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April 29, 2024

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: STB Docket No. FD 36710—*Richmond Waterfront Ind. Park, LLC*—
Petition for Declaratory Order

Dear Ms. Brown:

This letter is filed on behalf of the Petitioner, Richmond Waterfront Industrial Park, LLC (“RWIP”) in the captioned proceeding, for the purpose of informing the Surface Transportation Board that on April 25, 2024, RWIP filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, Eastern District that seeks that court’s review of the Opinion of the Superior Court of Pennsylvania addressed by the Supplement to Petition for Declaratory Order (“Supplement”) filed by RWIP in this docket on April 9, 2024. A copy of the Petition is attached hereto for the Board’s reference. RWIP stated it intended to pursue this further judicial appeal at page 4 of the Supplement. RWIP reiterates its request that the Board act on the Petition for Declaratory Order for the reasons stated in that petition and the Supplement.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Thomas W. Wilcox
*Attorney for Richmond Waterfront
Industrial Park*

Law Office of Thomas W. Wilcox

Letter to Cynthia T. Brown

April 29, 2024

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Cc: Mr. Jeffrey P. Lewis
Mr. Stephen Foxman

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT, NO.: _____

RICHMOND WATERFRONT INDUSTRIAL PARK, LLC

v.

PHILADELPHIA BELT LINE RAILROAD COMPANY

Petition of: **RICHMOND WATERFRONT INDUSTRIAL PARK, LLC**

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the Opinion and Order entered on March 25, 2024 in the Superior Court of Pennsylvania, Docket No. 1172 EDA 2023, affirming the Order entered December 6, 2022, In the Court of Common Pleas of Philadelphia County Civil Division at No: 02872 March 2022, dismissing this action for lack of subject matter jurisdiction

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PETITION FOR ALLOWANCE OF APPEAL

AND NOW, comes the Petitioner, Richmond Waterfront Industrial Park, LLC (“Petitioner RWIP”), by its counsel, Eckert, Seamans, Cherin & Mellott, LLC and the Law Office of Thomas W. Wilcox, Esquire, LLC, *pro hac vice*, and hereby petition this Honorable Court, pursuant to Pa.R.A.P. 1111, *et seq.*, as follows:

This presents an appeal from the Order of the Superior Court of Pennsylvania at 362 MDA 2023 (“Superior Court Appeal”), filed March 25, 2024, affirming the Order entered December 6, 2022, In the Court of Common Pleas of Philadelphia County, Civil Division at No: 02872 March 2022 (“Trial Court Action”) (Djerassi), as against Petitioner RWIP and in favor of Respondent, Philadelphia Belt Line Railroad Company (“Respondent PBL”) (“Trial Court Order”).

The Trial Court Order dismissed this action for lack of subject matter jurisdiction.

Special and important reasons exist to allow the appeal pursuant to Pa.R.A.P.

1114(a), in that:

- The “Question Presented is One of First Impression” and thus satisfying the standard governing an allowance of appeal pursuant to Pa.R.A.P. 1114(b)(3).
- The Question Presented is of “Substantial Public Importance as to Require Prompt and Definitive Resolution by the Pennsylvania Supreme Court,” thus satisfying the standard governing an allowance of appeal pursuant to Pa.R.A.P. 1114(b)(4).

- The Superior Court order that the trial court lacks subject matter jurisdiction was “erroneously entered...dismissing an appeal” and thus satisfying the standard governing an allowance of appeal pursuant to Pa.R.A.P. 1114(b)(7).

I. REFERENCE TO OPINIONS BELOW

The precedential Superior Court opinion, issued on March 25, 2024, which has not yet been officially published, is currently only referenced at *Richmond Waterfront Industrial Park, LLC v. Philadelphia Belt Line Railroad Company*, 2024 PA Super 57, 2024 WL 1245334, __A.3d___. Accordingly, it is only now available electronically at *Richmond Waterfront Industrial Park, LLC v. Philadelphia Belt Line Railroad Company*, 2024 WL 1245334. A copy of this opinion is attached hereto as Appendix A.

The Trial Court Order is not available electronically, but a copy of which is attached hereto as Appendix B.

The memorandum opinion of March 1, 2023 of the Court of Common Pleas of Philadelphia County (Djerassi) is not available electronically, but a copy of which is attached hereto as Appendix C.

II. ORDERS IN QUESTION

BY THE SUPERIOR COURT OF PENNSYLVANIA

Filed: March 25, 2024

No. 1172 EDA 2023

Plaintiff [Petitioner RWIP] argues that the railroad tracks on the Property are not subject to the [Surface Transportation Board’s (“STB”)] jurisdiction because Defendant [Respondent PBL] is allegedly not a rail carrier. The STB, however, has held that

Defendant [Respondent PBL] is a rail carrier with respect to its tracks running from north of the Property to south of the Property and that those tracks connected to Conrail tracks and were used to transport “approximately 2,894 carloads annually, of predominantly chemicals, intermodal containers, and import-export freight.” *Philadelphia Belt Line Railroad Co. v. Consolidated Rail Corp.*, STB Docket No. FD 32802, 1996 WL 362996 (“*Conrail*”), at *1-*2 (STB July 2, 1996). Although the STB dismissed Defendant’s [Respondent PBL’s] complaint in that case, it did so on the ground that Defendant [Respondent PBL] was not entitled to relief and not because the STB lacked jurisdiction. *Id.*, 1996 WL 362996, at *5-*6.

2[footnote in the opinion] While Plaintiff [Petitioner RWIP] also alleged a claim that Defendant does not have a valid right of way because Plaintiff’s [Petitioner RWIP’s] deed did not state that the Property was subject to Defendant’s [Respondent PBL’s] right of way, Amended Complaint ¶¶10-13, 39-44, Plaintiff has subsequently admitted that its ownership of the Property is subject to Defendant’s [Respondent PBL’s] right of way. Plaintiff’s Verified Statement in Support of STB Petition at 1-2 (stating under penalty of perjury that Plaintiff [Petitioner RWIP] “purchased the Property subject to an existing railroad right-of-way easement in favor of the Philadelphia Belt Line Railroad Company (“PBL”) which is 33 feet wide and runs the length of two parcels of the Property in a north-south direction for 2,719 feet”).

Philadelphia Belt Line Rail Road Co. - Petition for Declaratory Order, STB Docket No. FD 35345 (Aug. 3, 2010) (“*STB 2010 Order*”), does not support Plaintiff’s [Petitioner RWIP’s] claim that the STB lacks jurisdiction over the tracks on the Property. In that case, the STB held that it did not have jurisdiction over Defendant’s [Respondent PBL’s] right of way in a different part of Philadelphia because no railroad tracks had been constructed on that portion of Defendant’s [Respondent PBL’s] right of way and Defendant [Respondent PBL] was therefore not a rail carrier with respect to its right of way at the location. *Id.*, slip op at 3-6. Here, in contrast, Plaintiff [Petitioner RWIP] admits that there are railroad tracks on Defendant’s [Respondent PBL’s] right of way on the Property. Plaintiff’s Verified Statement in Support of STB Petition at 1-2.

Plaintiff [Petitioner RWIP] also argues that the trial court erred in ruling on the jurisdictional issue without discovery. Plaintiff [Petitioner RWIP], however, did not request any discovery on the issue of jurisdiction before the trial court ruled on the preliminary objections. Rather, it argued that the trial court should overrule the preliminary objections without discovery. Plaintiff’s [Petitioner RWIP’s] Opposition to Preliminary Objections ¶¶ 28-46; Plaintiff’s [Petitioner RWIP’s] Memorandum in Opposition to Preliminary Objections at 8-9, 17-20. The only reference that Plaintiff [Petitioner RWIP] made to discovery in its response to Defendant’s preliminary objections was in response to a different preliminary objection, a demurrer to one count of the complaint, and concerned merits discovery. Plaintiff’s [Petitioner RWIP’s] Memorandum in Opposition to Preliminary Objections at 14.

Moreover, given the STB's ruling that Defendant is a rail carrier with respect to its railroad tracks in the part of Philadelphia that includes the Property, *Philadelphia Belt Line Railroad Co. v. Consolidated Rail Corp.*, 1996 WL 362996, at *1-*2, and the STB's exclusive jurisdiction over rail carriers' railroad tracks, we believe that remand for jurisdictional discovery would be inappropriate because any determination that there are facts that remove these tracks from the STB's jurisdiction must be made by the STB, not by our courts. Indeed, Plaintiff [Petitioner RWIP] recognizes that deferring to the STB is an appropriate way of resolving this jurisdictional issue. Not only has Plaintiff [Petitioner RWIP] sought both a ruling from the STB that the STB lacks jurisdiction over the tracks at issue here and discovery on the jurisdictional issue in that STB proceeding, STB Petition at 2, 5 n.13, 15-17, 21-22, but Plaintiff [Petitioner RWIP] has represented to this Court that the jurisdictional question here "presents critical and complex factual and legal issues that are within the STB's expertise." Appellant's [Petitioner RWIP's] Application for Stay at 5.

Because the STB has held that Defendant is a rail carrier, Defendant's [Respondent PBL's] railroad tracks on the Property are within the exclusive jurisdiction of the STB unless and until the STB, in its expertise, concludes that there are particular facts concerning these tracks that remove them from its jurisdiction. To date, the STB has made no determination that it lacks jurisdiction over Defendant's [Respondent PBL's] tracks on the Property. The trial court therefore properly concluded that it lacked subject matter jurisdiction over this action seeking an adjudication that Defendant's [Respondent PBL's] railroad tracks on the Property have been abandoned, and its dismissal of this action without prejudice must be affirmed.

BY THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

Filed: December 6, 2022 (Trial Court Order) No. 02872 March 2022

[I]t is hereby **ORDERED** as follows:

1. Objections to Count I, II, and III^[1] pursuant to Pa. R. C. P. 1028 (a) (4)- legal insufficiency of a pleading (demurrer) - are **OVERRULED**.
2. Objection to Count IV^[2] pursuant to Pa. R.C.P. 1028 (a) (1) - lack of subject matter jurisdiction - is **SUSTAINED** and Plaintiff's complaint is **DISMISSED**.

¹ There is no dispute by the parties or the trial court that the Count concerning the jurisdiction issue is Count III, not Count IV. In its memorandum filed subsequently on March 1, 2023, the trial court correctly references Count III, as the count addressing jurisdiction. See, Appendix C, *Infra*.

² See, *Supra*.

Strasberg Scooters, LLC v Strasburg Rail Road, Inc. 210 A.2d 1064, 1069 (Pa. Super. 2019) (“Strasberg Rail”) (“Simply put... if, for example, an action concerns the 'operation or abandonment' of side tracks, the trial court must dismiss the action due to the STB's exclusive jurisdiction over the proceedings”).

As this court does not have subject matter jurisdiction, Plaintiff must bring the matter to the federal Safety[sic] Transportation Board ("STB") pursuant to the ICC Termination Act of 1995 (ICCTA), 49 U.S.C. Sec. 1050 I et seq. The Act completely preempts state action when it comes to determining if a railroad has abandoned its tracks. See *Cedarapids, Inc. v. Chicago, Central & Pacific R. Co.*, 265 F Supp. 2d 1005, 1012 (N.D. Iowa 2003) ("the STB has exclusive jurisdiction over: (2) the construction, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located entirely in one state").

Without subject matter jurisdiction, we offer no procedure for Plaintiff to follow if the STB finds the tracks at issue have been abandoned.

III. QUESTIONS PRESENTED FOR REVIEW

- A. Whether the “Question Presented is one of first impression” and thus satisfying the standard governing an allowance of appeal pursuant to Pa.R.A.P. 1114(b)(3).
- B. Whether the Question Presented is of “Substantial Public Importance as to Require Prompt and Definitive Resolution by the Pennsylvania Supreme Court,” thus satisfying the standard governing an allowance of appeal pursuant to Pa.R.A.P. 1114(b)(4).
- C. Whether the Superior Court of Pennsylvania’s ruling that the trial court lacked subject matter jurisdiction was “erroneously

entered...dismissing an appeal” and thus satisfying the standard governing an allowance of appeal pursuant to Pa.R.A.P. 1114(b)(7).

IV. STATEMENT OF PLACE OF PRESERVING ISSUES

Petitioner RWIP raised the issues herein as follows:

In the Trial Court Action, raised its Opposition to PBL’s (Defendant’s/Respondent’s) Preliminary Objections to Plaintiff’s (Petitioner RWIP’s) Complaint, (Reproduced Record³ (“RR”) 033a -p. 2), its Opposition to PBL’s (Defendant’s/Respondent’s) Preliminary Objections to Plaintiff’s (Petitioner RWIP’s) Amended Complaint, (R. 103a-6-9), which Plaintiff (Petitioner RWIP) had pled over as a matter of course, and in its briefs in support thereof. The Court of Common Pleas sustained the Preliminary Objections to Plaintiff’s (Petitioner RWIP’s) Amended Complaint, dismissing this case for lack of subject matter jurisdiction, (R.224a-p. 1).

Plaintiff (Petitioner RWIP) raised the same issues in its appeal from the Trial Court Order to the Superior Court of Pennsylvania in its Appellate brief (Petitioner RWIP’s Brief at pp.), Appellant’s reply brief (Petitioner’s RWIP Reply Brief)⁴ at pp. 3-4 and at oral argument.

V. STATEMENT OF THE CASE

³ Pursuant to Pa.R.A. P. 1112(d), a copy of the reproduced was filed with this Court.

⁴ The trial court had not entered an order directing the filing of a statement of matters complained of on appeal.

This action began when Petitioner RWIP, appellant, filed a Complaint against Respondent PBL in the Court of Common Pleas on March 28, 2022 (“original complaint”). *See*, Docket, first & second page, *RR* at 003a-004a. Thereafter, Respondent PBL filed a set of preliminary objections on May 18, 2022 to the original complaint. *See*, Docket, second page, *RR* at 004a. Petitioner RWIP filed an amended complaint as a matter of course on July 7, 2022 (“amended complaint”). *See*, Docket, third page, *RR* at 006a. Thereafter, on July 27, 2022, Respondent PBL filed preliminary objections to Petitioner RWIP’s amended complaint and a brief in support (“PBL’s Preliminary Objections”). *See*, Docket, third page, *RR* at 008a (collectively “preliminary objections to amended complaint”). In response, Petitioner RWIP filed an Opposition to PBL’s Preliminary Objections on August 16, 2022, together with a brief in support (collectively “opposition to PBL’s Preliminary Objections”). *See*, Docket, third & fourth pages, *RR* at 008a. Formal answers to the complaint or the amended complaint have never been filed by Respondent PBL due to the Trial Court’s decision to dismiss the amended complaint based only on PBL’s Preliminary Objections.

On December 6, 2022, Judge Djerassi, J., entered the Trial Court Order granting Respondent PBL’s Preliminary Objections as follows: the court overruled the First, Second and Third Counts⁵ of the preliminary objections (all raising legal insufficiency)

⁵ The trial court in its order mistakenly identifies this count as the Fourth Count. The Third Count raised the issue of lack of subject matter jurisdiction, not legal insufficiency. *See*, n. 1.

pursuant to Pa. R. C.P. 1028(a)(4) and sustained Fourth Count⁶ pursuant to Pa. R.C.P. 1028(a)(1) (for lack of subject matter jurisdiction), stating “Plaintiff must bring this matter to the federal[sic] Safety Transportation Board (“STB”) pursuant to the ICC Termination Act of 1995 (ICCTA), 29 U.S.C. Sec. 10501 *et seq.* Second Appendix, *RR* at 224a-225a.

