

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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MONTREAL, MAINE & ATLANTIC	)	
RAILWAY LTD. – DISCONTINUANCE OF	)	Docket No. AB-1043
SERVICE AND ABANDONMENT – IN	)	(Sub-No. 1)
AROOSTOOK AND PENOBSCOT	)	
COUNTIES, MAINE	)	

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**REPLY SUPPLEMENTAL COMMENTS OF  
LOUISIANA-PACIFIC CORPORATION**

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Dated: August 10, 2010

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**REPLY SUPPLEMENTAL COMMENTS OF  
LOUISIANA-PACIFIC CORPORATION**

Louisiana-Pacific Corporation (“LP”) hereby submits the following Reply Supplemental Comments pursuant to the Board’s decision served in this proceeding on July 20, 2010 (“July 20 Decision”). In this Reply, LP responds to the initial supplemental comments submitted by the Montreal, Maine & Atlantic Railway Ltd. (“MMA”), as well as the intervenor supplemental comments submitted by the Canadian Pacific Railway (“CP”), the Kansas City Southern Railway (“KCS”), and the Association of American Railroads (“AAR”) (collectively, “the Railroads”).

**I.**

**INTRODUCTION**

In its Opening Comments, LP demonstrated that the Board has virtually unlimited authority under 49 U.S.C. §10903 to impose such conditions on its approval of an abandonment as may be necessary to satisfy the public convenience and necessity, and that in this case a condition requiring the grant to a state-designated successor carrier of trackage rights to reach carriers other than MMA is absolutely necessary in order to allow

such a successor carrier to operate viably and thereby mitigate, to some extent, the devastating impacts the proposed abandonment would otherwise have on affected shippers including LP, and on the entire region of northern Maine that would lose access to economical rail service if the lines in question are abandoned. LP also demonstrated that a second condition, the grant of haulage rights to the successor carrier over MMA's line to St. Jean, PQ, is needed in order to limit MMA's ability effectively to "close" the route over which LP's traffic currently moves to Chicago and beyond.

In its Opening Comments, MMA – echoed by the AAR, KCS, and CP – argues that the Board (a) lacks authority under §10903 to include either trackage rights or haulage rights among the conditions it imposes on an abandonment, and (b) in any event lacks jurisdiction over the northernmost end of the Madawaska-St. Leonard line, which is in Canada, and therefore cannot "impose" trackage rights over that segment. MMA and the AAR also contend that, even if the Board could lawfully impose the requested access conditions on its proposed abandonment, it should decline to exercise that authority because doing so could result in a need for the Board to resolve difficult operational and financial terms if the parties (MMA and the State or its designated successor operator) are unable to do so.

As demonstrated in LP's Opening Comments, and further herein, the Railroads' arguments against the imposition of the requested access conditions in this case cannot withstand careful scrutiny. To the contrary, it is clear that if the Board determines that the proposed abandonment would only be consistent with the public

convenience and necessity if MMA agrees to offer the trackage and haulage rights the protestants have requested, *the Board has the authority to so conclude*, and to impose such a condition on its approval of the abandonment. It would then be entirely up to MMA whether to accept that condition and proceed with the abandonment, or to reject the condition, in which case the abandonment could not be consummated and the *status quo* would be maintained.

## II.

### **THE BOARD'S AUTHORITY TO IMPOSE SUCH CONDITIONS ON ITS APPROVAL OF AN ABANDONMENT AS IT REASONABLY CONCLUDES ARE NEEDED TO RECONCILE THE ABANDONMENT WITH THE PUBLIC CONVENIENCE AND NECESSITY IS NOT SUBJECT TO AN IMPLIED EXCEPTION FOR TRACKAGE OR OTHER ACCESS RIGHTS**

MMA and the AAR argue at some length that, notwithstanding the broad and facially unrestricted language of §10903(e) authorizing the Board to impose such conditions as it finds are “required by the public convenience and necessity,” Congress actually intended to carve out an implicit exception for trackage rights or other access conditions from that broad language. Specifically, MMA and the AAR contend that, because the Board was given explicit authority under 49 U.S.C. §§10907, 11102, and 11324 to impose trackage rights against an unwilling carrier, Congress’ failure to mention trackage rights in §10903(e) must mean that Congress did not intend to confer such authority in proceedings conducted under that provision. As another protestant has

observed,<sup>1</sup> this line of reasoning is commonly referred to by the Latin maxim “*expressio unius est exclusio alterius*.”

