

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

**HUBER ENGINEERED WOODS, LLC'S RESPONSE TO THE
SURFACE TRANSPORTATION BOARD'S JULY 20, 2010,
REQUEST FOR ADDITIONAL BRIEFING**

Dated: August 3, 2010

Respectfully submitted,

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BACKGROUND

Pending before the Surface Transportation Board (“Board”) is the application of the Montreal, Maine & Atlantic Railway (“MMA”) to abandon approximately 233 miles of its track in northern Maine. On July 19, 2010, the State of Maine (“State”) filed an Offer of Financial Assistance to take over operation of the lines to be abandoned, an offer conditioned in part on access by the new carrier to rail carriers other than MMA at both the northern and southern termini of the lines to be abandoned. STATE OF MAINE OFFER OF FINANCIAL ASSISTANCE at 4. In its order of July 20, 2010, the Board requested briefing “from interested parties as to whether provisions of 49 U.S.C. § 10903 and 49 U.S.C. § 10904 would support the imposition of conditions in this case requiring access of any sort, including trackage and haulage rights” JULY 20 ORDER at 3. As a shipper served by the lines in question, and as a participant in the July 7, 2010, hearing on this matter, Huber Engineered Woods, LLC (“Huber”) submits this brief and the Supplemental Verified Statement of Alan Weber in support of imposing trackage rights as a condition for MMA to abandon service on its lines of track in question.

ARGUMENT

To approve its abandonment application MMA has invoked the authority Congress provided the Board in 49 U.S.C. § 10903. That provision expressly grants the Board unfettered authority to impose conditions on abandonments. The purpose

to section 10903, as evidenced by the express language of § 10903(d) and in its legislative history, is to protect rural communities against disruptive railroad abandonments. Given that provision and the impact abandonment will have on the communities of northern Maine, the Board should impose trackage rights as a condition of abandonment.

I. THE BOARD SHOULD IMPOSE TRACKAGE RIGHTS AS A CONDITION OF APPROVING MMA'S ABANDONMENT APPLICATION.

Huber fully supports the request of the State, other shippers and interested parties in imposing trackage rights on MMA as a condition of approving its abandonment application. *See* SUPPLEMENTAL STATEMENT OF ALAN WEBER at 1-2. The benefits of such conditions are obvious – they will improve competition in the market for transportation services in northern Maine. *Id.* at 2. Huber believes trackage rights are preferable; if MMA wants to offer haulage services to a new operator, it can still do so on its own. *Id.*

II. THE BOARD HAS AUTHORITY TO IMPOSE TRACKAGE RIGHTS IN THIS CASE BECAUSE THE PURPOSE OF SECTION 10903 IS TO PROTECT RURAL COMMUNITIES AGAINST THE ADVERSE EFFECTS OF RAILROAD ABANDONMENTS.

Because Section 10903's purpose is to protect rural communities, that provision permits the STB to impose trackage rights on MMA's abandonment application. The importance of protecting rural communities is demonstrated by the plain language and legislative history of this section.

Under section 10903, a railroad abandonment can occur “only if the Board finds that the present or future public convenience and necessity require or permit the abandonment . . .” 49 U.S.C. § 10903(d). In analyzing “public convenience and necessity,” the Board must consider whether the abandonment “will have a serious, adverse impact on rural and community development.” *Id.* Adequate protection for rural communities is thus the keystone to any abandonment proceeding. The Board simply cannot approve an abandonment that, as here, severely adversely impacts rural community interests. Instead, the public convenience and necessity compel denial of MMA’s abandonment application.

The legislative history of section 10903 also demonstrates congressional intent to protect rural communities. Section 10903 was originally enacted as a part of the I.C.C. Termination Act of 1995. Representative Susan Molinari, then chair of the Subcommittee on Railroads of the House Transportation Committee and author of section 10903, explained the importance of protecting rural communities in abandonment proceedings. Representative Molinari explained that in drafting the bill, the subcommittee:

“addressed the concerns of rural areas and other communities served by financially marginal rail lines. We have tried to promote a more comprehensive approach to evaluating proposed abandonments, while emphasizing the option of sales to small railroads in order to keep these lines in service.”