On January 5, 2023, RWIP filed a notice of appeal from the Order to the Commonwealth Court of Pennsylvania. On March 1, 2023, Judge Dejerassi’s opinion was filed. *See*, Trial Court Opinion of March 1, 2023 (“*Trial Court Opinion*”), Appendix

Thereafter, this matter was transferred to the Superior Court of Pennsylvania by order granted by the Commonwealth Court *per curiam*, on April 26, 2023.

After the appeal to the Superior Court was fully briefed, oral argument took place on February 8, 2024, before a panel comprising Judges Stabile, McLaughlin and Colins. The Superior Court issued an opinion with order, filed on March 25, 2024, authored by Judge Colins, which affirmed the Trial Court’s Order.

Petitioner RWIP now seeks further review of these aspects of the Superior Court’s decision and respectfully requests that this Honorable Court reverse the decision of the Superior Court and reverse the Trial Court Order (dismissing this case) and remand it to the trial court to proceed with the underlying matter consistent with the relief sought there by Petitioner RWIP in its amended complaint.

⁶ *See*, n. 4, *Id.*

VI. REASONS FOR ALLOWANCE OF APPEAL

A. The Question Presented is One of First Impression and Presents a Question of “Substantial Public Importance as to Require Prompt and Definitive Resolution by the Pennsylvania Supreme Court,” thus satisfying the standard governing an allowance of appeal pursuant to Pa.R.A.P. 1114(b)(3) & (4)

PBL’s creation by the City of Philadelphia and its receipt of rights to construct tracks in Philadelphia to assist interstate railroads to provide service to their customers date back to 1890. And yet, on information and belief, prior to the Trial Court Orders that are the subject of this petition, no Pennsylvania state court, federal court or the STB had ever found, as a matter of law or after an evidentiary trial, that any of the tracks or rights-of-way PBL claims ownership of as a result of rights it acquired from the City are common carrier lines of railroad subject to the STB’s jurisdiction.⁷ Indeed, decisions by the STB concerning PBL discussed below indicate that precisely the opposite is true. In addition, this matter presents the first time that a Pennsylvania Trial Court has determined the railroad tracks on private property are lines or railroad subject to the STB’s exclusive jurisdiction based solely on bare allegations contained in preliminary

⁷ Petitioner RWIP could locate no Pennsylvania cases specifically holding that Respondent PBL’s tracks or rights-of-way are common carrier lines of railroad. Cases generally refer to Respondent PBL’s role as an agent of the City that assists actual interstate railroads. For example, it has been found to be “a corporation engaged in the administration of local rail freight deliveries in the City of Philadelphia for the benefit of interstate carriers.” *See, Philadelphia Belt Line R. Co. v Holt Hauling & Warehouse Systems, Inc*, 57 Pa. D. & C.2d 700, 700-701 (Phila. C.P. 1972). While some STB decisions refer to Respondent PBL as a Class III rail carrier, that has no bearing on whether a particular segment of track is a common carrier line of railroad.

objections. Accordingly, this presents a question of first impression, which satisfies the standard governing an allowance of appeal pursuant to Pa.R.A.P. 1114(b)(3).

The Trial Court Order and Superior court opinion, if allowed to stand, will create a dangerous precedent whereby Respondent PBL and other entities that claim railroad rights-of-way on another's property can simply bypass the normally fact-specific inquiry of whether the right-of-way and/or track is subject to the STB's jurisdiction and summarily obtain broad preemption from otherwise applicable Pennsylvania state laws by merely alleging the right-of-way and/or track is imbued with a federal common carrier obligation in preliminary objections, without any factual proof.

Consequently, this case, this presents a question of "substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court," which satisfies the standard governing an allowance of appeal pursuant to Pa.R.A.P. 1114(b)(4). Petitioner RWIP notes that the Trial Court Order is already being relied upon by parties to obtain rulings that state laws are preempted. *Scioli Turco, Inc. v. Phila. & Reading R.R. Co.*, Civil Action 21-563 (E.D. Pa. Nov 14, 2023) Slip Op. at 7.

B. The Superior Court of Pennsylvania's ruling that the trial court lacked subject matter jurisdiction was "erroneously entered...dismissing an appeal" and thus satisfying the standard governing an allowance of appeal pursuant to Pa.R.A.P. 1114(b)(7)

In addition to being a case of first impression and producing a ruling that requires the attention of this Court because letting it stand will be of substantial public importance, the Superior Court opinion affirming the Trial Court Order was just plain wrong, and therefore the dismissal was erroneously entered.

1. Introduction

Respondent PBL purports to own a railroad right-of-way (“PBL Right-of-Way”) in the City of Philadelphia, a segment of which runs through the rear of a parcel of real estate owned by Petitioner RWIP (“Parcel”). As part of a subdivision process, this Parcel was conveyed by Rohm and Haas Company (“Rohm and Haas”) to Petitioner RWIP via a special warranty deed, dated December 22, 1998, and recorded at D 0928 349 in the Philadelphia Recorder of Deeds Office (“Rohm and Haas Deed”).⁸ The easement contains railroad tracks, the age of which is not known since Respondent PBL has never said so, and which in any event have not been used in over 20 years. As such, the tracks are in a state of disrepair and in some sections missing completely or covered by roads and structures. As noted by the Trial Court, “PBL has not asserted any rights to the **use of the tracks or the right-of-way. Further, PBL has not disclosed plans to provide railroad, rail carrier, or rail transportation services even if the railway right-of-way was fully intact and accessible.**”⁹

This case presents a dispute between Respondent PBL and Petitioner RWIP with respect to whether Respondent PBL presently still holds a railway right-of-way interest

⁸ The segment of the purported Respondent PBL Right-of-Way that runs across the rear of the RWIP Parcel is referenced herein as the “RWIP Segment.”

⁹ See, *Opinion, Richmond Waterfront Industrial Park, LLC v. Philadelphia Belt Line Railroad Company*, No. 02872 March Term, 2022 (Phila. C.P), second page (unnumbered), filed March 1, 2023, Appendix C.

in the RWIP Segment under Pennsylvania property law governing, *inter alia*, adverse possession.

Petitioner RWIP alleged in its amended complaint that the state courts have subject matter jurisdiction of this dispute, in part because the RWIP Parcel is physically located within the City of Philadelphia, but also in part because there is no evidence of the tracks being subject to any federal authority, and indeed there is strong evidence to the contrary. *RR* at 097a. Accordingly, Petitioner RWIP commenced this matter in the Philadelphia Court of Common Pleas as an action to quiet title. *RR* at 013a; 086a.

In sustaining Respondent PBL's Preliminary Objections to Petitioner RWIP's amended complaint, the trial court rejected Petitioner RWIP's argument, *inter alia*, that the allegations in the amended complaint were sufficient to establish subject matter jurisdiction before that court. Petitioner RWIP had also contended that, if the allegations in the amended complaint were not sufficient to establish that the trial court had subject matter jurisdiction, then resolution of the issue of subject matter jurisdiction required that the court allow Petitioner RWIP at the very least to conduct some discovery to determine whether the facts surrounding the construction and history of the track demonstrate that this matter belongs in state court.

But the trial court cut Petitioner RWIP off. Instead, without allowing any discovery, the trial court entered the Trial Court Order, dismissing the amended complaint for lack of subject matter jurisdiction based entirely on the text of the amended complaint and the parties' preliminary objections. Specifically, the lower

court concluded from an utterly unsupported assumption in Respondent PBL's Preliminary Objections that the tracks are a common carrier line of railroad subject to the STB's exclusive jurisdiction. Specifically, Respondent PBL stated "nor does the Complaint aver that PBL sought authority from the [STB], or its predecessor the [ICC], to abandon its freight common carrier obligation over the segment of rail line that crosses RWIP's Property." PBL Preliminary Objections, Paragraph 12. This statement and mere assumption that the track was subject to the STB's jurisdiction was not preceded (or followed) by any specific allegations that (1) Respondent PBL had formally sought and obtained the common carrier obligation authority; (2) how such status was obtained; or (3) when it was obtained.

Petitioner RWIP vigorously disputed this assumption in its opposition to PBL's Preliminary Objections but to no avail, as the Trial Court concluded from this language that the track was a common carrier line of railroad. See Trial Court Opinion, Appendix C, citing *Strasberg Rail* ("Simply put...if, for example, an action concerns the 'operation or abandonment' of side tracks[sic], the trial court must dismiss the action due to the STB's exclusive jurisdiction over the proceedings"). See, *Order of December 6, 2022*, quoted in Section II.B. *infra*, Appendix B.

By so ruling, the trial court summarily sidestepped the critical, highly fact-specific threshold legal issue, which is that a particular right-of-way railroad track cannot be within the STB's "exclusive jurisdiction"—thereby divesting a state court of jurisdiction and preempting otherwise applicable state property laws—if the right-of-

way had never been subject to the STB's jurisdiction **in the first instance**. Obviously, if that cannot be the case, then the STB has no need (or jurisdiction) to apply the statutes and rules governing abandonment of common carrier lines of railroad, and the fate of the right-of-way may be determined by state law.

By affirming the Trial Court Order, the Superior Court “has erroneously entered an order quashing or dismissing an appeal,” contrary to Rule 1114(b)(7). Moreover, the lower court's legal ruling at the preliminary objection stage precluded the discovery of highly relevant facts covering a 130 year period concerning the construction and operation of the tracks at issue that would bear directly on the threshold jurisdictional question.

2. Law Applicable to Determining Whether Dispute over the Status of a Railroad Track Belongs before State or Federal Tribunal

The federal question presented concerns whether RWIP's claims under state property law that would result in the removal of railroad tracks owned by PBL on RWIP's property are preempted by the Interstate Commerce Commission Termination Act (the “ICCTA”), 49 U.S.C. § 10101, *et seq.*, which, vests the STB “with exclusive jurisdiction over the construction, **acquisition**, operation, **abandonment**, or discontinuance of railroad facilities.” See, *Watkins v. RJ Corman Railroad*, 2010 WL 1710203 (nonprecedential) (U.S.D.Ct., E.D. Ken. 2010) (“Watkins”) (bold added); see also e.g. 49 U.S.C. §10501(b).

In this case, as stated above, Respondent PBL has asserted, without any factual support, that the easement on RWIP's property is a line of railroad that is imbued with a common carrier obligation to provide service to the public at large. Railroad tracks with this designation may only be removed upon the owner of the track or a third party demonstrating to the STB that the tracks should be formally abandoned—and the common carrier obligation to provide service to the public extinguished—pursuant to 49 U.S.C. §10903 and related statutes.¹⁰ Until the STB grants such formal abandonment authority most state property laws are preempted that would otherwise apply to a dispute over the presence and disposition of the tracks are preempted. See, e.g., *Watkins* at *2 (citing 265 F.Supp.2d at 1015) (brackets in quotation).

In finding that federal law applies, the court rejected application of state law because, “to the extent that [the plaintiff’s] state law claims seek to force [the railroad operator] to abandon the track in question, such claims are preempted by the ICCTA.” *Watkins* at *2 (citing 265 F.Supp.2d at 1015) (brackets in quotation).

However, construction of a railroad track, without more, does not create a common carrier line of railroad. The party desiring common carrier status must request and obtain the express authorization from the STB to construct and/or operate a particular railroad track in common carrier service. 49 U.S.C. §§10901(a).¹¹ It also requires that when

¹⁰ See, 49 U.S.C 10904 and 10905.

¹¹ (a) A [person](#) may— (1) construct an extension to any of its [railroad](#) lines; (2) construct an additional [railroad](#) line; (3) provide [transportation](#) over, or by means of, an extended or additional [railroad](#) line; or (4) in the case of a [person](#) other than a [rail carrier](#), acquire a [railroad](#) line or acquire or

authorization to conduct common carrier operations is given by the STB, the party granted such authority must “perfect” that authority for it to take effect, *i.e.*, construct the track or conduct common carrier service. Failure to obtain construction or operating authority, or to perfect granted authority, results in the track at issue not qualifying as a common carrier line of railroad, no resulting STB preemption of state laws, but allowing a property owner to seek the removal of such track under applicable state laws.

The primary error of the lower courts in this case is that despite (1) Respondent PBL never asserting in its Preliminary Objections that it either constructed the track at issue or hired someone else at Respondent PBL’s expense to so do; (2) Respondent PBL never asserting in its Preliminary Objections when the track was constructed after Respondent PBL allegedly received the rights to do so in 1890; (3) Respondent PBL never specifically alleging that it ever sought or was granted authority from the STB to operate as a common carrier railroad over the track at issue; (4) no evidence that Respondent PBL ever perfected any such rights it claimed it may have been given, and indeed, PBL admitting it has never conducted any railroad operations over the tracks—common carrier or otherwise; (5) Respondent PBL never claiming that any other railroad conducted common carrier operations over the tracks, and (6) no independent filings, factual information, or case precedent contradicting any of the foregoing; the two lower courts

operate an extended or additional [railroad](#) line, only if the [Board](#) issues a certificate authorizing such activity under subsection (c).

nevertheless found, as a matter of law, that the tracks are a common carrier line of railroad that may only be removed subject to the formal abandonment rules administered by the STB.

3. The Superior Court's Attempt to Base its Affirmance on the STB's *Conrail* Decision was Misplaced

In its affirmance of the Trial Court, the Superior Court erroneously relied upon an STB decision that the lower court did not even mention, let alone base its decision on. Specifically, the Superior Court stated:

The STB, however, has held that Defendant is a rail carrier with respect to its tracks running from north of the Property to south of the Property and that those tracks connected to Conrail tracks and were used to transport “approximately 2,894 carloads annually, of predominantly chemicals, intermodal containers, and import-export freight.”

Philadelphia Belt Line Railroad Co. v. Consolidated Rail Corp., STB Docket No. FD 32802, 1996 WL 362996, at *1-*2 (STB July 2, 1996) (“*Conrail*”).

However, the STB held no such thing in *Conrail*, and the inference that the referenced transportation was by Respondent PBL, or that such transportation was in common carrier service, is wrong. Rather the STB in *Conrail* merely said that Respondent PBL was “a Class III railroad” *Conrail* at 1, and later, also that “[a]lthough a rail carrier, PBL never operated the Belt Line.” *Conrail* at 2. The STB separately stated “[t]he Belt Line North extends approximately 3 miles from Bridge Street in the north through the site of Conrail's former Port Richmond Yard to Allegheny Avenue in the south.” *Id.* But the STB in *Conrail* did not affirmatively hold either that the tracks of the

Belt Line North were a common carrier line of railroad, or that Respondent PBL was a rail carrier “with respect to” *any* tracks, let alone any of the tracks making up what PBL denominated the Belt Line North.

In fact, *Conrail* strongly implied that the STB agreed with Conrail that PBL did *not* have authority to conduct common carrier operations over the Belt Line North track. *See Conrail* at 5 (“Conrail emphasizes . . . that PBL failed to allege that it ever had authority to run trains between the Belt Line North and South, and that PBL has never run any trains”); and *Id* at 7 (“PBL may suffer future harm or injury, *if* it were to become the operator of the Belt Line North”) (emphasis supplied). See also, *Id* at 2, note 6 (where the Board simply recited PBL’s *assertions* that it had such operating authority pursuant to the Interstate Commerce Commission (“ICC”) docket (Finance Docket No. 29517), but the STB did not concur with PBL or find in PBL’s favor in that regard). Consequently, there was no holding in *Conrail* that the tracks involved in this dispute are lines of railroad subject to the exclusive jurisdiction of the Board or that PBL was a rail carrier “with respect to” the tracks in dispute.