The Railroads’ *expressio unius* argument is facile, but ultimately untenable. In the first place, *expressio unius* is not a rule of law but simply one of many aids in construing ambiguous language, *United States v. Barnes*, 222 U.S. 513, 519 (1912). However, there is no such ambiguity here in the statute for the Board to construe. The Board’s conditioning authority under §10903(e) is direct and unambiguous: any condition may be adopted so long as the condition is found by the Board to be “required by the public convenience and necessity.”

Second, on examination, the Railroads’ *expressio unius* arguments are clearly negated by other, more persuasive indicia of Congressional intent. *See, e.g., Chevron USA Inc. v. Echazabal*, 536 U.S. 73, 80 (2002); *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001). Turning first to the Railroads’ reliance on §§10907 and 11102, each of those provisions empowers the Board to impose *mandatory* trackage rights upon a carrier that has not itself sought any relief from the Board and simply wishes to preserve the *status quo*. As such, each of those provisions authorizes the Board to order a *forced taking* from the defendant carrier of the full and unfettered use of its private property (strictly speaking, a forced *shared usage* of that property by an unwelcome tenant). It is hardly surprising, therefore, that Congress deemed it necessary to make its intention to grant such authority explicit, inasmuch as it is well-established

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<sup>1</sup> Supplemental Comments of Huber Engineered Woods (Aug. 3, 2010) at 6.

that the courts will not lightly infer authority for a taking in the absence of explicit statutory language. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952); *City of Cincinnati v. Vester*, 281 U.S. 439, 446-49 (1930).<sup>2</sup>

Section 10903, by contrast, does not authorize the Board to *order* an unwilling railroad to do *anything* – rather, it simply vests the Board with the authority to *permit* a railroad to abandon some or all of its common carrier lines, subject to such conditions as the Board finds are necessary to satisfy the public convenience and necessity. Even after abandonment has been authorized, with or without conditions, the railroad is not obligated to exercise that authority, and remains free not to consummate its proposed abandonment. *See, e.g., Norfolk Southern Ry. – Abandonment Exemption – in Kanawha County, WV*, STB Docket No. AB 290 (Sub-No. 267X), (STB served June 25, 2010) at 1 (“When a carrier is authorized to abandon a line, that authority is permissive,

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<sup>2</sup> Section 10904 at least arguably falls into the same category as §§10907 and 11102, because once it is invoked, it vests the Board with power to prescribe the terms and conditions for sale of the line to a financially responsible offeror, and such terms will then bind the carrier, requiring it to sell even if it does not like the price or other terms. *See, e.g., Trinidad Ry. – Abandonment Exemption – in Las Animas County, CO*, STB Docket No. AB-573X (STB served Apr. 17, 2002), 2002 WL 563606 at \*3 (Offers of Financial Assistance (“OFAs”) involve “an involuntary taking of property”); *Increasing the Offer of Financial Assistance Purchase Price to Compensate for the Tax Liability Incurred on the Sale of Personal Property*, ICC Ex Parte No. 274 (Sub-No. 19), (ICC Decided Feb. 16, 1990), 1990 WL 287314 at \*2 (“an OFA sale constitutes an involuntary conversion”); *Chicago and N.W. Transp. Co. – Abandonment -- Between Clintonville and Eland, WI*, 363 I.C.C. 975, 976-77 (1981) (describing the OFA procedures as a “grant of authority from Congress mak[ing] the Commission a quasi-judicial condemnation tribunal” because “[u]nder no circumstances can a carrier reject [the Agency’s] determination of a fair subsidy amount or purchase price and terms”).

