

**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 PENOBSCOT COUNTIES, MAINE**

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

Karyn A. Booth
Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036
202.263.4108
202.331.8330 (fax)

*Attorneys for Irving Woodlands LLC and
Irving Forest Products, Inc.*

August 3, 2010

**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 PENOBSCOT COUNTIES, MAINE**

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

Irving Woodlands LLC and Irving Forest Products, Inc. (collectively, “Irving”) hereby file these Supplementary Comments with the Surface Transportation Board (“Board” or “STB”) pursuant to the Board’s decision issued on July 20, 2010. In its decision, the Board requested briefing on whether it may condition its abandonment decision in this proceeding by requiring access in the form of trackage or haulage rights over the applicant's retained rail lines, and whether it may establish the specific terms and conditions of such access rights. In these Supplementary Comments, Irving establishes that the Board has the authority under 49 USC § 10903 to take such action and strongly urges the Board to impose a trackage rights condition if the agency grants the abandonment application of the Montreal, Maine & Atlantic Railway, Ltd. (“MMA”).

I. Summary Of Argument

Irving continues to believe, as stated in its Protest filed on April 21, 2010, that the proposed abandonment of the Abandonment Lines¹ should not be approved because MMA has not met its burden of proof. The record in this proceeding clearly shows that the cessation of rail service over the Abandonment Lines would cause substantial harm to citizens, communities, and businesses in Northern Maine which far outweigh the burden to MMA in continuing rail service. Nonetheless, if the abandonment is approved, the Board should use its authority under 49 USC § 10903 to condition the abandonment on the existence of a trackage rights agreement between MMA and the State of Maine.² This agreement would allow the State to use trackage rights (1) between Millinocket and Brownville Junction for connection to the Eastern Maine Railway; and (2) between Madawaska and St. Leonard for connection to the Canadian National Railway.

These trackage rights are necessary to ensure that the interests of Northern Maine citizens, communities, and businesses are adequately protected in implementing the public convenience and necessity standard of 49 USC § 10903. Moreover, the trackage rights condition is necessary to address the statutory rural community and development factor of 49 USC § 10903(d). In short, conditioning the abandonment on a trackage rights agreement is necessary to serve the public interest. Without trackage rights, rail line operations on the Abandonment Lines would be hampered by the inefficiency of having multiple interchanges within a short

¹ Irving will use the term “Abandonment Lines” or “Lines” to refer to those rail lines proposed for abandonment in the MMA application filed February 25, 2010.

² Throughout these Supplementary Comments, Irving will refer to the “State” when discussing future rail operations on the Abandonment Lines. However, Irving believes the trackage rights condition attached to the abandonment decision should apply to any subsequent rail operator of the Abandonment Lines, and should apply regardless of whether the Lines are purchased through the Offer of Financial Assistance process.

distance, the well-documented poor rail service of MMA, and the negative financial impact of being captive to MMA. The last seven and a half years have established that MMA is incapable of successfully serving traffic from the Abandonment Lines. Without trackage rights, future rail operations on the Lines would be unsustainable and would likely fail, causing further economic harm to the shippers and communities of Northern Maine.

The Board should also retain jurisdiction to set the terms and price for the trackage rights agreement if MMA and the State are not able to reach agreement on such matters in the first instance.

II. The Board Has The Authority To Condition The Abandonment On The Existence Of A Trackage Rights Agreement

A. Section 10903(e) in ICCTA Expressly Authorizes the Board to Condition Its Approval of an Abandonment Application To Protect the Public Interest

The Board has exclusive and plenary authority under 49 USC § 10903 to regulate abandonment of railroad lines. *Chicago & North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311, 320 (1981). As part of this exclusive and plenary authority, Congress has given the Board wide latitude to attach conditions to abandonment decisions:

Subject to this section [10903] and sections 10904 and 1095 of this title, if the Board—

(1) finds public convenience and necessity, it shall—

(A) approve the application as filed; or

(B) *approve the application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity*