In fact, there is ample evidence to the contrary. As stated, there is no evidence or even an allegation by Respondent PBL that it ever sought authority from the STB or its predecessor the ICC to construct or operate the tracks. Nor has Respondent PBL ever alleged or claimed that it perfected any federal rights it might have claimed for the tracks on RWIP’s property. There is precedent strongly indicating the opposite is true.

For example, in *Philadelphia Belt Line Railroad Company—Petition For Declaratory Order*, STB Docket No. FD 35345 (served August 4, 2010) (“*STB 2010 Order*”) the STB was presented with a case also involving a right-of-way in Philadelphia involving Respondent PBL. There, it claimed the right-of-way in question also was covered by the 1890 Ordinance, Respondent PBL had yet to construct tracks at that location. The STB explained in the *STB 2010 Order* how Respondent PBL was required by the Transportation Act of 1920, which gave the ICC exclusive jurisdiction over the construction and operation of common carrier lines, to either (1) demonstrate its tracks and operations that predated the Act were grandfathered and therefore exempted from obtaining STB authority, or (2) obtain prior authorization from the STB for such construction or authorization to the extent they post-dated the Act. *Id.* at 4. However, the STB found in the *STB 2010 Order* that PBL had taken no such actions as to the right-of-way at issue in that proceeding.

Consequently, it denied Respondent PBL’s claim that the right-of-way it was granted by the City in 1890 was imbued with a federal common carrier obligation. *Id.* Both the Lower Court and the Superior court wrongly focused on the fact that no tracks were constructed in that case to distinguish its application to RWIP’s dispute. In doing so, they missed the decision’s greater significance, which is that PBL had taken no actions whatsoever to perfect any alleged federal rights associated with the 1890 Ordinance. Nor is there even an *allegation* that PBL took either action in this case. Instead, the Trial Court and the Superior Courts both simply assumed from the unsupported assumption of common

carrier status in the PBL's Objections that Respondent PBL had done so sometime over the past 130 years.

4. The Nature of Petitioner's Preliminary Objections

In response to Petitioner RWIP's *Amended Complaint* in the lower court, Respondent PBL filed preliminary objections. There,

- It cited the *1890 Ordinance* but did not allege that it was recorded in the Office of the Recorder of Deeds. *See, RR* at 104a; 149a.
- It did **not** cite the existence of any map anywhere of record (accompanying the 1890 Ordinance, on record in the Department of Public Works, in the Recorder of Deeds, or elsewhere), that shows where the right-of-way is located, as required, *inter alia*, per language to that effect in Section 1 of the *1890 Ordinance*. *See, e.g., Supra* at 2 (“The route of the said [PBL] and branches thereof shall be shown upon a map to be filed at the Department of Public Works.”). *See, RR* at 149a.
- It cites the admitted existence of rails located on the RWIP parcel (*See, PBL's Preliminary Objections, Quiet Title Action*, at ¶¶ 2 & 18), but did not allege or claim that they were constructed and used by PBL. *See, RR* at 151a.
- It contends that the STB “has exclusive jurisdiction to determine if rail lines have been abandoned.” *Id.* at ¶ 3. However, as discussed, there is no actual proof that the tracks were ever subject to the STB's jurisdiction in the first instance. This is merely to be assumed. *See, RR* at 116a.

In response to Respondent PBL's citation to the *1890 Ordinance*, Petitioner RWIP argues that PBL cites “no facts to support that the conditions for the grant of the easement at the Property were ever fulfilled.” *See, Plaintiff's Memorandum In Opposition to Preliminary Objections, Quiet Title Action* at 15, *RR* at 180a.

The Superior Court and Trial Courts also erred because they wrongly concluded that because the words “railroad tracks” and “abandoned its easement” appear in the amended complaint, means that the tracks are a common carrier line of railroad and RWIP’s state law claims are preempted. By merely using these words in its amended complaint Petitioner RWIP’s did not allege, nor does it concede that the legal status of the railroad tracks is that of a common carrier “railroad line” as that term is used in 49 U.S.C. § 10901 Nor did, Petitioner RWIP use the phrase “abandoned its easement” amount to a concession that the tracks are a “railroad line” that can only be removed pursuant to a formal proceeding under the statutory requirements of §10903 and the STB’s regulations. In addition to wrongly assigning critical specific statutory terms to different words used in the amended complaint, the Trial Court and the Superior Court also erred by proceeding from the the false premise that any and all railroad tracks, wherever they are located, are subject *ipso facto* to the STB’s jurisdiction as a matter of law, a premise that is directly contrary to law.

It is also necessarily a false premise that all railroad tracks of any kind may only be removed through the statutory requirements of § 10903 and the STB’s regulations governing abandonment of common carrier lines of railroad. Under the Superior Court’s approach, STB jurisdiction over all “railroad tracks” is to be simply presumed despite the fact that it is well established such legal determinations are very fact specific.

Respondent PBL alleges in a rote fashion as a pure conclusion of law that, essentially “railroad tracks equal STB jurisdiction”; it does not even gloss over any of the necessary criteria but passes over all of them in their entirety. It does so as a means to reach its desired objective to preempt otherwise applicable state law and force Petitioner RWIP to pursue its remedies before the STB. *See, Preliminary Objections to Amended Complaint*, ¶ 2 (“PBL further asserts that this Court lacks subject matter jurisdiction over Count 3 of the Complaint”) (“**PBI Has Abandoned Any Rights They May Have Had**”) as the STB has exclusive jurisdiction to determine if rail lines have been abandoned.”)

Further evidence of this bootstrapping is Respondent PBL citation of several cases addressing federal “statutory abandonment” to create the impression that they apply here to the tracks’ removal, but none of them apply because in each one no party to the action disputed STB’s jurisdiction over the tracks, nor did any allege any facts that would suggest that any party should or could dispute STB’s jurisdiction. *See, e.g., Hayfield N. R. Co. v. Chicago & N. W. Transp. Co.*, 467 U.S. 622, 628 (1984) (“*Hayfield*”) (cited in *Appellee Brief* at p. 13); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981) (“*Kalo Brick*”) (cited in *Appellee Brief* at 13); *Cnty. Of Dutchess v. CSX Transp., Inc.*, 2009 WL 2913684 (S.D.N.Y. 2009) (“*Dutchess*”) (cited in *Appellee Brief* at 13); *Wilson v. Norfolk Southern Ry. Co.*, 2009 WL 189397 (W.D.N.C.) (“*Wilson*”) (cited in *Appellee Brief* at p. 14).

In *Hayfield*, the rail carrier formed by shippers brought action against a freight rail carrier engaged in interstate rail service. In *Kalo*, the railroad was regulated under the ICC. In *Dutchess*, the railroad involved a railroad that was already a part of the national rail system. In *Wilson*, insufficient facts were stated in the opinion to question the basis for STB jurisdiction. Accordingly, and not surprisingly, in none of these cases did any party challenge jurisdiction under the STB. The Superior Court totally ignored this point in its reasoning.

By this means, Respondent PBL has “placed the rabbit in the hat,” which the trial court and the Superior Court embraced without engaging in any analysis whatsoever. Petitioner RWIP will not cover these points again in detail here, but it summarizes the deficiency in Respondent PBL’s argument as follows: Petitioner RWIP’s amended complaint does not allege sufficient facts that, if true, establish that the railroad tracks on the subject parcel owned by RWIP *in fee*, are part of the national rail system and thus subject to STB’s jurisdiction to determine abandonment under §10903.

VII. CONCLUSION

There are special and important reasons to allow the appeal. The decision below is one of first impression, is of substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court, and the order appealed from was erroneously entered. The petition should be granted, the opinion of the Superior Court reversed, and the Order of the Court of Common Pleas sustaining the Preliminary Objections and dismissing the Complaint for lack of jurisdiction reversed.

Respectfully Submitted,

ECKERT, SEAMANS, CHERIN &
MELLOTT, LLC

By: /s/_____
Stephen Foxman, Esquire
Pa. I.D. 16978
Jeffrey P. Lewis, Esquire
Pa. I.D.27586
Thomas W. Wilcox, Esquire, *pro hac*
vice
Counsel for Petitioner, Richmond
Waterfront Ind. Park, LLC

IN THE SUPREME COURT OF PENNSYLVANIA

Richmond Waterfront Industrial Park, LLC, :	:	
Appellant :	:	
	:	Eastern District No.
v. :	:	
	:	
Philadelphia Belt Line Railroad Company :	:	

PROOF OF SERVICE

I hereby certify that this 24th day of April, 2024, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	Hocky, Eric M.
Service Method:	eService
Email:	ehocky@clarkhill.com
Service Date:	4/24/2024
Address:	Two Commerce Square 2001 Market St., Suite 2620 Philadelphia, PA 19103
Phone:	215-640-8500
Representing:	Philadelphia Belt Line Railroad Company

Served:	Eldridge, Lisa Carney
Service Method:	eService
Email:	leldridge@clarkhill.com
Service Date:	4/24/2024

Address: Two Commerce Square
2001 Market St., Suite 2620
Philadelphia, PA 19103

Phone: 215-640-8500

Representing: Philadelphia Belt Line Railroad Company

/s/ Jeffrey P. Lewis

(Signature of Person Serving)

Person Serving: Lewis, Jeffrey P.

Attorney Registration No.: 27586

Law Firm: Eckert Seamans Cherin & Mellott, LLC
Two Liberty Place
50 South 16th St. 22nd Floor
Philadelphia, PA 19102

Representing: Richmond Waterfront Industrial Park, LLC

COMBINED CERTIFICATES OF COMPLIANCE

1. I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than un-confidential information and documents.

2. I further certify that according to the word count feature of the word processing program used to prepare it, this brief contains 6917 words, excluding those supplementary matters that are exempted. This document was prepared using Microsoft Word using Times New Roman font in 14 point.

ECKERT SEAMANS CHERIN
MELLOTT, LLC

By: /s/ Jeffrey P. Lewis
Jeffrey P. Lewis
Pa. I.D. 27586
Counsel for Petitioner Richmond
Waterfront Ind. Park, LLC

Appendix A

March 25, 2024

RICHMOND	:	IN THE SUPERIOR COURT
WATERFRONT	:	OF PENNSYLVANIA
INDUSTRIAL PARK, LLC	:	
Appellant	:	
	:	
v.	:	
	:	
PHILADELPHIA BELT LINE	:	No. 1172 EDA 2023
RAILROAD COMPANY	:	
	:	
	:	

Appeal from the Order Entered December 6, 2022
In the Court of Common Pleas of Philadelphia County Civil Division at
No(s): 02872 March 2022
BEFORE: STABILE, J., McLAUGHLIN, J., and COLINS, J.*

OPINION BY COLINS, J.: **FILED MARCH 25, 2024**

Appellant, Richmond Waterfront Industrial Park, LLC (Plaintiff) appeals from of an order of the Court of Common Pleas of Philadelphia County (trial court) dismissing its quiet title action for lack of subject matter jurisdiction on the ground that the federal Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. §§ 10101-16106, vests the federal Surface Transportation Board (STB) with exclusive jurisdiction to decide issues involving the abandonment of the railroad right of way and railroad tracks on its property. For the reasons set forth below, we affirm.

Plaintiff is the owner of a more than 50-acre property at 2950 Kirkbride Street, Philadelphia (the Property), which it acquired from Rohm & Haas Co. in 1998.

* Retired Senior Judge assigned to the Superior Court.

There are railroad tracks on the Property on a 33-foot wide right of way of Amended Complaint ¶¶9, 14-15, 17, 19-24, 26 & Ex. A at 3-4; Richmond Waterfront Industrial Park, LLC Petition for Declaratory Order, STB Docket No. FD 36710 (STB Petition), Plaintiff's Verified Statement in Support of STB Petition at 1-2.¹[in the opinion]

On March 28, 2022, Plaintiff filed a quiet title action against Defendant seeking an order barring Defendant from asserting any right, easement, or other interest in the Property. Defendant filed preliminary objections, and Plaintiff, on July 7, 2022, filed an amended complaint alleging that Defendant's easement was barred by adverse possession, abandonment, and prescription. Amended Complaint ¶¶45-68. Defendant filed preliminary objections to this amended complaint asserting that the tracks on the Property were constructed pursuant to an 1890 Philadelphia ordinance that granted Defendant the right to build railroad tracks from Allegheny Avenue north along the Delaware River and seeking, *inter alia*, dismissal of the action for lack of subject matter jurisdiction on the ground that the STB has exclusive jurisdiction over abandonment of its railroad tracks and right of way on the Property. Preliminary Objections to Amended Complaint ¶¶4, 8-9, 28-46. In response,

¹ Plaintiff submitted the STB Petition and all of its attachments to this Court for its consideration in this appeal in conjunction with an application that it filed to stay this appeal.

Plaintiff argued that the action should not be dismissed for lack of subject matter jurisdiction on the ground that Defendant is not a rail carrier and that the tracks and right of way were therefore not within the STB's jurisdiction. Plaintiff's Opposition to Preliminary Objections ¶¶ 24-46, 50-51.

On December 6, 2022, the trial court sustained Defendant's preliminary objection to jurisdiction and dismissed the action for lack of subject matter jurisdiction on the ground that abandonment of railroad tracks was within the exclusive jurisdiction of the STB and that Section 10501(b) of the ICCTA, 49 U.S.C. § 10501(b), preempted state courts from determining property rights involving alleged abandonment of railroad tracks. Trial Court Order, 12/6/22; Trial Court Opinion at 4-7. Plaintiff timely appealed to the Commonwealth Court, and the appeal was subsequently transferred to this Court on the joint application of the parties.

On July 28, 2023, prior to briefing in this appeal, Plaintiff filed the STB Petition, a petition for a declaratory order from the STB that Defendant's railroad tracks and right of way on the Property are not within the STB's jurisdiction. STB Petition at 2, 15-21. Plaintiff filed an application to stay this appeal pending the STB's ruling on whether it has jurisdiction over Defendant's railroad tracks and right of way on the Property. This Court denied the application for stay by *per curiam* order on September 13, 2023. Defendant on August 17, 2023 filed a response to the STB Petition in the STB proceeding requesting dismissal of the STB Petition. Joint Response to Court Order Directing

Parties to File Status Report on STB Proceeding ¶2. The STB has neither rendered a decision on whether to accept the STB Petition nor ruled on Defendant's request to dismiss the petition. *Id.* ¶4.

Plaintiff raises two issues in this appeal: (1) whether the trial court erred in holding that it did not have subject matter jurisdiction; and (2) whether the trial court erroneously characterized the nature of the tracks at issue and the requirements for their abandonment. Because the issue of subject matter jurisdiction is a question of law, our review is plenary and *de novo*. *Mazur v. Trinity Area School District*, 961 A.2d 96, 101 (Pa. 2008); *Strasburg Scooters, LLC v. Strasburg Rail Road, Inc.*, 210 A.3d 1064, 1068 (Pa. Super. 2019).

Section 10501(b) of the ICCTA provides:

(b) The jurisdiction of the [STB] over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; **and**

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). The only exceptions to the STB's exclusive jurisdiction that Section 10501 sets forth are for public transportation provided by local governments and their contractors and solid waste transfer facilities.

49 U.S.C. § 10501(c).

Section 10501(b) of the ICCTA preempts actions brought under state law, including quiet title actions, that concern operation or abandonment of railroad tracks. *Strasburg Scooters, LLC*, 210 A.3d at 1068-69; *B&S Holdings, LLC v. BNSF Railway Co.*, 889 F.Supp.2d 1252, 1258-60 (E.D.Wash. 2012); *Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Co.*, 265 F.Supp.2d 1005, 1012-16 (N.D.Iowa 2003); *Burgoyne, LLC v. Chicago Terminal Railroad Co.*, 169 N.E.3d 815, 823-28 (Ill. App. 2020); *Ouachita Railroad, Inc. v. Circuit Court of Union County*, 206 S.W.3d 811, 815-17 (Ark. 2005). Although Section 10501(b)(2) references only “spur, industrial, team, switching, or side tracks, or facilities,” 49 U.S.C.