not mandatory. The carrier can choose to exercise that authority or not.”<sup>3</sup> As such, a trackage or haulage rights condition imposed on a permissive authorization to abandon under §10903 simply does not constitute the sort of “taking” for which explicit Congressional authorization would have been expected or required. Accordingly, the contrast between the explicit language in §§10907 and 11102, and the more general language in §10903(e), is quite natural and understandable, without resort to canons such as “*expressio unius.*” The Railroads’ reliance on that maxim is misplaced – nothing in those sections supports an inference that Congress intended §10903’s broad language to be limited by an implicit exception for access conditions.

Indeed, if the Board were to rely on *expressio unius* to interpret the broad general conditioning language of §10903(e), LP submits that a proper and more logical application of the maxim would actually cut *against* the Railroads’ arguments. Specifically, in §10903(b)(2), Congress specified that the conditions imposed under §10903(e) must include specified labor protection conditions, demonstrating that it knew how to limit the Board’s discretion under the broad language of the latter subsection when it wanted to do so. Accordingly, Congress’ failure to prohibit the imposition of trackage rights as a condition under the broad language §10903(e) is an indication that no such prohibition was intended.

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<sup>3</sup> Even in the case of “adverse” abandonments sought by third parties, the Board’s approval of the abandonment simply removes the federal “shield” from the defendant railroad’s operation of the lines at issue, thereby allowing state condemnation or other law to apply, and does not itself order the railroad to do anything. *Cf. Hayfield N. R.R. v. Chicago & N. W. Transp. Co.*, 467 U.S. 622 (1984).

The Railroads' reliance on §11324, which authorizes the imposition of trackage rights as a condition in merger proceedings, is likewise misplaced. The trackage rights language in that section was added in the *ICC Termination Act of 1995*, Pub. L. 104-88, 109 Stat. 803 (1995) ("ICCTA"), and its legislative history reveals that it was intended to "elaborate" on "the existing power [of the agency] to impose conditions on the approval of a merger,"<sup>4</sup> as well as to specify that the trackage rights included in such conditions "must provide for compensation arrangements that ensure the alleviation of the underlying anticompetitive effects sought to be avoided by imposing the trackage rights conditions" (*id.*). Section 10903(e), by contrast, was simply carried over from prior law without substantive change (*id.* at 180-81), and thus it cannot be inferred that Congress considered and deliberately rejected a comparable "elaboration" on the Board's conditioning power under §10903. Rather, it seems more likely that the general conditioning language in §10903(e) was not modified because it simply never occurred to Congress, when it was considering which provisions of former law to carry forward without change under ICCTA and which to carry forward with modifications, that §10903(e) needed any clarification. *Cf. El Paso Natural Gas Co. v. Neztosie et al.*, 526 U.S. 473, 487 (1999), where the Court, after rejecting reliance on the *expressio unius* maxim, went on to observe that the apparent inconsistency in the statute at issue was most likely the result of "inadvertence" rather than a deliberate choice by Congress, and

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<sup>4</sup> H.R. Rep. 104-422 at 191 (ICCTA Conference Report).

that sometimes “silence is not pregnant.”<sup>5</sup> LP respectfully submits that this, like *El Paso*, is such a case.

## II.

### **IMPOSITION OF A TRACKAGE RIGHTS CONDITION WITH RESPECT TO THE MADAWASKA-ST. LEONARD LINE WILL NOT EXCEED THE BOARD’S JURISDICTION, WHICH IS PREDICATED UPON MMA’S PROPOSAL TO ABANDON TRACKAGE LOCATED ENTIRELY WITHIN THE UNITED STATES.**

The Railroads next argue that, even if the Board has the authority under §10903(e) to condition its approval of an abandonment application on the applicant’s agreement to grant trackage or other access rights to another carrier, the Board cannot do so with respect to the portion of MMA’s Madawaska-St. Leonard line that lies in Canada without exceeding the geographical limits of its regulatory authority.