49 USC § 10903(e)(B) (emphasis added). Critically, Congress has put “no restriction” on the conditions that can be attached to an abandonment decision “other than that they must be required by the public convenience and necessity.” *Consolidated Rail Corporation v. Interstate*

Commerce Commission, 29 F.3d 706, 714 (D.C. Cir. 1994). See also *International Minerals & Chemical Corporation v. Interstate Commerce Commission*, 656 F.2d 251, 261 (7th Cir. 1981) (court denies challenge to “rational” condition attached to abandonment). Thus, the Board's conditioning authority is broad and limited only by the requirement that it be exercised to advance the public interest.

In using this authority, the Board and the ICC have imposed a wide variety of conditions on abandonment decisions. *Central Oregon & Pacific Railroad, Inc. – Abandonment and Discontinuance of Service – In Coos, Douglas, and Lane Counties, OR*, STB Docket No. AB-515 (Sub-No. 2), slip op. at 13-14 (served Oct. 31, 2008) (abandonment approval conditioned on (1) Union Pacific Railroad and Longview, Portland & Northern Railway obtaining abandonment authority for rail lines that would otherwise be stranded, and (2) final resolution of feeder line process in STB Docket No. 35160); *Soo Line Railroad Company, d/b/a Canadian Pacific Railway – Abandonment Exemption – In Hennepin County, MN*, STB Docket No. AB-57 (Sub-No. 40X), slip op. at 1 (served June 26, 1998) (separate railroad must obtain STB approval to discontinue trackage rights before abandonment can occur); *Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*, ICC Docket No. AB-167 (Sub-No. 1094), 8 ICC2d 773, 792 (1992) (proponent of adverse abandonment must post surety requirement to indemnify railroad for excessive demolition costs); *Southern Pacific Transportation Company Abandonment Between Bonita Junction and Seagoville in Nacogdoches, Rusk, Cherokee, Anderson, Kaufman, and Dallas Counties, Texas*, ICC Docket No. AB-12 (Sub-No. 53), 363 ICC 105, 108 (1980) (abandonment conditioned on SP sale of certain non-abandoned lines to subsidiary St. Louis Southwestern Railroad Company).

In attaching a condition to its abandonment decision, the Board would not be ordering or granting trackage rights. Instead, the Board would be conditionally granting the abandonment such that MMA must meet the conditions in order to move forward with the abandonment. In this way, the Board can fulfill the oft-competing twin goals of the abandonment statute. *Kalo Brick*, 450 U.S. at 321 (ICC “must 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.”), *citing Purcell v. United States*, 315 U.S. 381, 384 (1942). *See also South Orient Railroad Company, Ltd. – Abandonment and Discontinuance of Trackage Rights – Between San Angelo and Presidio, TX*, STB Docket No. AB-545, 3 STB 743, 757 (1998) (In evaluating a proposed abandonment, the Board must “balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce.”). If the Board were to grant the abandonment in this case over the strong objections of Irving, the State of Maine and other business and community interests, it should at least impose the trackage rights condition in order to mitigate the harm that would result if a new operator over the Abandonment Lines was captive at both ends to MMA.

Additionally, the trackage rights condition would allow the Board to meet its statutory obligation to consider the impact of abandonment on rural and community development. 49 USC § 10903(d). If MMA believes the condition is too onerous, it can simply forgo the abandonment and will not have to implement the condition. In short, the request does not seek “granting” of trackage rights; it seeks a condition to be attached to the abandonment decision if the abandonment is approved to protect the public interest.