§ 10501(b)(2), preemption and exclusive STB jurisdiction are not limited to those items and encompass all railroad tracks of a rail carrier. Section 10501(b)(1) of the ICCTA gives the STB exclusive jurisdiction over “transportation by rail carriers.” 49 U.S.C. § 10501(b)(1). The ICCTA defines “transportation” as including any “property, ... instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail,” which necessarily includes railroad tracks. 49 U.S.C. § 10102(9).

Because the STB’s jurisdiction over claims concerning operation or abandonment of railroad tracks is exclusive, Pennsylvania courts lack subject matter jurisdiction over such claims. *Strasburg Scooters, LLC*, 210 A.3d at 1069. Plaintiff’s

quiet title action is predicated on the claim that Defendant abandoned the railroad tracks that are on the Property. Amended Complaint ¶¶17-34, 45-68.

Plaintiff argues that the railroad tracks on the Property are not subject to the STB's jurisdiction because Defendant is allegedly not a rail carrier. The STB, however, has held that Defendant is a rail carrier with respect to its tracks running from north of the Property to south of the Property and that those tracks connected to Conrail tracks and were used to transport "approximately 2,894 carloads annually, of predominantly chemicals, intermodal containers, and import-export freight." *Philadelphia Belt Line Railroad Co. v. Consolidated Rail Corp.*, STB Docket No. FD 32802, 1996 WL 362996, at *1-*2 (STB July 2, 1996). Although the STB dismissed Defendant's complaint in that case, it did so on the ground that Defendant was not entitled to relief and not because the STB lacked jurisdiction. *Id.*, 1996 WL 362996, at *5-*6.

² While Plaintiff also alleged a claim that Defendant does not have a valid right of way because Plaintiff's deed did not state that the Property was subject to Defendant's right of way, Amended Complaint ¶¶10-13, 39-44, Plaintiff has subsequently admitted that its ownership of the Property is subject to Defendant's right of way. Plaintiff's Verified Statement in Support of STB Petition at 1-2 (stating under penalty of perjury that Plaintiff "purchased the Property subject to an existing railroad right-of-way easement in favor of the Philadelphia Belt Line Railroad Company ("PBL") which is 33 feet wide and runs the length of two parcels of the Property in a north-south direction for 2,719 feet").

Philadelphia Belt Line Rail Road Co. - Petition for Declaratory Order, STB Docket No. FD 35345 (Aug. 3, 2010), does not support Plaintiff's claim that the STB lacks jurisdiction over the tracks on the Property. In that case, the STB held that it did not have jurisdiction over Defendant's right of way in a different part of Philadelphia because no railroad tracks had been constructed on that portion of Defendant's right of way and Defendant was therefore not a rail carrier with respect to its right of way at the location. *Id.*, slip op at 3-6. Here, in contrast, Plaintiff admits that there are railroad tracks on Defendant's right of way on the Property. Plaintiff's Verified Statement in Support of STB Petition at 1-2.

Plaintiff also argues that the trial court erred in ruling on the jurisdictional issue without discovery. Plaintiff, however, did not request any discovery on the issue of jurisdiction before the trial court ruled on the preliminary objections. Rather, it argued that the trial court should overrule the preliminary objections without discovery. Plaintiff's Opposition to Preliminary Objections ¶¶ 28-46; Plaintiff's Memorandum in Opposition to Preliminary Objections at 8-9, 17-20. The only reference that Plaintiff made to discovery in its response to Defendant's preliminary objections was in response to a different preliminary objection, a demurrer to one count of the complaint, and concerned merits discovery. Plaintiff's Memorandum in Opposition to Preliminary Objections at 14.

Moreover, given the STB's ruling that Defendant is a rail carrier with respect to its railroad tracks in the part of Philadelphia that includes the Property, *Philadelphia Belt Line Railroad Co. v. Consolidated Rail Corp.*, 1996 WL 362996, at *1-*2, and the STB's exclusive jurisdiction over rail carriers' railroad tracks, we believe that remand for jurisdictional discovery would be inappropriate because any determination that there are facts that remove these tracks from the STB's jurisdiction must be made by the STB, not by our courts. Indeed, Plaintiff recognizes that deferring to the STB is an appropriate way of resolving this jurisdictional issue. Not only has Plaintiff sought both a ruling from the STB that the STB lacks jurisdiction over the tracks at issue here and discovery on the jurisdictional issue in that STB proceeding, STB Petition at 2, 5 n.13, 15-17, 21-22, but Plaintiff has represented to this Court that the jurisdictional question here "presents critical and complex factual and legal issues that are within the STB's expertise." Appellant's Application for Stay at 5.

Because the STB has held that Defendant is a rail carrier, Defendant's railroad tracks on the Property are within the exclusive jurisdiction of the STB unless and until the STB, in its expertise, concludes that there are particular facts concerning these tracks that remove them from its jurisdiction. To date, the STB has made no determination that it lacks jurisdiction over Defendant's tracks on the Property. The trial court therefore properly concluded that it lacked subject matter jurisdiction over this action seeking an

adjudication that Defendant's railroad tracks on the Property have been abandoned, and its dismissal of this action without prejudice must be affirmed.

In its second issue, Plaintiff contends that the trial court erred in allegedly determining that the tracks on the Property are "side tracks" and in ruling on the substance of the federal requirements for abandonment. We conclude that the first of these claims fails because it is an inaccurate characterization of the trial court's rulings and that the second contention has merit, but is not grounds for reversal of the trial court's order.

Contrary to Plaintiff's arguments, the trial court did not make any finding that Defendant's railroad tracks on the Property are "side tracks." The only references to "side tracks" in the trial court's order are quotes from two cases and are not a characterization of the tracks at issue here. Trial Court Order at 1-2. Rather, the trial court stated in its order that it lacks subject matter jurisdiction because the ICCTA "completely preempts state action when it comes to determining if a railroad has abandoned it[s] tracks," not that only determinations concerning "side tracks" are preempted. *Id.* at 1. The only reference to "side tracks" in the trial court's opinion is in a description of Section 10501(b) setting forth the broad range of types of railroad tracks that are subject to STB jurisdiction. Trial Court Opinion at 4. Moreover, the opinion makes clear that the trial court's ruling that it lacked jurisdiction was based on its conclusion that the STB has exclusive jurisdiction over abandonment of "railroad

tracks.” *Id.* at 1-4, 7.

In contrast, Plaintiff's assertion that the trial court made statements in its opinion concerning the federal requirements for abandonment is supported by the record. Trial Court Opinion at 4-5. Whatever the accuracy or inaccuracy of the trial court's statements, the trial court lacked jurisdiction to reach the issue of which federal abandonment procedures and requirements apply to these tracks because that is a matter within the STB's exclusive jurisdiction. Those statements are thus without legal effect and the issue of what requirements for abandonment apply to these railroad tracks is for the STB to decide. Nothing in the trial court's order, however, made any ruling concerning the procedures or requirements for abandonment that apply to these tracks under the ICCTA. This argument is therefore not a basis for reversal of the trial court's order.

For the foregoing reasons, we conclude that the trial court correctly held that the STB has exclusive jurisdiction over Plaintiff's claims concerning the railroad tracks at issue in this action and affirm its order dismissing this action for lack of subject matter jurisdiction.

Order affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 3/25/2024

Appendix B

**IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION**

**Richmond Waterfront Industrial Park
Plaintiff,**

**March Term, 2020
No. 02872**

v.

Commerce Program

**Philadelphia Belt Line Railroad Company
Defendant.**

41 CD 2023

Djerassi, J.

December 6, 2022

ORDER

And Now, on this 6th day of December 2022, upon consideration of Defendant Philadelphia Belt Line Railroad Company's Preliminary Objections to Plaintiff Richmond Waterfront Industrial Park, LLC's Amended Complaint, it is hereby **ORDERED** as follows:

3. Objections to Count I, II, and III pursuant to Pa. R. C. P. 1028 (a) (4)- legal insufficiency of a pleading (demurrer) - are **OVERRULED**.

4. Objection to Count IV¹² pursuant to Pa. R.C.P. 1028 (a) (1) - lack of subject matter jurisdiction - is **SUSTAINED** and Plaintiff's complaint is **DISMISSED**. *Strasberg Scooters, LLC v Strasburg Rail Road, Inc.* 210 A.2d 1064, 1069 (Pa. Super. 2019 ("Simply put... if, for example, an action concerns

¹² See, footnote 1, *Supra*. This should read "Count III."

the 'operation or abandonment' of side tracks, the trial court must dismiss the action due to the STB's exclusive jurisdiction over the proceedings").

As this court does not have subject matter jurisdiction, Plaintiff must bring the matter to the federal Safety Transportation Board ("STB") pursuant to the ICC Termination Act of 1995 (ICCTA), 49 U.S.C. Sec. 1050 I et seq. The Act completely preempts state action when it comes to determining if a railroad has abandoned its tracks. See *Cedarapids, Inc. v. Chicago, Central & Pacific R. Co.*, 265 F Supp. 2d 1005, 1012 (N.D. Iowa 2003) ("the STB has exclusive jurisdiction over: (2) the construction, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located entirely in one state").

Without subject matter jurisdiction, we offer no procedure for Plaintiff to follow if the STB finds the tracks at issue have been abandoned.

18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

BY THE COURT,



RAMY I. DJERASSI, J.

Appendix C

March 1, 2023

**IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION**

**Richmond Waterfront Industrial Park
Plaintiff,**

**March Term, 2020
No. 02872**

v.

Commerce Program

**Philadelphia Belt Line Railroad Company
Defendant.**

41 CD 2023

Djerassi, J.

March 1, 2023

OPINION

In this quiet title action, Plaintiff/Appellant Richmond Waterfront Industrial Park, LLC ("RWIP") appeals from an Order dated December 6, 2022, sustaining Defendant/Appellee Philadelphia Belt Line Railroad Company ("PBL")'s Preliminary Objection to Count III (abandonment of railroad right-of-way) of Plaintiffs Complaint for lack of subject matter jurisdiction under Pa. R. Civ. P. 1028(a)(1).

As a procedural matter, the court notes that RWIP filed this appeal with the Commonwealth Court of Philadelphia. Although the Superior Court of Pennsylvania typically reviews orders and judgments on appeal from the Commerce Court, the Commonwealth Court is not precluded from exercising jurisdiction over this appeal. *See* Pa. C.S.A. § 762. The Commonwealth Court

may, upon its own motion or upon application of any party, transfer the appeal to the Superior Court. *See* 42 Pa. C.S.A. § 705 and Pa. R. A. P. 752.

RWIP seeks quiet title to a railroad right-of-way claimed by PBL, a rail terminal switching carrier engaged in transportation-related development and real estate leasing in the Port of Philadelphia. PBL's Preliminary Objection was sustained because federal law grants the federal Surface Transportation Board ("STB") express and exclusive jurisdiction over actions concerning the abandonment of railroad tracks. To assert property rights against PBL, the STB must first certify that the tracks occupying PBL's right-of-way on RWIP's property have been abandoned. The state court then has jurisdiction to make a final determination of abandonment and other property claims under state law.

For the reasons set forth below, this court's judgment should, respectfully, be affirmed.

I. Statement of Facts

RWIP acquired their property at 2950 Kirkbride Street, Philadelphia, PA, from Rohm & Haas on or about December 22, 1998. RWIP's recorded deed includes the following legal description of PBL's alleged right-of-way: "to a point for a corner on the Easterly side of Thirty Three foot wide (33.00' wd.) Right-of-Way of the Philadelphia Belt Line Rail road." This right- of-way is referenced three times in the deed.

PBL's railway right-of-way on the property dates to Philadelphia's 1890 Ordinance, which established the PBL franchise in the city. The ordinance granted PBL the right to build and operate tracks from Allegheny Avenue north along the Delaware River, including the tracks on RWIP's property.

RWIP asserts that PBL has not monitored, maintained, or used the tracks on the right-of-way during RWIP's ownership of the property. Accordingly, the tracks exist in a state of disrepair. Remaining sections of intact tracks have gaps, rendering them unusable. RWIP has rented portions of their property for truck and trailer parking, which frequently block remnants of the tracks. In addition, RWIP has completely covered sections of the tracks with gravel so that trucks can more easily traverse the property.

Access to the tracks is limited. The tracks run just beyond the northern end of the property; no terminal point exists here and RWIP maintains a fence and a gate to control access.

Likewise, on the southern and western boundaries of the property, RWIP maintains a gate. To the east of the tracks is the west bank of the Delaware River.

PBL has not asserted any rights to the use of the tracks or the right-of-way. Further, PBL has not disclosed plans to provide railroad, rail carrier, or rail transportation services even if the railway right-of-way was fully intact and accessible.

II. Procedural Background

RWIP filed their Complaint on March 28, 2022, and an Amended Complaint on July 7, 2022. The Amended Complaint included the following counts: (I) PBL does not have any right-of-way, easement, or other property right; (II) RWIP owns the land claimed as a right-of-way through adverse possession; (III) PBL has abandoned any rights they may have had; and (IV) in the alternative to Count II (adverse possession), RWIP has acquired a prescriptive easement.

PBL filed Preliminary Objections to the Amended Complaint on May 18, 2022. PBL objected to Counts I, II, and IV based on demurrer under Pa. R. Civ. P. 1028(a)(4). On Count III (abandonment), PBL objected due to lack of subject matter jurisdiction under Pa. R. Civ. P. 1028(a)(1). On December 6, 2022, the Court overruled PBL's objections to Counts I, II, and IV.

On Count III, the Court found that if an action concerns the abandonment of railroad tracks, the state trial court must dismiss the action due to the federal Surface Transit Board's express and exclusive jurisdiction over the matter. The Court thus sustained PBL's Preliminary Objection to Count III and dismissed RWIP's Amended Complaint in its entirety.¹³ On January 5, 2023, RWIP filed their appeal from the Court's order.

¹³ See Court Order dated December 6, 2022.

III. Discussion

Subject matter jurisdiction is "the power of the court to hear cases of the class to which the case before the court belongs, that is, to enter into inquiry, whether or not the court may ultimately grant the relief requested." *Harley v. HealthSpark Found.*, 265 A.3d 674, 687, 2021 PA Super 205 (2021) (quoting *Lowenschuss v. Lowenschuss*, 579 A.2d 377, 380 n.2, 396 Pa. Super. 531 n.2 (1990)).

With respect to the subject matter of the case here, jurisdiction lies with the Surface Transportation Board. Established by the Interstate Commerce Commission Termination Act of 1995 (ICCTA), the SIB has express and exclusive jurisdiction over (1) transportation by rail carriers and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state. 49 U.S.C. § 10501(b)(1)-(2) (2018). Section 10501(b) categorically preempts state action with respect to determining if a railroad has abandoned its tracks: "Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law." *Id.* Thus, if an action concerns transportation by a rail company or the operation or abandonment of tracks pursuant to Sec. 10501(b)(1) or (2), the state trial court

must dismiss the action due to STB's exclusive jurisdiction over the proceedings. *Strasberg Scooters, LLC v. Strasburg R. R., Inc.*, 210 A.3d 1064, 1068-69, 2019 PA Super 158 (2019).

