMA should be in favor of trackage rights that would enable the State to successfully acquire the Lines, and would provide MMA with an opportunity to earn additional revenues beyond its business plan as described in this proceeding. If MMA's service is superior to what the State could offer using the trackage rights, then MMA would earn the revenue from this traffic without having the burden of operating, maintaining, and investing in the Abandonment Lines. Irving Supp. Comments at 11-12. Hence, it is misguided to claim there is not enough traffic to support two railroads on the trackage rights segments. MMA Supp. Comments at 10. Even if the State were providing rail service based on the trackage rights, MMA would still earn a trackage rights fee to cover its incremental costs from the State's service. Thus, there would be no possible harm to MMA from trackage rights.

III. Reliance On Future Use Of Other Statutory Provisions To Address MMA's Poor Service And Rising Rates Would Not Meet The Board's Duties Under Section 10903 And Would Ignore The Record In This Case

AAR's claim that shippers' service concerns are "hypothetical" is directly contradicted by the substantial evidence in this proceeding regarding the business lost due to MMA's chronic service problems. AAR Supp. Comments at 16-17. The AAR also states that any service concerns can be addressed in the future under "the emergency and alternative service rules, the feeder line provisions, and enforcement of the statutory common carrier obligation." AAR Supp. Comments at 16-17 (internal citation omitted). This is an untenable position.

³ Grindrod A.V.S. at 7 (customers served by the Lines will make use of "alternative transportation...which will adequately replace MMA's rail service" if the abandonment is approved).

The Board has a current statutory duty under 49 USC § 10903 to implement the “public convenience and necessity” and to consider the impact on rural and community development for the proposed abandonment. The Board does not meet these obligations by ignoring the extensive evidence and requiring Northern Maine shippers to address such concerns through future Board litigation. Shippers who are already reeling from MMA’s poor service and the recent economic downturn should not have to engage in further costly and time-consuming Board litigation to protect their interests at issue in this abandonment proceeding. Forcing communities and shippers to wait for the resolution of future Board proceedings would not only be wasteful, violating 49 USC §§ 10101(2) and (15), but would also disregard the Board’s duties under § 10903 to protect the public interest and consider rural and community development.

Even if shippers were willing to wait and pursue expensive remedies under 49 USC §§ 10907, 11101, or 11123, such proceedings would not be decided until more business opportunities were lost and the success of the State’s rail operations were placed further into doubt.

IV. The Board Can Condition The Abandonment On A Trackage Rights Agreement That Provides For Connection To The Canadian National Railway

Several railroad parties have asserted that the Board has no jurisdiction to require MMA to provide trackage rights in Canada so that the State may connect to the Canadian National Railway (“CN”) at St. Leonard. This assertion erroneously characterizes the trackage rights condition as providing the Board with jurisdiction over rail operations in Canada. The Board need only condition the abandonment of the MMA lines *in the United States* upon a requirement that the MMA grant trackage rights on the northern segment between Madawaska and St. Leonard to allow for interchange with the CN. Thus, the STB would not be extending its jurisdiction over extra-territorial rail operations in Canada. Rather, the Board's jurisdiction

would remain over operations performed in the United States and whether the trackage rights condition is fulfilled by MMA. The Canadian authorities would retain jurisdiction over the actual rail operations occurring in Canada.

The public need for a connection at St. Leonard has been entirely created by MMA based on the structure of its “internal abandonment”, its desire not to serve the traffic on the Abandonment Lines, and its abysmal service as documented in this proceeding. As explained in its Supplemental Comments, MMA’s proposal to retain the northern line segment extending from Madawaska and southern line segment extending from Millinocket has greatly increased the harm that will be suffered by Irving and other Northern Maine businesses, if the abandonment is approved without the trackage rights condition.