B. Precedent Previously Cited By MMA Does Not Limit The Board's Authority To Attach The Requested Trackage Rights Condition

In its Rebuttal Evidence filed on May 25, 2010, MMA claimed that the Board does not have authority to attach conditions regarding trackage rights to an abandonment decision. MMA Rebuttal at 29-30. MMA's argument is contrary to the unrestricted authority given in 49 USC § 10903, not to mention contrary to the D.C. Circuit's opinion in *Consolidated Rail Corporation v. Interstate Commerce Commission*, 29 F.3d 706, 714 (D.C. Cir. 1994) (In describing the ICC's "broad authority" to add conditions to abandonment decisions, the court noted that "[t]here is no restriction placed on the conditions the ICC can impose other than that they must be required by the public convenience and necessity."). Moreover, the precedent cited by MMA is clearly inapposite to the issue at hand.

In the first two cases cited by MMA, a prospective rail line purchaser using the OFA statute requested that the ICC set the conditions of the OFA sale and also grant trackage rights over another rail line of the abandoning railroad. *Chicago & North Western Transportation Company – Abandonment Exemption – Mason City, IA*, ICC Docket No. AB-1 (Sub-No. 205X) (served Nov. 20, 1987); *Illinois Central Gulf Railroad Company – Abandonment – Between Tuscaloosa and Maplesville, AL*, ICC Docket No. AB-43 (Sub-No. 10) (served Aug. 7, 1984). The ICC rejected the request in both cases, finding that it was inappropriate to grant trackage rights as part of an OFA transfer. In contrast, the issue before the Board regarding the MMA abandonment application is whether to add a condition to the abandonment approval under Section 10903, not to grant trackage rights in an OFA sale governed by Section 10904.

The third case cited by MMA entailed a stand-alone request for trackage rights, purportedly on the authority of the feeder line statute. *Request for an Order Directing the*

Southern Pacific Transportation Company to Negotiate Trackage Rights with the Great Western Railway, ICC Docket No. 30872 (served Oct. 15, 1986). The request was denied because the feeder line statute concerns rail line acquisition, not trackage rights. As written, the decision does not address 49 USC § 10903 and does not preclude conditioning an abandonment approval by requiring the applicant and a third party to enter into a trackage rights agreement.

Clearly, the cases cited by MMA do not address the Board's abandonment conditioning authority under 49 USC § 10903. Furthermore, MMA's flawed interpretation of these three cases is contrary to a fourth ICC decision which left open the possibility of attaching a trackage rights condition to an abandonment decision. *Chicago & North Western Transportation Company – Abandonment Between Ringwood, IL and Geneva, WI*, ICC Docket No. AB-1 (Sub-No. 70F), 363 ICC 956, 962-963 (1981). See also *Wisconsin Central Ltd. – Abandonment – In Ozaukee, Sheboygan, and Manitowoc Counties, WI*, STB Docket No. AB-303 (Sub-No. 27), slip op. at 25, Vice Chairman Mulvey commenting (served Oct. 18, 2004).

III. If the Board Approves the MMA Application, It Must Protect the Public Interest By Requiring the State and MMA to Implement a Trackage Rights Agreement Rather Than Haulage Rights

Irving generally agrees, with two exceptions described below, with the parameters of the trackage rights condition described by the State on page 4 of its Offer of Financial Assistance (“OFA”) Application filed on July 19, 2010. In operating the rail lines after abandonment, the State should have (1) overhead trackage rights from Millinocket to Brownville Junction for connection to the Eastern Maine Railway; and (2) primarily overhead trackage rights from Madawaska to St. Leonard for connection to the Canadian National Railway.³ The State has also

³ This aspect of the trackage rights should give the State access across the Van Buren Bridge to the full extent of MMA's current rights, which would include interchange with Canadian National. Such a condition is warranted due to the large volume of cross border traffic, and it

asked for overhead trackage rights from Millinocket to Northern Maine Junction for connection to Pan Am Railways. While connection to Pan Am would be useful for the State, Irving believes the access issue at the southern end of the Lines would be sufficiently addressed by overhead trackage rights to Eastern Maine Railway at Brownville Junction.