The ICCTA sets forth the procedures a rail carrier must undertake to abandon or discontinue operation of a railroad line. 49 U.S.C. § 10903 (2018). Under Sec. 10903(a), a rail carrier who seeks to abandon or discontinue any part of its railroad line must first file an application with the STB.¹⁴ Sec. 10903(d) provides that a rail carrier may not abandon or discontinue operating a rail line unless the STB finds that public convenience and necessity require or permit such abandonment or discontinuance. See *Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222, 225 (3d Cir. 2003) ("A line or railroad may not be taken out of the national rail system, and a railroad may not be relieved of its common carrier obligation, unless the carrier first obtains abandonment authority from the STB.").¹⁵

After the STB makes its finding and issues a certificate of abandonment, "STB's jurisdiction ends, and the property becomes subject to ordinary processes of

¹⁴ Alternatively, a petition for abandonment may be filed by a party other than a rail carrier. This is called adverse abandonment. *See, e.g., Murray v. Dep't of Conserv. & Rec.*, 55 N.E.3d 429 n.7 (Mass. 2016).

¹⁵ PBL currently retains Conrail as an operating carrier providing rail transportation service under terms of the "the Belt Line Principle" of open access to both Norfolk Southern and CSX. See www.philadelphiabeltline.com/about-us/.

state law, including condemnation, quiet title, and contract actions." In re Condemnation by Lancaster, 909 A.2d 913, 918 (Pa. Commw. Ct. 2006) (finding that, after the STB exercised its jurisdiction to authorize abandonment of a railroad line, the County of Lancaster's attempted taking was a matter to be decided in the state courts under state law). See also *Moody v. Allegheny Valley Land Trust*, 930 A.2d 505, 509, 2007 PA Super 189 (2007) ("[W]e held that once the ICC had authorized unconditional abandonment or rail service along the Rail Corridor, the jurisdiction of the ICC and its successor, the STB, terminated.").

RWIP first avers here that because PBL has failed to maintain or use the tracks and thus assert any rights to the property, PBL intentionally abandoned the right of way and any property rights. However, mere nonuse of railroad tracks by a railroad does not amount to abandonment.

See *Birdsboro Mun. Auth. v. Reading Co.*, 758 A.2d 222, 227, 2000 PA Super 231(2000) (holding that a mere failure to maintain and repair existing tracks did not amount to abandonment). See also *Buffalo Twp. v. Jones*, 813 A.2d 659, 665, 571 Pa. 637, 646 (2002) ("there must be a showing of intent to abandon the property interest together with a showing of external acts by which such intention is carried into effect"). As properly asserted by PBL, the question of whether PBL abandoned its railroad right-of-way is subject to STB certification before a state court may consider the action.

RWIP next asserts that because PBL is not a statutorily defined "rail carrier," PBL is not subject to SIB's express and exclusive jurisdiction under Section 10501(b)(1). A rail carrier is "a person providing common carrier railroad transportation for compensation[.]" 49 U.S.C. § 10102(5) (2018). RWIP points to a STB Order from 2010 to support this claim. There, PBL properly petitioned the STB for an order declaring that PBL retained a rail right-of-way on a former Philadelphia street struck from a new city plan.¹⁶ The STB found that because PBL failed to demonstrate its status as a common carrier, STB did not have jurisdiction over PBL's claim to the right-of-way, and STB denied the petition.

Yet RWIP's use of this 2010 Order to explain why the SBT lacks jurisdiction here is misleading. The STB determined that PBL was not a rail carrier not because PBL failed to meet the statutory definition of a rail carrier, but because the STB found no evidence that the right-of-way at issue was ever, in fact, used for rail purposes. PBL conceded that it never constructed or operated a railroad over the particular right-of-way or took an action on the relevant right-of-way that would have met the ICC's minimum requirement for operation, extension, or construction of a railroad line.¹⁷ The STB thus concluded that it lacked jurisdiction over the

¹⁶PBL filed its petition for declaratory order from STB under 5 U.S.C. § 554(e) and 49 U.S.C. § 721(b)(4) [renumbered to § 1321].

¹⁷ Belt Line Ry. Co. — Petition for Declaratory Order, S.T.B. Docket No. FD 35345 (Aug. 3, 2010).

matter because PBL could not claim to be a rail carrier over a rail that did not, in fact, exist.

Also, STB's finding in the 2010 Order that PBL was not a rail carrier subject to STB jurisdiction has no bearing on the facts here. Recall that Section 10501(b) grants the STB express and exclusive jurisdiction over two classes of matters, the second of which — (b)(2) — concerns the abandonment of tracks, the issue here. RWIP seeks quiet title to the right-of-way on the claim that the tracks — which visibly exist and occupy the right-of-way — have been abandoned. PBL does not address the merits of RWIP's claim of abandonment; PBL asserts only, and properly, that RWIP's claim of abandonment in state court fails because the claim is subject to express and exclusive federal STB jurisdiction under Sec. 10501(b)(2). Accordingly, the proper course of action for this matter is for either party to first petition the STB to determine if PBL has abandoned the tracks. Once the STB decides, a state trial court may thereafter take subject matter jurisdiction on whether RWIP may has quiet title on the right-of-way property under review in this dispute.

IV. Conclusion

This court properly sustained PBL's Preliminary Objection to Count III (abandonment) for lack of subject matter jurisdiction. 49 U.S.C. § 10501(b)(2) grants the STB express and exclusive jurisdiction to decide whether railroad tracks

are abandoned, the threshold issue in this case. Under 49 U.S.C. § 10903, a rail carrier who intends to abandon or discontinue any part of its railroad line must first file an application with the STB. Once the STB reviews and grants or denies a certificate of abandonment---or makes a ruling as in 2010 that the right-of-way in question was never used by a common rail carrier, then this trial court may apply applicable state law to the applicable quiet title action raised by complaint.

For the reasons set forth above, we, respectfully, request that our order sustaining preliminary objections for lack of subject matter jurisdiction be affirmed.

Appendix D



User Name: Melissa Pawloski

Date and Time: Monday, April 22, 2024 4:20:00PM EDT

Job Number: 222547527

Document (1)

1. [49 USCS § 10101](#)

Client/Matter: 999999-99999-9999

[49 USCS § 10101](#)

Current through Public Law 118-46, approved March 22, 2024, with a gap of Public Law 118-42.

United States Code Service > TITLE 49. TRANSPORTATION (§§ 101 — 80504) > Subtitle IV. Interstate Transportation (Pts. A — C) > Part A. Rail (Chs. 101 — 119) > CHAPTER 101. General Provisions (§§ 10101 — 10388)

§ 10101. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

- (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
- (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
- (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;
- (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
- (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
- (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
- (7) to reduce regulatory barriers to entry into and exit from the industry;
- (8) to operate transportation facilities and equipment without detriment to the public health and safety;
- (9) to encourage honest and efficient management of railroads;
- (10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;
- (11) to encourage fair wages and safe and suitable working conditions in the railroad industry;
- (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;
- (13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;
- (14) to encourage and promote energy conservation; and
- (15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part [[49 USCS §§ 10101](#) et seq.].

History

HISTORY:

Added Dec. 29, 1995, *P. L. 104-88*, Title I, § 102(a), *109 Stat. 804*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Short titles:

Effective date of section:

Other provisions:

Explanatory notes:

A prior § 10101 (Act Oct. 17, 1978, [P.L. 95-473](#), § 1, [92 Stat. 1337](#); July 1, 1980, [P.L. 96-296](#), § 4, [94 Stat. 793](#); Oct. 14, 1980, [P.L. 96-448](#), Title I, § 101(b), [94 Stat. 1898](#); Sept. 20, 1982, [P. L. 97-261](#), § 5, [96 Stat. 1103](#); Aug. 26, 1994, *P. L. 103-311*, Title II, § 204, *108 Stat. 1683*) was omitted in the general revision of this Subtitle by Act Dec. 29, 1995, *P. L. 104-88*, Title I, § 102(a), *109 Stat. 804*, effective Jan. 1, 1996, with certain exceptions, as provided by § 2 of such Act ([49 USCS § 1301](#) note). Such section provided for rail transportation policy.

Short titles:

Act July 1, 1980, [P. L. 96-296](#), § 1, [94 Stat. 793](#), provides: "This Act may be cited as the 'Motor Carrier Act of 1980'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 14, 1980, [P. L. 96-448](#), § 1, [94 Stat. 1895](#), provides: "This Act may be cited as the 'Staggers Rail Act of 1980'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 15, 1980, [P. L. 96-454](#), § 1, [94 Stat. 2011](#), provides: "This Act may be cited as the 'Household Goods Transportation Act of 1980'.". For full classification of such Act, consult USCS Tables volumes.

Act Sept. 20, 1982, [P. L. 97-261](#), § 1, [96 Stat. 1102](#), provides: "This Act may be cited as the 'Bus Regulatory Reform Act of 1982'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 22, 1986, [P. L. 99-521](#), § 1, [100 Stat. 2993](#), provides: "This Act may be cited as the 'Surface Freight Forwarder Deregulation Act of 1986'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 26, 2002, *P. L. 107-298*, § 1, *116 Stat. 2342*, provides: "This Act [amending [49 USCS §§ 13102](#), [13506](#), [14501](#), and [31138](#)] may be cited as the 'Real Interstate Driver Equity Act of 2002'.". For full classification of such Act, consult USCS Tables volumes.

Act Aug. 10, 2005, *P. L. 109-59*, Title IV, Subtitle B, § 4201, *119 Stat. 1751*, provides: "This subtitle may be cited as the 'Household Goods Mover Oversight Enforcement and Reform Act of 2005'.". For full classification of such Subtitle, consult USCS Tables volumes.

Act Aug. 10, 2005, *P. L. 109-59*, Title IV, Subtitle C, § 4301, *119 Stat. 1761*, provides: "This subtitle may be cited as the 'Unified Carrier Registration Act of 2005'.". For full classification of such Subtitle, consult USCS Tables volumes.

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Act July 30, 2008, *P. L. 110-291*, § 1, *122 Stat. 2915*, provides: “This Act [amending [49 USCS §§ 13102](#), [13902\(a\)](#), and [13905\(d\)](#), and appearing in part as [49 USCS § 13902](#) notes] may be cited as the ‘Over-the-Road Bus Transportation Accessibility Act of 2007’.”.

Act Oct. 16, 2008, *P. L. 110-432*, Div A, Title VI, § 601, *122 Stat. 4900*, provides: “This title [adding [49 USCS §§ 10908–10910](#) and amending [49 USCS § 10501](#)] may be cited as the ‘Clean Railroads Act of 2008’.”.

Effective date of section:

This section took effect on Jan. 1, 1996, pursuant to Act Dec. 29, 1995, *P. L. 104-88*, § 2, *109 Stat. 804*, which appears as [49 USCS § 1301](#) note.

Other provisions:

Statutory construction of Surface Freight Forwarder Deregulation Act of 1986. Act Oct. 22, 1986, *P. L. 99-521*, § 1, *100 Stat. 2999*, effective 60 days after enactment on Oct. 22, 1986, as provided by § 15 of such Act, which appears as [49 USCS § 10102](#) note, provides: “Nothing in this Act (including any amendment made by this Act) shall be construed to limit or otherwise affect the authority of the Secretary of Transportation to regulate a freight forwarder and the transportation the freight forwarder uses (whether or not such transportation is provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of title 49, United States Code).”.

NOTES TO DECISIONS

1. Application of particular policies
- 2.—Preemption of state claims and remedies
- 3.—Filed-rate doctrine
- 4.—Primary jurisdiction doctrine

1. Application of particular policies

In light of Congress's unquestionable concern that large carriers might unfairly squeeze profits from captive small carriers, former Interstate Commerce Commission's total failure to address such issue rendered inadequate its finding that small carriers would be protected in absence of regulation. [Brae Corp. v. United States](#), *740 F.2d 1023*, *238 U.S. App. D.C. 352*, *1984 U.S. App. LEXIS 21065 (D.C. Cir. 1984)*, cert. denied, *471 U.S. 1069*, *105 S. Ct. 2149*, *85 L. Ed. 2d 505*, *1985 U.S. LEXIS 1719 (1985)*.

[49 USCS § 10101\(1\)](#) manifests preference for market-based, rather than regulatory, rate setting. [Association of Am. R.R. v. Surface Transp. Bd.](#), *237 F.3d 676*, *345 U.S. App. D.C. 38*, *2001 U.S. App. LEXIS 1186 (D.C. Cir. 2001)*.

Although Surface Transportation Board (STB) must adhere to federal policies encouraging safe and suitable working conditions in railroad industry, Interstate Commerce Commission Termination Act (ICCTA) and its legislative history contain no evidence that Congress intended for STB to supplant authority of Federal Railroad Administration over rail safety; rather, agencies' complementary exercise of their statutory authority accurately reflects congressional intent for ICCTA and Federal Railway Safety Act to be construed in *pari materia*. [Tyrrell v. Norfolk S. Ry. Co.](#), *248 F.3d 517*, *2001 FED App. 0136P*, *2001 U.S. App. LEXIS 7459 (6th Cir. 2001)*.

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Surface Transportation Board's elimination of indirect competition from market dominance calculus under Staggers Act, [Pub. L. No. 96-448, 94 Stat. 1895](#) (1980), was proper balance between policy language of [49 USCS § 10101\(1\)](#), calling for competition and demand for services to establish reasonable rates, and statutory obligations under [49 USCS § 10101\(2\)–\(15\)](#) and [49 USCS § 10704\(d\)](#), to expeditiously resolve rail rate cases and to establish expeditious procedures for resolution of cases. [Ass'n of Am. R.R. v. Surface Transp. Bd., 306 F.3d 1108, 353 U.S. App. D.C. 282, 2002 U.S. App. LEXIS 21030 \(D.C. Cir. 2002\)](#).

Petition for review of Surface Transportation Board decision, which approved offer of financial assistance (OFA), was denied because OFA was for continued freight service, finding which comported with expressed policy of Congress to ensure continuation of sound rail transportation system to meet needs of public and national defense. [Borough of Columbia v. Surface Transp. Bd., 342 F.3d 222, 2003 U.S. App. LEXIS 17808 \(3d Cir. 2003\)](#).

Interstate Commerce Commission Termination Act of 1995 (ICCTA), [49 USCS §§ 10101](#) et seq., private right of action applies only to agreements executed after ICCTA's effective date of January 1, 1996; because written agreements underlying claims brought by owner-operators were executed before ICCTA's effective date, damages claims would have had impermissible retroactive effect, and owner-operators therefore lacked standing to bring those claims. [Rivas v. Rail Delivery Serv., 423 F.3d 1079, 2005 U.S. App. LEXIS 19366 \(9th Cir. 2005\)](#).

Bankruptcy court properly dismissed interline freight railroad's action seeking recognition of interline trust doctrine as federal common law, and therefore debtor, interstate motor carrier that commonly engaged in interlining with other transportation providers, did not hold money in trust for railroad, and instead money was part of bankruptcy estate; underlying policies of Bankruptcy Code did not auger for recognition of federal common law rule, and [49 USCS § 10101\(1\)](#), (2), and [49 USCS § 10703](#), part of Interstate Transportation Act, were more supportive of system in which rail carriers were free to contract with other transportation providers in providing through service rather than strictly determining that all interline accounts were held in trust for other carriers. [Norfolk Southern Ry. v. Consol. Freightways Corp. \(In re Consol. Freightways Corp.\), 443 F.3d 1160, 46 Bankr. Ct. Dec. \(LRP\) 90, Bankr. L. Rep. \(CCH\) ¶ 80508, 2006 U.S. App. LEXIS 8698 \(9th Cir. 2006\)](#).