The Railroads’ jurisdictional argument is a complete red herring. Of course, the Board is not addressing here the tougher issue of whether it can affirmatively grant trackage rights over a carrier’s trackage lying outside the United States pursuant to, *e.g.*, §10907 or §11102, without exceeding its jurisdiction. However, the Railroads’ suggestion that any such applicable constraints apply to the Board’s conditioning authority under §10903 is without merit, because it is predicated upon a fundamental

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<sup>5</sup> “Why, then, the congressional silence on tribal courts? If ‘*expressio unius . . .*’ fails to explain the Congress’s failure to provide for tribal-court removal, what is the explanation? After all we have said, inadvertence seems the most likely. We have not been told of any nuclear testing laboratories or reactors on reservation lands, and if none was brought to the attention of Congress either, Congress probably would never have expected an occasion for asserting tribal jurisdiction over claims like these. *Now and then silence is not pregnant.*” *Id.* (emphasis added).

mischaracterization of what the Board actually does under that section. Specifically, as discussed in the previous section of this Reply, a Board decision conditionally approving a carrier's abandonment application under §10903 does not *order* the applicant to do *anything*, it simply *permits* the applicant to abandon the lines at issue if, and only if, the carrier agrees to comply with those conditions. Accordingly, if the Board grants the requests of LP, the State, and the other protestants for a trackage rights condition extending over the entire Madawaska-St. Leonard line, the legal effect of that order will not be a *prescription* of trackage rights over the line; rather, such an order will simply constitute a *conditional authorization* for MMA to abandon a portion of its trackage that lies entirely within the United States and concededly is within the Board's jurisdiction, only if MMA agrees in return to grant *voluntary* trackage rights to the carrier designated by the State to take over operation of the lines MMA is abandoning. No one has argued that MMA lacks the power to grant such rights on a voluntary basis, subject to whatever review Canada might require with respect to the few thousand feet of the line that lie north of the US-Canada border.<sup>6</sup> Accordingly, if the Board reasonably concludes that such trackage rights are required in order to reconcile MMA's proposed abandonment with the public convenience and necessity, its order conditioning approval of the

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<sup>6</sup> Nor has anyone suggested that Canadian authorities would deny approval of such MMA-conferred trackage rights, but in the remote event that such approval were withheld, MMA's good-faith but ultimately unsuccessful effort to convey the trackage rights would presumably be deemed to satisfy the Board's condition.

abandonment upon MMA's agreement to grant such rights would not exceed the Board's jurisdiction.<sup>7</sup>

### III.

#### **THE RAILROADS' OTHER ARGUMENTS AGAINST EXERCISE OF THE BOARD'S AUTHORITY TO IMPOSE TRackage AND HAULAGE RIGHTS CONDITIONS UPON ITS APPROVAL OF MMA'S ABANDONMENT APPLICATION ARE WITHOUT MERIT**

Finally, MMA and the AAR argue – although the July 20 Order did not specifically request evidence or argument on the point – that even if the Board concludes that it has the authority under §10903 to impose trackage rights and haulage rights conditions on its approval of MMA's proposed abandonment, it should refrain from doing so for practical reasons. They argue that consideration of access rights would delay the Board's processing of abandonment applications, and that it would necessarily involve the Board in complex and difficult disputes concerning the appropriate compensation for such access rights, as well as the operational terms that would govern haulage services or shared usage of facilities (*i.e.*, trackage rights), all of which should, they contend, be left for the parties to resolve.