Irving believes that the public interest supports a modification of the trackage rights requested by the State in two ways. First, the State should be able to serve the Van Buren transload facility, which is located on the Madawaska to St. Leonard portion of the MMA. Second, the State should also be able to serve the Fraser facility at Madawaska for all traffic inbound from the south and outbound to the south. These local rights would reduce the number of rail interchanges necessary for traffic to and from these two facilities, thus reducing the cost and complexity of rail operations. Due to the efficiency fostered by these local rights, the State would be able to offer better rail service at lower prices, and shippers would be able to move more traffic. Without these local rights, inefficiencies would result. For example, without local rights, all southbound traffic from Fraser would be handled first by MMA for a dramatically short rail movement of a few hundred feet. Then, interchange to the State on the Abandonment Lines would be required. The Board should recognize that the success of the Abandonment Lines in the future would be greatly increased with the limited local rights described herein, thus providing better rail service to Northern Maine and supporting the public interest standard of 49 USC § 10903. See also 49 USC §§ 10101(5) and (9), and 11102(a).

The Board has asked whether a haulage agreement would be sufficient access for the State. While haulage has the theoretical potential to be sufficient, the existence of haulage only,

would consist of the Board exercising jurisdiction only over the Abandonment Lines. *See, e.g.,* Pinette P.V.S. at 3. Irving is not aware of any restrictions that would prevent the parties from negotiating an agreement that provided the State with access rights to the Van Buren bridge in Canada.

without a trackage rights option, would realistically be doomed to fail for numerous reasons. First, MMA has repeatedly stated throughout this case, supported by numerous witnesses, statistics, spreadsheets, and analyses, that it “can no longer afford...to operate the Abandonment Lines” because they are a “proverbial financial anchor around MMA’s neck.” MMA Application at 23 and 2 (filed Feb. 25, 2010). MMA has calculated that it can only survive as a railroad if there is no obligation to serve the traffic generated by the Abandonment Lines. *See, e.g.*, Application Verified Statement (“A.V.S.”) of Robert Grindrod at 6 (serving the Lines’ traffic is a “drain on MMA’s cash [which] results in risks to other portions of MMA’s system”). A haulage arrangement would force MMA to continue serving traffic that it apparently does not have the cost structure to sustainably move.

A. Trackage Rights Are Necessary to Ensure Adequate Service Quality

As stated throughout this proceeding by numerous shippers, MMA's abysmal service has prevented shippers from increasing rail traffic levels and/or forced shippers to use other modes of transportation. Protest Verified Statement (“P.V.S.”) of Robert Pinette at 5-7 (filed April 21, 2010); Sass P.V.S. at 2-3; Motion to Dismiss Verified Statement (“M.D.V.S.”) of Brian Sass at 2-4 (filed March 12, 2010). A haulage arrangement would continue to subject the Lines’ traffic to the deleterious effects of MMA rail service – and do so when MMA itself said it would be better off not serving this traffic. MMA has a long history of ignoring the needs of lower-rated traffic such as logs and chips. Irving has repeatedly experienced MMA’s penchant for switching out cars filled with Irving’s forest products when a train is found too heavy for MMA’s locomotives. These Irving cars are parked in random locations on the MMA system, thus delaying delivery to Irving’s customers and stranding Irving’s railcars. Consequently, Irving must sometimes temporarily cease production because many of its railcars are stranded, idle, on

the MMA system. Additionally, time sensitive shipments cannot be sent by MMA rail transportation. Irving Protest at 11-12; Pinette P.V.S. at 5-7.