Policies underlying federal bankruptcy under Bankruptcy Code and interstate transportation law under [49 USCS §§ 10101](#) et seq. do not conflict significantly with use of state law in determining payment of interline balances; therefore, creation of new federal common law rule imposing constructive trust for payment of interline balances in bankruptcy is not justified. [Norfolk Southern Ry. v. Consol. Freightways Corp. \(In re Consol. Freightways Corp.\), 443 F.3d 1160, 46 Bankr. Ct. Dec. \(LRP\) 90, Bankr. L. Rep. \(CCH\) ¶ 80508, 2006 U.S. App. LEXIS 8698 \(9th Cir. 2006\)](#).

Surface Transportation Board's heavy reliance of company's stand-alone railroad upon cross-over traffic was not arbitrary and capricious where Board's explanation for its decision to allow cross-over traffic as simplifying mechanism, which Board described as now standard feature of stand-alone cost cases, was both reasonable and intelligibly explained in accordance with [49 USCS § 10101\(15\)](#); moreover, although Modified Straight-Mileage Prorate (MSP) method of allocating revenue to cross-over traffic did not take into account economies of density, Board gave adequate reason for rejecting Density Adjusted Revenue Allocation method, namely, its failure to take into account diminishing nature of those economies. [Burlington Northern & Santa Fe Ry. v. STB, 453 F.3d 473, 372 U.S. App. D.C. 1, 36 Envtl. L. Rep. 20114, 2006 U.S. App. LEXIS 14749 \(D.C. Cir. 2006\)](#).

Surface Transportation Board's decision that [49 USCS § 10101\(10\)](#) encouraged increases reflecting costs each customer caused railroad was consistent with statutory language. [N. Am. Freight Car Ass'n v. Surface Transp. Bd., 529 F.3d 1166, 381 U.S. App. D.C. 462, 2008 U.S. App. LEXIS 13281 \(D.C. Cir. 2008\)](#).

Challenging Surface Transportation Board's denial of their application for adverse abandonment of two railroad lines on ground that there was reasonable potential for future use of lines, city and religious brotherhood (petitioners), argued that record did not support Board's conclusion because evidence, public statement of former rail customer recorded in newspaper article and railroad's submission, indicated that customer had no present interest in receiving coal by rail; however, shipping coal by rail was generally more efficient than by truck, so

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customer's practice of receiving about 14 truck loads of coal every weekday was not economically rational, and customer's public statement showed that it might have been interested in receiving coal shipments if political and social pressures diminished in future; thus, newspaper article presented plausible explanation—unchallenged by petitioners—why customer had not resumed economically rational practice; accordingly, by denying petitioners' application and allowing reasonable period of time for another railroad to acquire lines, invest in rehabilitating them, address local concerns, and pursue shippers, Board acted reasonably and in furtherance of its statutory duty to preserve and promote continued rail service under [49 USCS §§ 10101\(4\)](#) and [10903\(d\)](#), which was neither arbitrary nor capricious pursuant to [5 USCS § 706\(2\)\(A\)](#). *City of S. Bend v. Surface Transp. Bd.*, 566 F.3d 1166, 386 U.S. App. D.C. 120, 2009 U.S. App. LEXIS 11503 (D.C. Cir. 2009).

Staggers Rail Act of 1980, [Pub. L. No. 96-448](#), [94 Stat. 1895](#), contains no provision requiring that minor mergers are automatically approved unless Surface Transportation Board acts before expiration of statutory period; indeed, Surface Transportation Board has certain procedural flexibility to accommodate environmental review to relevant timeframes. *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 394 U.S. App. D.C. 353, 41 *Env'tl. L. Rep.* 20113, 2011 U.S. App. LEXIS 5014 (D.C. Cir. 2011).

Where Surface Transportation Board (STB) authorized railroad to construct about 35 miles of new rail line, it was not arbitrary or capricious for STB to grant railroad exemption under [49 USCS § 10502](#) from full licensing procedures required by [49 USCS § 10901](#), and substantial evidence supported STB's findings for Rail Transportation Policy factors considered. *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 43 *Env'tl. L. Rep.* 20016, 2013 U.S. App. LEXIS 1478 (9th Cir. 2013).

Where Surface Transportation Board (STB) authorized railroad to construct about 35 miles of new rail line, there was no error under National Environmental Policy Act of 1969, because purpose and need statement was adequate, STB considered all viable, reasonable alternatives, and Environmental Impact Statement contained detailed, thorough, and thoughtful discussion of wetlands impacts and mitigation measures. *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 43 *Env'tl. L. Rep.* 20016, 2013 U.S. App. LEXIS 1478 (9th Cir. 2013).

Surface Transportation Board's denial of county's petitions to revoke two exemptions Board granted with respect to freight rail easement over county's property was arbitrary and capricious for failing to address county's claim that notices of exemption, whether or not ultimately false, misleadingly omitted material information. *Snohomish Cty. v. Surface Transp. Bd.*, 954 F.3d 290, 446 U.S. App. D.C. 56, 2020 U.S. App. LEXIS 9617 (D.C. Cir. 2020).

Driver involved in collision with tractor-trailer has no viable claim, even though, pursuant to Interstate Commerce Act ([49 USCS §§ 10101](#) et seq.), freight brokers are supposed to select drivers who are leased to motor carriers to provide transportation on their shipments, and driver of tractor-trailer was not adequately insured, licensed, and leased, because Act does not provide private right of action. *Graham v. Malone Freight Lines*, 43 F. Supp. 2d 77, 1997 U.S. Dist. LEXIS 23493 (D. Mass. 1997), *aff'd*, 201 F.3d 427, 1999 U.S. App. LEXIS 36918 (1st Cir. 1999).

Motion of moving company, van company, driver, and individual, for summary judgment on subrogation claim for household goods damaged during interstate move was granted as to: (1) state law claims under preemption of Carmack Amendment, [49 USCS § 14706](#), to Interstate Commerce Act, [49 USCS §§ 10101](#) et seq.; (2) all claims against moving company, driver, and individual because they were acting within their apparent authority as van company's agents; and (3) as to all damages exceeding \$70,000 limitation in bill of lading; motion was denied as to Carmack Amendment claims against van company. *Parramore v. Tru-Pak Moving Sys.*, 286 F. Supp. 2d 643, 2003 U.S. Dist. LEXIS 18225 (M.D.N.C. 2003).

In context of Motor Carrier Act of 1980, [49 USCS §§ 10101](#) et seq., mere possibility that owner of tractor-trailer combination might have traveled out of state at some point after inception of insurance policy at issue was insufficient to warrant shifting burden of ensuring compliance with federal regulations regarding MCS-90 endorsement to insurer. *Waters v. Miller*, 560 F. Supp. 2d 1318, 2008 U.S. Dist. LEXIS 44137 (M.D. Ga. 2008), *aff'd*, 564 F.3d 1355, 21 Fla. L. Weekly Fed. C 1726, 2009 U.S. App. LEXIS 7889 (11th Cir. 2009).

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Policy prohibiting tariff charges for hauling empty, privately owned cars to and from repair facilities was inconsistent with requirements of former [49 USCS § 10101](#) because it encouraged cross-subsidization and promoted inefficiency by giving private car owners little or no incentive to consider transportation costs in selecting repair facilities. *General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.* (1987) [3 I.C.C.2d 599](#).

Rail transportation policy of former [49 USCS § 10101a](#) did not require regulation of proposal for construction and operation of rail line intended to improve rail service for industrial park and to create river port barge transfer loading facility where, notwithstanding contention that proposal would cause competitor to lose business, proposal would improve service to shippers and foster competition. *Louisville & Jefferson County River Port Authority & CSX Transp., Inc.—Construction & Operation Exemption—In Jefferson County, Ky.* (1988) [4 I.C.C.2d 749](#).

2. —Preemption of state claims and remedies

Under as-applied preemption analysis, state actions were not preempted merely because they reduced profits of company; *Mich. Comp. Laws § 462.309* was not preempted by Interstate Commerce Commission Termination Act of 1995, [49 USCS §§ 10101](#) et seq., because it was not unreasonably burdensome and did not discriminate against railroads. *Adrian & Blissfield R.R. Co. v. Blissfield*, 550 F.3d 533, 2008 FED App. 0449P, 2008 U.S. App. LEXIS 25761 (6th Cir. 2008).

Plaintiff company's state-law claims were dismissed in action alleging non-payment of car mileage allowances generated by movement of privately-owned tank cars by defendant railroads; interplay between relevant provisions of Interstate Commerce Commission Termination Act of 1995, [49 USCS §§ 10101–11908](#), and regulations showed that Congress occupied field of car mileage so completely as to preempt any potentially parallel state-law remedy. *Engelhard Corp. v. Springfield Terminal Ry. Co.*, 193 F. Supp. 2d 385, 2002 U.S. Dist. LEXIS 5762 (D. Mass. 2002).

When two homeowners filed state common law claims against railroad for negligence and nuisance for way railroad operated its switching yard resulting in noise and vibrations, court found that claims were preempted by Interstate Commerce Commission Termination Act, [49 USCS §§ 10101](#) et seq., and that Surface Transportation Board had exclusive jurisdiction. *Rushing v. Kan. City Southern Ry.*, 194 F. Supp. 2d 493, 2001 U.S. Dist. LEXIS 23397 (S.D. Miss. 2001).

When two homeowners filed state common law claims against railroad for negligence and nuisance for way railroad constructed earthen berm to absorb and deflect noise from its switching yard, court found that this claim was not preempted under Interstate Commerce Commission Termination Act, [49 USCS §§ 10101](#) et seq., since design/construction of berm did not directly relate to manner in which the railroad conducted its switching activities. *Rushing v. Kan. City Southern Ry.*, 194 F. Supp. 2d 493, 2001 U.S. Dist. LEXIS 23397 (S.D. Miss. 2001).

State's motion to remand its suit against railroad to state court to pursue its state law claims was denied where claims were largely preempted under comprehensive federal scheme to regulate interstate rail commerce, including [49 USCS § 10101](#). *South Dakota v. Burlington Northern & Santa Fe Ry.*, 280 F. Supp. 2d 919, 2003 DSD 12, 2003 U.S. Dist. LEXIS 14791 (D.S.D. 2003).

Court denied defendants' request that plaintiffs' action remain in federal court and not be remanded to state court because dismissal of plaintiffs' class action claims eliminated the ground for court's grant of diversity jurisdiction under [28 USCS § 1332\(d\)](#) and [49 USCS § 10501\(b\)](#) did not expressly preempt plaintiffs' action as plaintiffs' complaint did not involve type of dispute Act preempted, which was all state regulatory authority over railroad operations. *Irish v. Burlington Northern Santa Fe Ry.*, 632 F. Supp. 2d 871, 2009 U.S. Dist. LEXIS 58604 (W.D. Wis. 2009).

Unpublished decision: Property owner's argument was rejected when carrier voluntarily contracted with third party to limit its rights, preemption under Interstate Commerce Commission (ICC) Termination Act of 1995, [49 USCS §§](#)

[10101](#) et seq., no longer applied. [Blanchard Securities v. Rahway Valley R.R. Co., 191 Fed. Appx. 98, 2006 U.S. App. LEXIS 16690 \(3d Cir. 2006\).](#)

Appellate court disagreed with ruling obtained by railroad because it held that any attempt by State to legislate regarding conduct of railroad at railroad crossing constituted per se impermissible governance, management and significant interference with federal transportation and operation interests of railroad under Interstate Commerce Commission Termination Act of 1995 and was therefore void ab initio; matters clearly raised substantial constitutional question and presented issue of great public importance in Ohio regarding fundamental police powers of state legislature to protect public safety and welfare, not to mention fundamental notions of federalism, which could appropriately be decided and resolved only by Supreme Court of Ohio. [State v. CSX Transp., Inc., 2020-Ohio-2665, 154 N.E.3d 327, 2020 Ohio App. LEXIS 1619 \(Ohio Ct. App., Union County 2020\),](#) discretionary app. allowed, 2020-Ohio-4232, 159 Ohio St. 3d 1486, 151 N.E.3d 635, 2020 Ohio LEXIS 1973 (Ohio 2020), rev'd, [2022-Ohio-2832, 168 Ohio St. 3d 543, 200 N.E.3d 215, 2022 Ohio LEXIS 1672 \(Ohio 2022\).](#)

Interstate Commerce Commission Termination Act (ICCTA), [49 USCS §§ 10101–16106](#), preempted enforcement of city's public nuisance ordinance against defendant railroad based on its rusted and graffiti-covered bridge, as bridges were expressly considered part of railroads' operations under [49 USCS § 10102](#), and enforcement of ordinance against defendant would have effect on its railroad operations that fell within scope of ICCTA. [City of Cayce v. Norfolk S. Ry. Co., 391 S.C. 395, 706 S.E.2d 6, 2011 S.C. LEXIS 33 \(S.C. 2011\).](#)

City could not enforce its nuisance ordinance, banning graffiti- and rust-covered bridges, against defendant railroad, owner of such bridge, as ordinance was preempted by Interstate Commerce Commission Termination Act (ICCTA), [49 USCS §§ 10101–16106](#); although aesthetic appearance of bridges was not covered in ICCTA, challenged provision did not have to be in direct conflict with ICCTA for federal preemption to apply. [City of Cayce v. Norfolk S. Ry. Co., 391 S.C. 395, 706 S.E.2d 6, 2011 S.C. LEXIS 33 \(S.C. 2011\).](#)

3. —Filed-rate doctrine

Strict application of filed rate doctrine associated with tariff provisions of Interstate Commerce Act ([49 USCS §§ 10101](#) et seq.), under which doctrine carrier's duly filed rate is only lawful charge, is necessary to prevent carriers from intentionally misquoting rates to shippers as means of offering rebates or discounts; regardless of carrier's motive—whether seeking to benefit or harm particular customer—policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for same services; thus, even if carrier intentionally misrepresents rate and customer relies on misrepresentation, carrier cannot be held to promised rate if it conflicts with published tariff; discriminatory preference or rebate is necessary result of every violation of filed rate doctrine, where carrier renders or pays for service not covered by prescribed tariffs; under doctrine, rights as defined by tariff cannot be varied or enlarged by either contract or tort of carrier. [AT&T v. Central Office Tel., 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222, 11 Fla. L. Weekly Fed. S 622, 87 Cal. Daily Op. Service 4546, 1998 Colo. J. C.A.R. 3095, 98 D.A.R. 6235, 1998 U.S. LEXIS 4002,](#) reh'g denied, 524 U.S. 972, 119 S. Ct. 20, 141 L. Ed. 2d 781, 1998 U.S. LEXIS 4560 (1998).

Under filed-rate doctrine based on [49 USCS § 10101](#), carriers are obligated to select least expensive route for transportation unless shipper instructs otherwise. [AVR, Inc. v. Churchill Truck Lines, 915 F. Supp. 1025, 1996 U.S. Dist. LEXIS 8983 \(D. Minn. 1996\).](#)

4. —Primary jurisdiction doctrine

Court would not defer adjudication of railroad antitrust claim until former Interstate Commerce Commission (ICC) considered it, under doctrine of primary jurisdiction, because in this case, court could marshal facts as adequately from materials submitted by parties as from ICC's factfinding, legal consideration by ICC might not be suitable to antitrust analysis, and deferral would deprive plaintiff of choice of forum as well as cause substantial delay.

Delaware & H. R. Co. v. Conrail, 654 F. Supp. 1195, 1988-2 Trade Cas. (CCH) ¶ 68205, 1987 U.S. Dist. LEXIS 1663 (N.D.N.Y. 1987).

Defendant van company was “carrier” on bill of lading and was liable under Interstate Commerce Act, 49 USCS § 10101 et seq., for household goods that were damaged during transportation and for actions of remaining defendants, moving company, driver, and individual, because they were acting within their apparent authority when van was in accident that cause damage; moving company, driver, and individual could not be held liable because they did not act ultra vires and were not parties to bill of lading as matter of law under 49 USCS § 13907(a). *Parramore v. Tru-Pak Moving Sys.*, 286 F. Supp. 2d 643, 2003 U.S. Dist. LEXIS 18225 (M.D.N.C. 2003).