Furthermore, if the Board approves the abandonment but fails to require the trackage rights condition, “then the State may not be able to complete the purchase” of the Abandonment Lines. State Supp. Comments at 9. In such a case, the northern segment would be stranded from the rest of the national rail system. The businesses and communities of the northern segment would be forced to rely on Canadian rail regulatory authority to reach the U.S. national rail network. *See* Motion to Dismiss at 2-4 (filed March 12, 2010). This can hardly be viewed as serving the public interest.⁴ For this reason, if the Board determines that it does not have authority to attach the trackage rights condition for connection to CN, then the abandonment application should be denied.⁵

⁴ For example, if rail lines in Canada were abandoned using the equivalent of 49 USC § 10903, then the Board would have no input on the Canadian abandonment decision, and the communities on the northern segment would be permanently barred from using a transit route through Canada to reach any rail customer or shipper in the U.S.

⁵ If the Board were to decide that it lacks the authority to impose a trackage rights condition into Canada, then at an absolute minimum, the Board should attach a condition that requires a trackage rights arrangement between MMA and the State to the U.S.-Canadian border.

V. Other Railroad Concerns Are Illusory

The AAR has further contended that if the Board attaches the trackage rights condition sought by the State, the Board “would be required to conduct an analysis of anticompetitive conduct in every abandonment case.” AAR Supp. Comments at 12. This sort of “slippery slope” assertion is utterly unconvincing and wildly hyperbolic. As the AAR surely knows, the vast majority of abandonments filed at the Board are exempt transactions under 49 USC § 10502 where the subject rail line is not currently used by any shipper. In virtually all such cases, there is no opposition to the abandonment, and approval occurs automatically. It is disingenuous to claim that the Board would be “required” to evaluate a possible trackage rights condition for these exempt cases.

In contrast, the trackage rights condition at issue here is appropriate based on the expansive scope and unique structure of the proposed transaction, as well as its substantial impact on Irving and other Northern Maine businesses. There are unique characteristics at play here, namely that the subject rail lines are heavily-used, that MMA has proposed an “internal abandonment” that would leave any future rail operator captive to MMA, that evidence in this case shows significant harm to the public if an unconditioned abandonment is approved, and that the northern segment would be stranded from direct access to the rest of the U.S. rail system without continued operations on the Abandonment Lines. These circumstances are unprecedented in the Board’s history, and unlikely to be repeated any time soon.

Lastly, a concern about employee protective conditions is based on a misconception of the State’s request. AAR believes the request is for “mandated trackage rights.” AAR Supp. Comments at 13. However, a trackage rights condition would not be “mandated” trackage rights; instead it is a condition for approval and would remain the choice of the MMA whether

the condition was implemented. Thus, the trackage rights would result from MMA's decision to abandon the Lines, and would not be mandated by the Board. Hence, an analogy to the employee protective conditions in the forced sale provisions of the feeder line statute is inapposite. 49 USC § 10907(e). Moreover, the Board will apply employee protective conditions to any decision approving the abandonment. *Oregon Short Line Railroad and the Union Pacific Railroad Company – Abandonment Portion – Goshen Branch Between Firth and Ammon, In Bingham and Bonneville Counties, Idaho*, ICC Docket No. AB-36 (Sub-No. 2), 360 ICC 91 (1979).

VI. Conclusion

Given the unique and unprecedented circumstances involved with the MMA's abandonment application, commensurate action by the Board is required to protect the public interest and implement the rural and community development factor of 49 USC § 10903(d). In short, the abandonment should be denied. However, if the Board decides to approve the abandonment it must be conditioned on the implementation of a trackage rights arrangement between MMA and the State in order to protect the public interest and reduce the substantial

harm that would otherwise result to Irving, the State, and the other Northern Maine businesses that depend on reliable and cost-effective rail service.

Respectfully submitted,

A handwritten signature in black ink that reads "Karyn A. Booth". The signature is written in a cursive style and is positioned above a horizontal line.

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August 10, 2010

CERTIFICATE OF SERVICE

I certify that on this 10th day of August 2010 I caused a copy of the foregoing to be served by e-mail or by first class mail, postage prepaid upon all parties of record.


Karyn Booth