Moreover, a haulage arrangement would add another interchange – reducing efficiencies while increasing unnecessary delays and costs. For a movement from the Abandonment Lines to southern Maine, for instance, use of haulage would require two interchanges within just 37 miles (at Millinocket and Brownville Junction). Each interchange requires time, switching, and expense. Reliance on haulage would add inefficiency and cost, thereby acting as a unnecessary burden on the ability of the State to make operation of the Lines succeed.⁴

Trackage rights are also necessary because MMA has repeatedly revealed that it is not interested in the high volume, low-rated log and chip traffic that is a key product of the Abandonment Lines area. Commodities such as these can be successfully transported via rail if efficient, high-volume service is provided. Large blocks of cars are used, and they must be turned quickly in order to maximize railcar utilization. Including a time-consuming interchange at Millinocket or Madawaska adds inefficiency and undermines the potential for a successful transition to a new operator.⁵

B. Trackage Rights Are Necessary To Prevent Future Rail Operations From Being Captive To MMA

Without trackage rights, all rail traffic from the Abandonment Lines would have to pass through MMA's control before reaching any other railroad or any destination not located on MMA. This would enable MMA to price its portion of the rail service such that the revenue

⁴ In addition, MMA has not shown that adequate trackage exists at Madawaska and Millinocket to physically enable interchange to occur.

⁵ If the Board were to decide to condition the abandonment on implementation of a haulage agreement, then Irving urges the Board to provide the State with the unilateral right to trigger the above-described trackage rights if the concerns regarding poor rail service, inefficiencies, and higher costs materialize as anticipated by Irving and other shippers.

remaining for the State would only cover its variable costs of service. The State would not have the ability to use revenue for capital investment in the Abandonment Lines. All efforts by the State and shippers at increasing efficiency, reducing costs, and streamlining service would be negated by MMA's ability to raise its rates, thereby siphoning off the benefits created by the work of the State and the shippers. This is directly contrary to the national rail transportation policy of 49 USC §§ 10101(1), (2), (4), (5), (9), and (12). Thus, approving the abandonment without the trackage rights would not serve the public interest.

If the Board does approve the abandonment with no trackage rights condition, it is entirely likely that other U.S. railroads may attempt similar "internal" abandonments. State and local governments have an inevitable interest in saving jobs and fostering economic growth; when a heavily used rail line is included in an abandonment, it is entirely plausible that some governmental entity would step forward to save the rail service. Of course, any newly created internal shortline railroad would be captive at both ends to the abandoning railroad, which would then be able to absorb all excess revenue while taxpayers must make capital investments in the subject rail line. The abandoning railroad would get all the benefits of monopoly pricing without the requirement of maintaining the rail lines creating the traffic. Action by the Board in this case, by attaching a trackage rights condition to the MMA abandonment decision, is necessary to discourage this type of railroad behavior.

C. MMA Would Benefit From Trackage Rights

Conditioning the abandonment on a trackage rights agreement between the State and MMA would actually provide a benefit to MMA. Throughout this proceeding, MMA has described the financial drain caused by ownership and operation of the Abandonment Lines. Despite MMA's "herculean efforts" to attract sufficient traffic to the Lines, the "low level of

revenues generated by operations on the Abandonment Lines has made it impossible for MMA to maintain the lines.” Grindrod A.V.S. at 5; MMA Application at 17. In fact, MMA has determined that it is better off forgoing the revenues from traffic originating or terminating on the Lines in order to avoid the costs of maintaining and operating the Lines.

If the abandonment is conditioned on a trackage rights agreement, then rail operations on the Lines are likely to continue, but with the State as operator. Customers served by the Lines would still use rail service. Most importantly, MMA would be able to compete for the revenues from this rail traffic. That is, MMA could compete with the State for service outbound from Madawaska and Millinocket (or inbound to Madawaska and Millinocket). If MMA’s service and proposal were 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. MMA has deemed its rail system to be profitable except for the Abandonment Lines; the addition of further incremental revenue to the same truncated but profitable rail system can only aid MMA.

Without conditioning the abandonment on a trackage rights agreement, however, rail service on the Abandonment Lines may permanently cease. If the proposed abandonment is approved and rail service ceases, MMA envisions that rail customers served by the Lines will make use of “alternative transportation...which will adequately replace MMA’s rail service.” Grindrod A.V.S. at 7. Hence, abandonment without trackage rights would entail permanently lost revenue for MMA. Conversely, adding a trackage rights condition would give MMA the opportunity to earn incremental revenue and, therefore, benefits MMA.