Research References & Practice Aids

Cross References:

This section is referred to in 33 USCS § 1803; 49 USCS §§ 302, 10502, 10706.

Code of Federal Regulations:

Surface Transportation Board, Department of Transportation—Procedures for Surface Transportation Board consideration of safety integration plans in cases involving railroad consolidations, mergers, and acquisitions of control, 49 CFR 1106.1 et seq.

Am Jur:

9B Am Jur 2d, Bankruptcy § 1667.

13 Am Jur 2d, Carriers §§ 34, 39, 63, 65, 75–77, 163.

14 Am Jur 2d, Carriers § 825.

48 Am Jur 2d, Labor and Labor Relations § 705.

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 264, 270, 298.

65 Am Jur 2d, Railroads §§ 24, 184.

Law Review Articles:

Johnson. The Negotiated Rates Act of 1993: Congress curtails undercharge litigation in bankruptcy by amending the filed rate doctrine. 68 Am Bankr LJ 319, Summer 1994.

McCoy; Fielkow. Paid in full: undercharge claims & the Negotiated Rates Act. 68 Wis Law 20, November 1995.

Corporate and Business Law:

10 Kintner, Federal Antitrust Law (Matthew Bender), ch 73, Exemptions for Transportation Companies and Organizations §§ 73.3, 73.12.

Annotations:

Propriety of Federal Court's Abstention, Under Younger v. Harris, 401 U.S. 37, 91 S. Ct. 756, 27 L. Ed. 2d 669 (1971), to Avoid Interference in Ongoing State Proceedings Involving Land Use and Zoning. 55 ALR Fed 2d 261.

Other Treatises:

- 1 [Energy Law & Transactions \(Matthew Bender\), ch 2](#), The Law of Public Utilities § 2.01.
- 1 [Energy Law & Transactions \(Matthew Bender\), ch 3](#), Federal Regulation of Energy Transactions § 3.01.
- 2 [Energy Law & Transactions \(Matthew Bender\), ch 52](#), Electricity § 52.02.
- 3 [Energy Law & Transactions \(Matthew Bender\), ch 55](#), Coal § 55.14.
- 3 [Energy Law & Transactions \(Matthew Bender\), ch 56](#), Synthetic Natural Gas (SNG) and Liquefied Natural Gas (LNG) § 56.02.
- 4 [Energy Law & Transactions \(Matthew Bender\), ch 80](#), Rates and Tariffs §§ 80.02, 80.03.
- 4 [Energy Law & Transactions \(Matthew Bender\), ch 85](#), Oil Pipelines § 85.03.
- 5 [Energy Law & Transactions \(Matthew Bender\), ch 140](#), Discovery § 140.04.

Hierarchy Notes:

[49 USCS, Subtit. IV](#)

[49 USCS, Subtit. IV, Pt. A](#)

[49 USCS, Subtit. IV, Pt. A, Ch. 101](#)

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Document (1)

1. [49 USCS § 10901](#)

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[49 USCS § 10901](#)

Current through Public Law 118-46, approved March 22, 2024, with a gap of Public Law 118-42.

United States Code Service > TITLE 49. TRANSPORTATION (§§ 101 — 80504) > Subtitle IV. Interstate Transportation (Pts. A — C) > Part A. Rail (Chs. 101 — 119) > CHAPTER 109. Licensing (§§ 10901 — 10936)

§ 10901. Authorizing construction and operation of railroad lines

(a) A person may—

- (1) construct an extension to any of its railroad lines;
- (2) construct an additional railroad line;
- (3) provide transportation over, or by means of, an extended or additional railroad line; or
- (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding.

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

(d)

(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if—

- (A) the construction does not unreasonably interfere with the operation of the crossed line;
- (B) the operation does not materially interfere with the operation of the crossed line; and
- (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.

History

HISTORY:

Added Dec. 29, 1995, *P. L. 104-88*, Title I, § 102(a), *109 Stat.* 822.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Effective date of section:

Explanatory notes:

A prior § 10901 (Act Oct. 17, 1978, [P. L. 95-473](#), § 1, [92 Stat. 1402](#); Oct. 14, 1980, [P. L. 96-448](#), Title II, § 221, [94 Stat. 1928](#)) was omitted in the general revision of this Subtitle by Act Dec. 29, 1995, [P. L. 104-88](#), Title I, § 102(a), [109 Stat. 804](#), effective Jan. 1, 1996, with certain exceptions, as provided by § 2 of such Act ([49 USCS § 1301](#) note). Such section provided for authorizing construction and operation of railroad lines.

Effective date of section:

This section took effect on Jan. 1, 1996, pursuant to Act Dec. 29, 1995, [P. L. 104-88](#), § 2, [109 Stat. 804](#), which appears as [49 USCS § 1301](#) note.

NOTES TO DECISIONS

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B.State Proceedings**36.Generally****37.Limitations upon state authority****I. IN GENERAL****1. Generally**

Prior to former 49 USCS §§ 1–5, 5b–15a, 16, 17–23, 26, 27, [301–305](#), [306–327](#), 901–923, 1001–1022, carrier could not have maintained suit to prevent competitor from building extension into territory already served by it, competitor's proposed action not threatening interference with any legal right; no carrier could then demand exemption from honest competition. [Western P. C. R. Co. v. Southern Pacific Co.](#), 284 U.S. 47, 52 S. Ct. 56, 76 L. Ed. 160, 1931 U.S. LEXIS 875 (1931).

Prior to Transportation Act of 1920 ([41 Stat. 456](#)) no right, constitutional or statutory, existed to protect one railroad from another due to losses incident to competition of competing lines; Transportation Act of 1920 ([41 Stat. 456](#)) created no such right; on contrary, it expressly provided for entry of competing carrier into traffic territory of another carrier, where Commission [now Surface Transportation Board] found that public convenience and necessity required new construction. [Indian Valley R. v. United States](#), 52 F.2d 485, 1931 U.S. Dist. LEXIS 1654 (D. Cal. 1931), aff'd, 292 U.S. 608, 54 S. Ct. 775, 78 L. Ed. 1469, 1934 U.S. LEXIS 769 (1934).

Where transaction is not consolidation, merger, or acquisition of control within meaning of former [49 USCS § 11343](#), or where transaction involves takeover of line that has been abandoned within meaning of former [49 USCS § 10903](#), acquisition of line of railway is typically governed by former [49 USCS § 10901](#), and decision whether to impose labor protective conditions on acquiring entity in transaction under § 10901 falls within ICC's [now Surface Transportation Board] discretionary authority. [Black v. Interstate Commerce Com.](#), 762 F.2d 106, 246 U.S. App. D.C. 12, 119 L.R.R.M. (BNA) 2742, 1985 U.S. App. LEXIS 31408 (D.C. Cir. 1985).

2. Purpose

Purpose of former 49 USCS §§ 1–5, 5b–15a, 16, 17–23, 26, 27, [301–305](#), [306–327](#), 901–923, 1001–1022 is to develop and maintain adequate railway system, and to cure wasteful competition and building of unnecessary lines. [Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.](#), 270 U.S. 266, 46 S. Ct. 263, 70 L. Ed. 578, 1926 U.S. LEXIS 891 (1926).

Object of former 49 USCS § 1(18), (19) and (20) is regulation of interstate commerce; control is exerted over intrastate commerce only as necessary incident of freeing interstate commerce from unreasonable burdens, obstructions, or unjust discrimination resulting from operating branch line at large loss. [Colorado v. United States](#), 271 U.S. 153, 46 S. Ct. 452, 70 L. Ed. 878, 1926 U.S. LEXIS 905 (1926).

Purpose of former 49 USCS § 1(18)–(22) was to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating competing line not required in public interest. [Texas & N. O. R. Co. v. Northside B. R. Co.](#), 276 U.S. 475, 48 S. Ct. 361, 72 L. Ed. 661, 1928 U.S. LEXIS 292 (1928).

In absence of plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower Commission [now Surface Transportation Board] to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in public interest. [Chesapeake & O. R. Co. v. United States](#), 283 U.S. 35, 51 S. Ct. 337, 75 L. Ed. 824, 1931 U.S. LEXIS 866 (1931).

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Former 49 USCS § 1(18)–(22) have been declared to be part of general plan by which Congress intended to promote development and maintenance of adequate transportation facilities. [*Western P. C. R. Co. v. Southern Pacific Co.*, 284 U.S. 47, 52 S. Ct. 56, 76 L. Ed. 160, 1931 U.S. LEXIS 875 \(1931\)](#).

By terms of former 49 USCS § 1(18) Congress intended to confer upon Commission [now Surface Transportation Board] plenary power to limit interstate carriers' expenditures for construction or operation to lines of railroad reasonably necessary for service of public. [*Transit Com. v. United States*, 289 U.S. 121, 53 S. Ct. 536, 77 L. Ed. 1075, 1933 U.S. LEXIS 972 \(1933\)](#).

Congress, in adding to former 49 USCS § 1(18)–(22) sought to prevent building of duplicate railroad lines, when they would not serve present or future convenience and necessity, but simply depend for their traffic on taking it away from railroads already built. [*Detroit & M. R. Co. v. Boyne City, G. & A. R. Co.*, 286 F. 540, 1923 U.S. Dist. LEXIS 1808 \(D. Mich. 1923\)](#).

Congress by former 49 USCS § 1 provided that expansion or contraction of railroad activities should no longer be matter of carrier's independent judgment or desire but, being matter of national concern affecting economical development and operation of adequate railway system, should be subject for consideration and determination by Commission [now Surface Transportation Board] in interest of carriers generally and of public particularly. [*Pennsylvania R. Co. v. United States*, 40 F.2d 921, 1930 U.S. Dist. LEXIS 2085 \(D. Pa. 1930\)](#).

Theory of Transportation Act of 1920 ([41 Stat. 456](#)), requiring common carriers engaged in interstate commerce to obtain Commission [now Surface Transportation Board]'s permission before building track, extending old lines, or abandoning old lines, is that by encouraging and requiring interstate carriers to cut costs, increase their efficiency, and expedite service, shipping public is benefited, and cost of transportation reduced. [*Missouri P. R. Co. v. Union P. R. Co.*, 60 F.2d 126, 1931 U.S. Dist. LEXIS 2065 \(D. Kan. 1931\)](#).

General purpose was to control railroads whose operations affected interstate commerce, in such a way as to avoid excessive expenditures by building of unnecessary lines and to prevent injurious competition and abandonment of useful arteries of commerce. [*Transit Com. v. United States*, 1 F. Supp. 595, 1932 U.S. Dist. LEXIS 1797 \(D.N.Y. 1932\)](#), aff'd, [289 U.S. 121, 53 S. Ct. 536, 77 L. Ed. 1075, 1933 U.S. LEXIS 972 \(1933\)](#).

Primary aim of policy of Interstate Commerce Act is avoidance of waste. [*Georgia v. United States*, 28 F. Supp. 749, 1939 U.S. Dist. LEXIS 2417 \(D. Va. 1939\)](#).

Former [49 USCS §§ 11343](#) et seq. deals with unification of two or more carriers in common ownership or control, while § 10901 deals with abandonment, acquisition, or extension of individual line of railroad and is essentially directed at transportation-oriented activities of single rail carrier or applicant; thus, when one railroad applies to abandon line, and another applies to acquire that line, acquisition application is properly filed under § 10901 rather than § 11343, since intent is to acquire portion of trackage and no unification of rail properties is contemplated. *Illinois Central Gulf R. Co.* (1978) [360 I.C.C. 45](#).

By granting authority to ICC [now Surface Transportation Board] in former [49 USCS § 10901](#) to review line extensions and additions, Congress intended to curtail or at least discourage construction of unnecessary or wasteful lines. *City of Detroit v. Canadian National Railway Company, et al.* (1993) [9 I.C.C.2d 1208](#).

3. Construction

Former 49 USCS §§ 1–5, 5b–15a, 16, 17–23, 26, 27, [301–305](#), [306–327](#), 901–923, 1001–1022 including former 49 USCS § 1(18) and related provisions, is construed to make federal authority effective to full extent that it has been exerted and with view to eliminating evils that Congress intended to abate. [*Transit Com. v. United States*, 289 U.S. 121, 53 S. Ct. 536, 77 L. Ed. 1075, 1933 U.S. LEXIS 972 \(1933\)](#).

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Liberal or broad construction must be given to word “extension” and limited or narrow construction to word “spur.” [*Chicago & E. I. R. Co. v. Illinois C. R. Co.*, 261 F. Supp. 289, 1966 U.S. Dist. LEXIS 8188 \(N.D. Ill. 1966\)](#).

Both former 49 USCS § 207(a) and § 1(18) employed expression “public convenience and necessity”, and words “convenience” and “necessity” were used conjunctively and were not synonymous but were to be given separate and distinct meaning; however, “necessity” was to be somewhat liberally construed, since word was not used in sense of absolute necessity and every case had to be decided in light of its own special circumstances. [*Valley Transit Co., Inc.*, 128 M.C.C. 887 \(1976\)](#).

4. Relationship to other laws

“Pure” acquisitions of railroad lines were to be governed by former [49 USCS § 10901](#) without mandatory labor protections of former [49 USCS § 10903](#). [*Railway Labor Executives' Asso. v. Interstate Commerce Com.*, 784 F.2d 959, 121 L.R.R.M. \(BNA\) 3246, 1986 U.S. App. LEXIS 22840 \(9th Cir. 1986\)](#), amended, [*122 L.R.R.M. \(BNA\) 2721 \(9th Cir. 1986\)*](#), app. after remand, [*811 F.2d 1327, 1987 U.S. App. LEXIS 2764 \(9th Cir. 1987\)*](#).

District Court did not have jurisdiction to enjoin strike activity of unions, since neither language nor legislative history of former [49 USCS § 10901](#), giving ICC [now Surface Transportation Board] authority to approve acquisition of railroad and to impose discretionary employee protective provisions, suggested that strong national policy embodied in anti-injunction provision of Norris-La Guardia Act ([29 USCS §§ 101](#) et seq.) were to be subordinated to ICC's [now Surface Transportation Board] authority to approve acquisition of railroad property. [*Railway Labor Executives' Asso. v. Pittsburgh & L. E. R. Co.*, 831 F.2d 1231, 126 L.R.R.M. \(BNA\) 2975, 107 Lab. Cas. \(CCH\) ¶ 10155, 1987 U.S. App. LEXIS 16240 \(3d Cir. 1987\)](#), cert. denied, 486 U.S. 1031, 108 S. Ct. 2013, 100 L. Ed. 2d 601, 109 Lab. Cas. (CCH) ¶ 10531, 1988 U.S. LEXIS 2399 (1988).

Interstate Commerce Act provisions governing labor protective agreements superseded mandatory bargaining requirements of Railway Labor Act ([45 USCS §§ 151](#) et seq.); thus, railroad which sold rail line to new carrier was properly exempted from prior approval requirements of Interstate Commerce Act, and was not obligated to bargain with unions over transfer and to maintain status quo until bargaining was concluded. [*Railway Labor Executives' Ass'n v. Chicago & Northwestern Transp. Co.*, 848 F.2d 102, 128 L.R.R.M. \(BNA\) 2534, 109 Lab. Cas. \(CCH\) ¶ 10542, 1988 U.S. App. LEXIS 7224 \(8th Cir. 1988\)](#), vacated, remanded, 492 U.S. 901, 109 S. Ct. 3207, 106 L. Ed. 2d 558, 131 L.R.R.M. (BNA) 2759, 112 Lab. Cas. (CCH) ¶ 11231, 1989 U.S. LEXIS 3147 (1989).

