

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

**MONTREAL, MAINE & ATLANTIC RY., LTD.**

**- DISCONTINUANCE OF SERVICE AND ABANDONMENT -  
IN AROOSTOOK AND PENOBSCOT COUNTIES, MAINE**

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**REPLY OF  
STATE OF MAINE, DEPARTMENT OF TRANSPORTATION  
TO SUPPLEMENTAL COMMENTS ON ACCESS CONDITIONS**

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Dated: August 10, 2010

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The State of Maine, by and through its Department of Transportation (“State”), files this Reply in response to the supplemental comments on access conditions filed by various parties to the proceeding and other interested parties in response to the request of the Board as set forth in its decision served July 20, 2010 (the “July 20 Decision”). The comments filed by the State and the shippers<sup>1</sup> looking to preserve service over the Abandonment Lines provide evidence of and support for the need for trackage rights to be imposed as conditions of any abandonment authority, and of the power of the Board to impose such conditions. The Applicant Montreal, Maine & Atlantic Ry., Ltd. (“MMA”), as well as the Association of American Railroads (“AAR”) and other railroads<sup>2</sup> that are not parties to the proceeding, argue that the Board does not have the power to impose trackage rights or other access conditions on an abandonment. MMA and the railroads also argue that the Board does not have the power to impose any condition or

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<sup>1</sup> The affected shippers who filed include Irving Woodlands LLC and Irving Forest Products, Inc. (collectively, “Irving”), Louisiana-Pacific Corporation (“LP”), Huber Engineered Woods, LLC (“Huber”), and Twin Rivers Paper Company (“Twin Rivers”) and Fraser Timber Limited (“FTL”). Seven Islands Land Company and Maine Woods Company also submitted letters that were attached to the State’s Supplemental Filing, Exhibit C.

<sup>2</sup> The non-party railroads who filed include Kansas City Southern (“KCS”) and Canadian Pacific Railway (“CP”).

make any determination of terms and conditions of rights on lines beyond the US/Canadian border at St. Leonard. The arguments of the two sides have been clearly drawn, and the State will not repeat in full the arguments previously made. Instead, the State will respond briefly to various points raised in the supplemental comments on access that were filed.

## **DISCUSSION**

### **The need for trackage rights.**

The State and shipper comments make clear that if a new operator is going to be able to operate the Abandonment Lines successfully, it will need the direct access to connecting carriers that MMA currently can provide. This is necessary so that the operator will not be solely dependent on MMA for the pricing and handling of traffic to and from the Abandonment Lines. No one seriously challenges the need for this access.<sup>3</sup>

There has been a strong preference expressed for trackage rights over haulage, on both an operational and legal basis. As noted by a number of parties, haulage agreements are generally not subject to the Board's jurisdiction, and the Board would not be able to oversee such arrangements. Further, although haulage may make sense commercially in certain circumstances, it adds an additional physical interchange to what is already a short haul, and it leaves the traffic dependent on MMA for scheduling and service – the very areas about which the shippers have been complaining.

### **The power to impose conditions on abandonment authority.**

MMA and the other railroads point to decisions that provide that the Board should not impose trackage rights as part of an OFA under 49 USC §10904. The decisions compare the language of Section 10904 which speaks generally of setting terms and conditions to that of 49

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<sup>3</sup> At the public hearing in Presque Isle, MMA argued only that it thought that haulage rights would provide sufficient access, not that such access was not necessary for the operator.

USC §10907 (governing feeder line applications) where limited trackage rights are expressly permitted, and conclude that Section 10904 does not allow for imposition of trackage rights. The State believes that because there are no limitations on the types of conditions that the Board can impose, the Board should be able to impose trackage rights under the appropriate circumstances, just as it can impose other types of conditions. *See Chelsea Property Owners – Abandonment – Portion of Conrail’s West 30<sup>th</sup> Street Secondary Track in New York, NY*, 8 ICC 2d. 773, 705 n.23 (1992) (Commission authorized to impose any conditions required by the public convenience and necessity). Examples of various types of conditions that have been imposed in abandonment proceedings are set forth in the supplemental comments filed by Irving and LP.

Even if the decisions cited by MMA and the railroads are accepted, they do not lead to a similar limitation on the Board’s power to impose conditions as part of any abandonment authorization under 49 USC §10903. There are important distinctions between the underlying statutory provisions. Sections 10904 and 10907 both deal with forced sales – once the Board establishes the terms and conditions, the railroad is required to accept the offer; it has no choice. On the other hand, abandonment authority granted under Section 10903 is permissive – the railroad has the choice of whether to exercise the authority.

Further, Section 10903(e)(1)(B) includes the added directive that the Board require conditions that are required by the public convenience and necessity. Trackage rights, as a prerequisite of continued rail service in this case, support the directive of Section 10903(d) to consider the adverse impacts of abandonment on rural and community development, and rail transportation policy as set forth in 49 USC §10101.