The Railroads' "practical" arguments against access conditions are no more probative than their legal arguments. To begin with, while it might be true that *routine* consideration of access conditions in every abandonment case (most of which, of course,

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<sup>7</sup> A Board decision to impose the requested trackage rights condition would of course be subject to judicial review under the "arbitrary and capricious" and "abuse of discretion" standards of 5 U.S.C. §706(2)(A), but for the reasons discussed in the text it could not properly be overturned under 5 U.S.C. §706(2)(C) as exceeding the Board's

are processed under individual or class exemption procedures) could slow down the Board's expedited procedures for handling such cases, no one is suggesting that such consideration be routine. To the contrary, as the Board itself has recognized throughout this proceeding, MMA's abandonment proceeding is in many respects *sui generis* – no abandonment proceeding since the days of massive abandonments by bankrupt carriers in the 1970's has involved such a significant adverse impact on such a large part of a state, as well as on so many rail-dependent shippers. Consideration of trackage rights and haulage rights conditions in this unique and most consequential case would in no way imply a readiness on the part of the Board to entertain similar consideration in the more typical cases it processes every year.

The Railroads' invocation of the specter of difficult operational and cost/financial issues is no more persuasive. In the first place, *protestants agree* that the Board need not, and should not, resolve such issues at this time. Rather, protestants agree that the parties should be allowed to continue negotiations with respect to the terms and conditions, including compensation, that would govern the successor carrier's use of either trackage or haulage rights over the MMA, and that the Board will need to become involved only if and when the parties reach a complete impasse, and one side or the other requests the Board to step in and resolve the matter.

Assuming however that the Board eventually does have to adjudicate any intractable disputes among the parties over operational or cost/financial terms, it is plain

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statutory jurisdiction.

that the Board is the proper body, with the necessary experience and expertise, to do so. In particular, the Board (and its predecessor, the Interstate Commerce Commission) have for decades entertained and resolved disputes among railroads over trackage rights fees and other terms, as well as related operational disagreements, most recently with respect to the massive trackage rights imposed as a condition to its approval of the 1996 merger of the Union Pacific and Southern Pacific Railroads. *See Union Pacific Corp. et al. – Control and Merger – Southern Pacific Rail Corp. et al.*, STB Finance Docket No. 32760 (STB served Oct. 22, 2002); *id.* (STB served Mar. 21, 2002); *id.* (STB served Dec. 20, 2001). Accordingly, the Railroads’ suggestion that such disputes could involve the Board in matters outside its authority or expertise, simply will not wash.

To reiterate, imposition of the requested trackage rights and haulage conditions requested by LP, the State, and the other protestants will not necessarily require the Board to resolve any disputes over the implementation of such conditions, but if such disputes eventually do reach the Board, the Board is amply equipped to consider and resolve them.

#### **IV.**

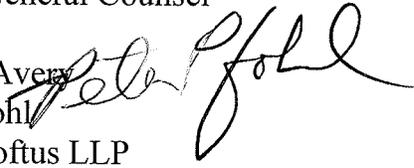
#### **CONCLUSION**

For the reasons set forth in LP’s April 21, 2010 Comments and Protest, its August 3, 2010 Supplemental Comments, and these Reply Supplemental Comments, LP respectfully submits that the public convenience and necessity does not support the Board granting discontinuance and abandonment absent the granting of appropriate conditions

as have been requested by LP and other protestants which are necessary to ameliorate the harmful effects of the transaction on LP, other affected shippers in the region, and a wide expanse of rural communities in northern Maine.

Respectfully submitted,

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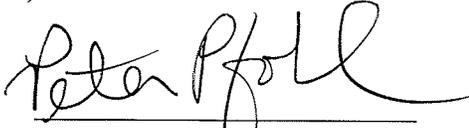
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Dated: August 10, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 10th day of August, 2010, caused copies of the foregoing Reply Supplemental Comments to be served on all known parties of record in STB Docket No. AB-1043 (Sub-No. 1).

  
Peter A. Pfohl