I.C.C. TERMINATION ACT OF 1995: HEARINGS ON H.R. 2539 BEFORE THE H. Comm. on Transp. and Infrs., 104th Cong. (1995) (statement of Rep. Susan Molinari,

Chairwomen, H. Comm. on Transp. and Infrs.) (reported at 1995 WL 647944). This critical protection for rural communities has been at the heart of section 10903 since Congress enacted that section.

With the importance of rural communities in mind, Congress granted the Board broad authority to impose conditions necessary to protect rural communities when approving abandonment applications. In subsection (e) of section 10903, Congress allowed the Board to approve railroad abandonments “with modifications” and allowed the Board to “require compliance with conditions that the Board finds are required by the public convenience and necessity.” 49 U.S.C. § 10903(e)(1)(B).

Because the Board must consider an abandonment’s impact on rural communities, it can impose conditions on any abandonment application to mitigate an adverse impact. Congress, moreover, imposed no specific limitations on the Board’s power to impose conditions on abandonment. Here, where the State and numerous shippers have testified to the broad, adverse impact from abandonment on many communities in northern Maine and have specifically requested trackage rights be granted to a new operator of the abandonment lines, the Board has statutory authority to condition MMA’s abandonment on the grant of trackage rights to a new operator. *Cf. Wisconsin Cent. Ltd. – Abandonment – In Ozaukee, Sheboygan and Manitowoc Counties, WI*, STB Dkt. No. AB-303 (Sub. No. 27) (Oct. 18, 2004), at 25 (Mulvey, Vice Chairman, concurring) (abandonment could be conditioned on imposition of trackage rights if requested by a party). To hold that the Board cannot impose trackage rights

as a condition under 10903(e)(1)(B) would render that subsection superfluous and would frustrate the statute's purpose of protecting rural communities.

III. NEITHER PRIOR ICC PRECEDENT NOR SPECIFIC REFERENCES IN OTHER PROVISIONS OF TITLE 49 PRECLUDE THE STB FROM IMPOSING TRackage RIGHTS AS A CONDITION OF APPROVING MMA'S ABANDONMENT APPLICATION.

MMA has previously cited decisions by the Interstate Commerce Commission that purportedly preclude the imposition of trackage rights in abandonment proceedings. REBUTTAL ARGUMENT OF MMA at 29-30 (filed May 26, 2010). MMA's argument overlooks the importance of section 10903's limitations on abandonment approvals that might otherwise occur under section 10904, which MMA's precedent construed. Section 10903 expressly states that abandonment may occur as provided by section 10904 only if the public convenience and necessity permit abandonment – which they will not if there will be a severe, adverse impact on rural communities and interests. *See* 49 U.S.C. § 10903(d). This important limitation, enacted as part of the I.C.C. Termination Act of 1995 and after the decisions MMA cites as authority, neutralizes any relevance section 10904 might have on this case. To proceed under section 10903, as MMA has elected to do, must show that its abandonment proposal will not to have an unduly adverse impact on rural communities. Its burden – to show that the public convenience and necessity support abandonment – can only be met in this case with the imposition of trackage rights.

Nor can MMA argue that Congress's express authorization of trackage rights in sections 10907 and 11324 of Title 49 prohibits the Board from imposing trackage rights under section 10903, where trackage rights are not explicitly mentioned. This argument, based on the Latin maxim *expressio unius est exclusio alterius*, does not apply to independent statutory sections. See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). While these statutory sections have similar purposes, these provisions are not so closely associated as to assume Congress meant to prohibit imposing trackage rights as a condition of abandonment simply because such rights are not expressly mentioned in section 10903.

Second, *expressio unius* is "an aid to construction, not a rule of law. It can never override clear and contrary evidences of Congressional intent." *Neuberger v. Comm'r*, 311 U.S. 83, 88 (1940). In this statute, Congress has expressed its intent that rural communities be protected in railroad abandonment proceedings, authorizing the Board to impose whatever conditions are necessary to protect rural interests. Adopting MMA's statutory argument would frustrate this important provision. *Expressio unius* should not be applied "to work a destruction" on section 10903's protection of rural interests and the "general principle upon which [it is] based." *Cont'l Ill. Nat'l Bank & Trust Co. of Chicago v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 677-678 (1935).