IV. Trackage Rights Are Necessary At Both The Northern And Southern Ends Of The Abandonment Lines

Access is needed at both ends of the Abandonment Lines for numerous reasons. First, the State would be severely limited by the MMA quality of service if trackage rights do not exist at both ends. Significant volumes of Irving traffic would use both the northern and southern trackage rights segments. For example, Irving uses rail service for transport of logs and other forest products from Maine to a mill in St. Leonard; at the southern end, Irving uses rail service for transportation of forest products to locations in southern Maine and southern New Brunswick. Pinette P.V.S. at 2-3; McGonigle A.V.S. at 16. Without trackage rights, the traffic of Irving and other shippers would be detrimentally affected by MMA's cost structure, reliability and service problems, and various other factors that contributed to the failure of the Abandonment Lines. Lack of trackage rights at either end would also ignore the lesson of the past eight years – that MMA faces serious obstacles in serving traffic from the Abandonment Lines. Given that the State is interested in effectively serving traffic from the Abandonment Lines via a new operator, the Board should allow the State to serve the Lines' traffic without having to rely on MMA for haulage at either end.

Reliable and cost-effective rail service provided by the State would likely result in business growth for Irving and other shippers. Irving Protest at 11. Moreover, trackage rights at both ends may open opportunities for Irving and other shippers to reach multiple markets that were not viable when MMA was the only operator. Use of trackage rights rather than haulage rights at both ends would ensure that MMA would not simply obtain the Lines' traffic by default; instead, MMA would only serve the Lines' traffic as a result of successful competition. The efficiencies and cost savings inherent in competition would create the best result for the communities and businesses of Northern Maine.

V. The Terms of the Trackage Rights Condition Should be Negotiated Between the State and MMA But the Board Should Establish Such Terms if the Parties Cannot Reach Agreement

If the abandonment is approved and the Board conditions the approval on implementation of the trackage rights discussed above, the State and MMA should negotiate the terms and conditions of the trackage rights arrangement, including the fee to be paid to MMA. If an agreement can not be achieved between such parties, either the State or MMA should have the right to petition the Board to determine the trackage rights terms, conditions, and fee.

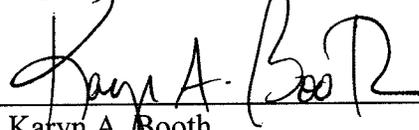
The trackage rights fee should be set at a reasonable level sufficient to compensate MMA for the incremental use of its track and consistent with standard industry practice. Of course, a fee set too high would eviscerate the entire purpose of the overhead trackage rights – to enable the State to have an opportunity to succeed in performing or arranging rail service without the distorting influence of MMA pricing.

The trackage rights should have a sufficiently long term, such as ten years, so that businesses would be able to rely on consistent rail operations and a predictable economic environment. Automatic renewal rights would also be appropriate. Fees earned by MMA from the trackage rights should be invested in the track associated with the State's train movements. The agreement should ensure that State trains are treated fairly in priority and dispatching, with no discrimination in favor of MMA trains. Standard indemnity and liability terms can be included such that each party is responsible for damages caused by or resulting from its own actions. In the event MMA seeks abandonment or discontinuance authority for the trackage rights segments of track, or any portion thereof, then the State should have the right of first refusal to acquire such track. Finally, Irving believes that it would be appropriate for the Board to maintain oversight of implementation of the trackage rights condition.

VI. CONCLUSION

For all the reasons set forth above, the Board should condition any approval of the abandonment in this proceeding by requiring MMA and the State to negotiate a trackage rights arrangement consistent with the comments set forth herein.

Respectfully submitted,



Karyn A. Booth
Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036
202.263.4108
202.331.8330 (fax)

*Attorneys for Irving Woodlands LLC and
Irving Forest Products, Inc.*

August 3, 2010

CERTIFICATE OF SERVICE

I certify that on this 3rd 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.



David E. Benz