A determination by the Board that it has the power to impose a trackage rights condition, does not mean, as suggested by the railroads, that the issue would be raised in every

abandonment proceeding. The Board could certainly determine guidelines for when it would consider such a condition (just as it has guidelines for when it will impose conditions in merger cases). This abandonment proceeding is unique in its size and scope. It involves over 200 miles of rail lines providing the only rail service to over 20 active shippers (with 9000 annual carloads) in a largely rural, economically challenged region. Here, it is particularly in the public interest to do what is necessary to preserve rail service. Granting abandonment authority with the requested trackage rights condition would allow MMA to stop operating lines that it has determined it no longer wants to operate, while making it possible for a new operator to have the chance to successfully operate the lines without having to rely on the carrier that no longer wants to provide the service.

Thus, if the Board were to determine in this proceeding that a trackage rights condition was necessary to serve the public interest by making continued rail service feasible, then it could choose to require MMA to grant the requested trackage rights as a condition of being relieved from its operating and maintenance obligations. MMA could then elect whether to accept the condition, or to reject the condition and continue to operate. The effect of a Section 10903 condition may be similar to one imposed as part of an OFA under Section 10904, but the process is different.

If the Board believes that the preservation of service is important in this case, but that it does not have the power to impose trackage rights conditions to make a new operator's operations feasible, then it should deny the abandonment.

**The power to grant conditions relating to operations across the border.**

As discussed above, because abandonment authority under Section 10903 is permissive, the State believes that the Board has the power to impose as a condition on the abandonment of

lines in the United States, a requirement that the abandoning carrier grant access to a connecting carrier even if such access rights would cross the border. If the Board however does not believe it can order any actions to be taken that involve operations on the other side of the border, then the State asks that the Board require a grant of trackage rights to the border. The State would then seek to negotiate the remaining access with MMA, or absent agreement seek relief under Canadian law.

Even if the Board were to impose a requirement that MMA grant trackage rights across the border to the connection with Canadian National in St. Leonard, the State acknowledges that the Board would not have the authority to set terms and conditions for the portion of the trackage rights in Canada. Again, the State would then need to either negotiate the terms with MMA, or absent agreement seek relief under Canadian law.

**The ability of Board to set trackage rights terms and conditions in a timely manner.**

MMA, and to a lesser extent AAR, argue that the Board should not impose the trackage rights conditions because it would be overly complicated for the Board to set terms and conditions if the parties cannot agree. As has been previously noted, the State and MMA have been negotiating the terms of a possible acquisition including access. If the Board were to grant the requested abandonment authority conditioned on the grant of trackage rights, there is still the opportunity for the State and MMA to reach agreement on the terms and conditions that would govern.

However, if they do not, the Board is well equipped to make the necessary determinations, and in fact, it does so in other instances. While the Board (and its predecessor) prefer that the parties negotiate terms and conditions of trackage rights, if they are unable to do so the Board has the general power to do so. *See Denver Terminal Railroad Company – Adverse*

*Discontinuance – In Denver, CO* STB Docket No. AB-446 (Sub-No. 2) (served January 9, 1997) (affirming the Board’s jurisdiction to fix terms and conditions of trackage rights agreements, and requiring the parties to negotiate in good faith before asking the Board to set the terms and conditions); *TP&E – Trackage Rights Compensation – PPU*, ICC Finance Docket No. 26476 (Sub-No.1) (served September 20, 1995), 1994 ICC LEXIS 175 (resolving a dispute between the parties over trackage rights compensation). The decisions can be made promptly if necessary. *Se, e.g., BN/SF Merger*, ICC Finance Docket No. 32549, Decision No. 38 (served August 23, 1995), ordering paragraphs 33 and 35 (giving the applicant and the trackage rights user 10 days to negotiate terms or to submit proposals to the Commission, with a determination to be made within 20 days). There are already abandonment procedures in place for the setting of terms and conditions when the parties cannot agree. 49 USC §10904; 49 CFR §1152.27(g). Thus, the possible need to set terms and conditions is certainly not a reason not to impose a trackage rights condition.

## CONCLUSION

Based on the foregoing and the State's Supplemental Filing on Access Conditions, and the unique circumstances of this proceeding, the State hereby requests that the Board find that it has the power to require MMA to grant the trackage rights requested by the State, either as a condition to any abandonment authority granted under 49 USC §10903, or as part of the OFA submitted by the State under 49 USC §10904.

Respectfully submitted,

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Dated: August 10, 2010

Attorneys for State of Maine, Department of  
Transportation

## CERTIFICATE OF SERVICE

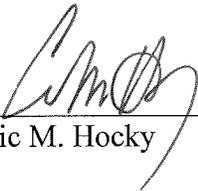
I hereby certify that on the date set forth below, I caused a copy of the foregoing Supplemental Filing on Access Issues to be served electronically on counsel for Montreal, Maine and Atlantic Ry., Ltd., as follows:

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and to be served on all other parties of record either electronically or by U.S. first class mail, postage prepaid.

Dated: August 10, 2010

  
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