IV. THE BOARD SHOULD ESTABLISH THE TERMS AND CONDITIONS OF TRACKAGE RIGHTS IF THE PARTIES CANNOT NEGOTIATE THEM

In its July 20 order, the Board invited comments on the terms and conditions of any trackage rights, including cost and duration. Huber believes that the Board should step in to set such terms and conditions under its existing rules and precedent if the State and MMA cannot agree to those terms. But MMA represented at the July 7 public hearing it would agree to commercially reasonable terms and conditions, and it should be held to that representation. Huber also notes that trackage rights should have a duration concurrent with the continued existence of rail service on the lines to be abandoned, and transferrable to any operator of those lines.

CONCLUSION

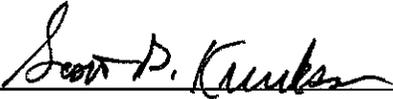
Section 10903 grants the Board authority to impose trackage rights in this case. Given the statute's purpose of protecting rural communities from the loss of rail service, the conditions authorized by section 10903 must be interpreted to permit the Board to protect rural communities with necessary conditions, including trackage rights to new operators.¹

¹ In its July 20 order, the Board also invited comment on the question whether its authority to impose trackage rights extended to permitting an interchange with a Canadian carrier. In an earlier filing MMA did not identify any comparable problem in retaining its Madawaska segment, which could only be accessed through Canada. MMA REPLY TO MOTION TO REJECT OR DISMISS at 6-7 (filed March 15, 2010). Trackage rights that would place a new carrier in the same position as MMA is today (pre-abandonment) should present no extra-territorial limitations on the Board's

Dated: August 3, 2010

Respectfully submitted,

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authority under section 10903. It would be the new operator, like MMA, that would potentially be subject to Canadian regulatory authority if its service crosses the border.

CERTIFICATE OF SERVICE

I certify that on this 3rd day of August, 2010, I caused a copy of the foregoing to be served by Federal Express and/or U.S. Mail upon the following parties:

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SUPPLEMENTAL VERIFIED STATEMENT OF ALAN WEBER
(PUBLIC VERSION)

Dated: August 2, 2010

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SUPPLEMENTAL VERIFIED STATEMENT OF ALAN WEBER

My name is Alan Weber. I am the Vice President of Supply Chain and Logistics for Huber Engineered Woods, LLC (“Huber”). I understand that on July 20, 2010, the Surface Transportation Board requested additional comments from affected parties on the location and type of access the Board should order if it approves the abandonment application of the Montreal, Maine & Atlantic Railway, Ltd. (“MMA”). I provide my supplemental statement in response to that Order.

Huber believes that if the Board approves abandonment, it should impose conditions on MMA that allow a new operator access to other railroads at both the northern and southern ends of the lines to be abandoned. For a shipper like Huber, which uses rail to both receive inputs and ship finished product, direct access to other carriers will ensure that MMA cannot exert undue market power over its remaining rail lines to reach interchange points north and south. If MMA’s market power is not restrained by competition with other rail carriers, and not just trucks, Huber will incur significant added transportation costs. MMA’s switching charges to reach other carriers could easily

be several hundred dollars a car, while transloading product to trucks to avoid these charges could be even more expensive. These added transportation costs will increase operating costs significantly at Huber's Easton plant, while increased shipping costs for finished product will be borne by Huber's customers. Expensive switching charges will divert traffic from rail to truck. For a switching charge of [] per car, for example, Huber will expect as much [] of outbound shipments that would go by rail would go by truck instead. These added costs will adversely impact Huber's Easton plant, reducing its competitiveness and long-term prospects.

As a shipper, Huber will also benefit from competitive access at both the northern and southern ends of the lines to be abandoned. On the northern end, Huber will be able to receive inputs and ship finished product. Moreover, on the southern end, there are opportunities to interchange at Brownville Junction and Northern Maine Junction to ship finished product. In its order approving abandonment, the Board should make both those interchange points available to a new operator.

In terms of trackage versus haulage rights, Huber believes trackage rights are preferable, as they will give the new operator greater operational and marketing flexibility. Moreover, trackage rights will help avoid the service issues that MMA has presented. Nevertheless, MMA will still be able to offer haulage services to a new operator if MMA elects to do so.

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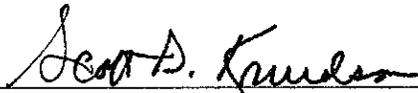
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