ICC [now Surface Transportation Board] could approve acquisition of railroad under former [49 USCS § 10901\(a\)\(3\)](#) or [11343](#), but it was not always clear which statute given transaction was to be classified under; importance of getting classification right was that rights of workers who were made superfluous by transaction differed greatly under two statutes. [*Brotherhood of R.R. Signalmen v. ICC*, 63 F.3d 638, 150 L.R.R.M. \(BNA\) 2075, 1995 U.S. App. LEXIS 23915 \(7th Cir. 1995\)](#), reh'g, en banc, denied, [*1995 U.S. App. LEXIS 27329 \(7th Cir. Sept. 22, 1995\)*](#).

Although petitioner, new rail carrier, contended that Surface Transportation Board should have resolved its [49 USCS § 10502\(a\)](#) exemption petition before addressing crossing issue and that Board could consider [49 USCS § 10901\(d\)](#) crossing petition only after it had issued certificate of public convenience and necessity pursuant to [49 USCS § 10901\(c\)](#), nothing in [49 USCS § 10901\(d\)](#) barred Board from proceeding first with crossing issue where new carrier had no way of achieving its preferred route without obtaining crossing authority and, absent statutory requirements, formulation of procedures was basically to be left within discretion of agencies to which Congress confided responsibility for substantive judgment. [*HolRail, LLC v. STB*, 515 F.3d 1313, 380 U.S. App. D.C. 90, 2008 U.S. App. LEXIS 3739 \(D.C. Cir. 2008\)](#).

Department of Transportation Surface Transportation Board acted arbitrarily and capriciously in relying on five-year time frame, resulting in faulty analysis of possible cumulative impacts from reasonably foreseeable coal bed methane (CBM) projects that could overlap construction of railroad, but Board reasonably concluded that rail projects would not result in cumulative effects with respect to nine already approved CBM sites; because new coal mine was reasonably foreseeable, environmental impact statement should have addressed its impacts. [N. Plains](#)

[*Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 74 Env't Rep. Cas. \(BNA\) 1133, 42 Env'tl. L. Rep. 20012, 2011 U.S. App. LEXIS 25959 \(9th Cir. 2011\).](#)

Because environmental impact statement did not provide baseline data for many affected species, and instead planned post-approval mitigation measures, Department of Transportation's Surface Transportation Board did not take sufficiently "hard look" to fulfill its National Environmental Policy Act (NEPA), [42 USCS §§ 4321–4347](#), imposed obligations at impacts as to these species by projects to build 130-mile railroad to carry coal to market. [N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 74 Env't Rep. Cas. \(BNA\) 1133, 42 Env'tl. L. Rep. 20012, 2011 U.S. App. LEXIS 25959 \(9th Cir. 2011\).](#)

Were simultaneous construction of subject railroad construction, new coal bed methane projects, new coal mines to occur, there would be combined effects as to water quality that Surface Transportation Board should have addressed in its environmental impact statement (EIS) for rail construction project even though railroad was not expected to discharge water during operation since mitigation measures such as revegetation were estimated to reduce sediment delivery during operations to "near zero"; thus, EIS was deficient as to its water quality analysis related to construction, but sufficient as to operations. [N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 74 Env't Rep. Cas. \(BNA\) 1133, 42 Env'tl. L. Rep. 20012, 2011 U.S. App. LEXIS 25959 \(9th Cir. 2011\).](#)

Surface Transportation Board relied on stale data during environment impact analysis process of railroad construction project and failed to properly update data with additional studies and surveys; such faulty reliance did not constitute "hard look" required under National Environmental Policy Act (NEPA), [42 USCS §§ 4321–4347](#). [N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 74 Env't Rep. Cas. \(BNA\) 1133, 42 Env'tl. L. Rep. 20012, 2011 U.S. App. LEXIS 25959 \(9th Cir. 2011\).](#)

Where Surface Transportation Board (STB) authorized railroad to construct about 35 miles of new rail line, there was no error under National Environmental Policy Act of 1969, because purpose and need statement was adequate, STB considered all viable, reasonable alternatives, and Environmental Impact Statement contained detailed, thorough, and thoughtful discussion of wetlands impacts and mitigation measures. [Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, 43 Env'tl. L. Rep. 20016, 2013 U.S. App. LEXIS 1478 \(9th Cir. 2013\).](#)

Where Surface Transportation Board (STB) authorized railroad to construct about 35 miles of new rail line, it was not arbitrary or capricious for STB to grant railroad exemption under [49 USCS § 10502](#) from full licensing procedures required by [49 USCS § 10901](#), and substantial evidence supported STB's findings for Rail Transportation Policy factors considered. [Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, 43 Env'tl. L. Rep. 20016, 2013 U.S. App. LEXIS 1478 \(9th Cir. 2013\).](#)

Where short-line railroad in single state was denied by Interstate Commerce Commission [now Surface Transportation Board] certificate of convenience and necessity to operate as interstate common carrier, and upon charge that railroad was unlawfully engaging in interstate commerce Commission [now Surface Transportation Board] concluded that in respect to interstate features of its business it operated in capacity of plant facility to shippers on its line, such decision of Commission [now Surface Transportation Board] was entitled to be given effect in determining whether or not railroad's employees were within coverage of Fair Labor Standards Act [[29 USCS § 201](#) et seq.]. [Walling v. Rockton & R. R. R., 54 F. Supp. 342, 8 Lab. Cas. \(CCH\) ¶ 62047, 4 Wage & Hour Cas. \(BNA\) 272, 1944 U.S. Dist. LEXIS 2587 \(D.S.C.\), aff'd, 146 F.2d 111, 9 Lab. Cas. \(CCH\) ¶ 62453, 4 Wage & Hour Cas. \(BNA\) 912, 1944 U.S. App. LEXIS 2247 \(4th Cir. 1944\).](#)

Determination of whether particular track segment is railroad line requiring STB authorization under [49 USCS § 10901\(a\)](#) or spur track over which STB does not exercise licensing authority ([49 USCS § 10906](#)) turns on intended use of track segment; exempt spurs are commonly constructed either to improve facilities required by shippers already served by carrier or to supply facilities to others who, being within same territory and similarly situated, are entitled to like service from carrier. Indiana Rail Road Company—Petition for Declaratory Order (4/15/09) STB Finance Docket No. 35181.

49 USCS § 10901

Construction application may be denied based on evidence and analysis set out in environmental impact statement prepared pursuant to requirements of National Environmental Policy Act. The Indiana and Ohio Railway Company—Construction and Operation (1993) [9 I.C.C.2d 783](#).

Acquisition of line of railroad by non-carrier was governed by former [49 USCS § 10901](#), and not by former [49 USCS § 11343](#); thus, imposition of labor protective provisions on transaction for benefit of employees of selling carrier was discretionary with Commission [now Surface Transportation Board] and not mandatory. Genesee & Mohawk Valley Railroad Company—Acquisition and Operation Exemption (1993) [9 I.C.C.2d 1249](#).

5. Definitions and terms

Contention that Commission [now Surface Transportation Board] is not authorized to grant certificate of convenience and necessity authorizing construction and operation of ferry as part of railway's line was not sustained; former 49 USCS § 1(3), as amended by the Transportation Act of 1920 ([41 Stat. 456](#)), provides that term "railroad" shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad. [Claiborne-Annapolis Ferry Co. v. United States](#), 285 U.S. 382, 52 S. Ct. 440, 76 L. Ed. 808, 1932 A.M.C. 688, 1932 U.S. LEXIS 816 (1932).

There must be something more than mere intention to build line to bring proposed extension within meaning of word "undertake" in former 49 USCS § 1(18), statute should not be construed to give such broad and liberal meaning to exceptions so as to remove from absolute prohibition of statute definite extension on which work was actually begun many years after time limit (90 days after enactment of the Transportation Act, Feb. 28, 1920), merely because it may have been planned, projected, or intended prior to time limit. [Interstate Commerce Com. v. Piedmont & N. R. Co.](#), 51 F.2d 766, 1931 U.S. Dist. LEXIS 1565 (D.S.C. 1931), aff'd, 286 U.S. 299, 52 S. Ct. 541, 76 L. Ed. 1115, 1932 U.S. LEXIS 818 (1932).

Surface Transportation Board's interpretation of "railroad line" as including right to operate as common carrier was consistent with common usage and led to logical application of [49 USCS § 10901](#)'s authorization requirement, limited to actual carriers only, and was entitled to Chevron deference. [Bhd. of R.R. Signalmen v. Surface Transp. Bd.](#), 638 F.3d 807, 395 U.S. App. D.C. 32, 190 L.R.R.M. (BNA) 2646, 2011 U.S. App. LEXIS 6300 (D.C. Cir. 2011), reh'g, en banc, denied, 2011 U.S. App. LEXIS 26370 (D.C. Cir. May 5, 2011).

In view of governmental policy of control of interstate transportation by single body charged with duty of supervising it as whole, it is reasonable to construe words "operate any line of railroad," in former 49 USCS § 1(42), as embracing any railroad having interstate relations that runs its trains over lines of another, under trackage agreement entered into between two roads. [Transit Com. v. United States](#), 1 F. Supp. 595, 1932 U.S. Dist. LEXIS 1797 (D.N.Y. 1932), aff'd, 289 U.S. 121, 53 S. Ct. 536, 77 L. Ed. 1075, 1933 U.S. LEXIS 972 (1933).

Term "necessity" must be construed to mean a substantial need for present or future service which is not or cannot be adequately supplied by existing carriers or facilities. [Denver & R. G. W. R. Co. v. United States](#), 312 F. Supp. 329, 1970 U.S. Dist. LEXIS 11761 (D. Colo.), aff'd, 400 U.S. 921, 91 S. Ct. 188, 27 L. Ed. 2d 182, 1970 U.S. LEXIS 369 (1970).

II. RELATION TO STATE POWERS

6. Generally

Former 49 USCS § 1(18) and (20) show a continuing purpose to refrain from any regulation of intrastate commerce save such as is involved in rightful power of Congress over interstate and foreign commerce; if intended to depart from this path and to deal with intrastate commerce independently, reasonably that intent would have been plainly

declared; this was not done. [*Texas v. Eastern T. R. Co.*, 258 U.S. 204, 42 S. Ct. 281, 66 L. Ed. 566, 1922 U.S. LEXIS 2261 \(1922\)](#).

State law cannot require railroad constructed exclusively for intrastate carriage to engage in interstate commerce if by so doing it would violate any law of the United States. [*Texas & N. O. R. Co. v. Northside B. R. Co.*, 276 U.S. 475, 48 S. Ct. 361, 72 L. Ed. 661, 1928 U.S. LEXIS 292 \(1928\)](#).

Provisions of former 49 USCS § 1, ¶ 18, relating to issuance of certificates of convenience and necessity for proposed addition to or extension of railroad lines, affect intrastate commerce only as that may be incidental to effective regulation of interstate commerce. [*Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 52 S. Ct. 440, 76 L. Ed. 808, 1932 A.M.C. 688, 1932 U.S. LEXIS 816 \(1932\)](#).

Under former 49 USCS § 1(18) Interstate Commerce Commission [now Surface Transportation Board] has jurisdiction, to exclusion of state transit commission, to pass on or prescribe terms and conditions of agreement between carriers in interstate commerce for use by one, of the tracks and terminal facilities of the other, even though such use commenced prior to the enactment of such provisions of the Interstate Commerce Act, where the agreement regarding such use has expired. [*Transit Com. v. United States*, 289 U.S. 121, 53 S. Ct. 536, 77 L. Ed. 1075, 1933 U.S. LEXIS 972 \(1933\)](#).

State law in so far as it permits denial of certificate of public convenience and necessity to common carrier, purely in interstate commerce, is unconstitutional. [*Red Ball Transit Co. v. Marshall*, 8 F.2d 635, 1925 U.S. Dist. LEXIS 1666 \(D. Ohio 1925\)](#).

Congress has manifested intent to occupy field of railroad unification, consolidation, combination, and acquisition of control; its enactment supersedes state's regulatory provision requiring authorization by its public service commission. [*Kansas City S. R. Co. v. Chicago G. W. R. Co.*, 58 F.2d 810, 1932 U.S. Dist. LEXIS 1228 \(D. Mo. 1932\)](#).

7. Eminent domain

Water control and improvement district taking railroad track in exercise of its power of eminent domain is not required to procure from Commission [now Surface Transportation Board] certificate permitting such railroad to construct another line, even though railroad is engaged in interstate commerce. [*Chicago, R. I. & G. R. Co. v. Tarrant County Water Control & Improv. Dist.*, 76 S.W.2d 147, 1934 Tex. App. LEXIS 1235 \(Tex. Civ. App. 1934\)](#), cert. denied, 295 U.S. 762, 55 S. Ct. 921, 79 L. Ed. 1704, 1935 U.S. LEXIS 514 (1935).

State had power to condemn right of way of interstate railroad as incident to improvement of river, thus requiring relocation of track. [*Board of Hudson River Regulating Dist. v. Fonda, J. & G. R. Co.*, 249 N.Y. 445, 164 N.E. 541, 1928 N.Y. LEXIS 829 \(N.Y. 1928\)](#).

Appropriation of part of railroad right-of-way under power of eminent domain in public interest is not interference with powers of Interstate Commerce Commission [now Surface Transportation Board] with respect to location and relocation of railroad tracks. [*Board of Hudson River Regulating Dist. v. Fonda, J. & G. R. Co.*, 217 N.Y.S. 781, 127 Misc. 866, 1926 N.Y. Misc. LEXIS 722 \(N.Y. Sup. Ct. 1926\)](#), aff'd, [*223 A.D. 358, 228 N.Y.S. 686, 1928 N.Y. App. Div. LEXIS 6215 \(N.Y. App. Div. 1928\)*](#).

8. Grade crossings

Order of State Transit Commission for elimination of highway grade crossings was not in violation of former 49 USCS §§ 1–5, 5b–15a, 16, 17–23, 26, 27, [*301–305, 306–327*](#), 901–923, 1001–1022. [*In re Bay St. Crossing of Staten I. R. T. R. Co.*, 220 A.D. 80, 221 N.Y.S. 129, 1927 N.Y. App. Div. LEXIS 9239 \(N.Y. App. Div.\)](#), aff'd, [*245 N.Y. 643, 157 N.E. 892, 1927 N.Y. LEXIS 826 \(N.Y. 1927\)*](#).

9. Interconnection between railroads

State may require crossing or intersecting railroads to make track connections for interchange of traffic, where there is showing of public necessity. [*Seaboard A. L. R. Co. v. Railroad Com. of Georgia*, 240 U.S. 324, 36 S. Ct. 260, 60 L. Ed. 669, 1916 U.S. LEXIS 1454 \(1916\)](#).

Unless Interstate Commerce Commission [now Surface Transportation Board] authorizes such connection, state cannot compel connections between interstate railroads. [*People v. McCabe*, 259 N.Y.S. 374, 144 Misc. 702, 1932 N.Y. Misc. LEXIS 1248 \(N.Y. Spec. Sess. 1932\)](#).

10. Lien laws

Mississippi statute giving lien to contractors for construction of interstate railroad was not superseded by Interstate Commerce Act. [*Gulf States Creosoting Co. v. Southern Finance & Constr. Corp.*, 166 Miss. 714, 146 So. 860, 1933 Miss. LEXIS 360 \(Miss. 1933\)](#).

11. Public health and safety

Act of state in requiring relocation of interstate railroad in constructing improvements in stream for public welfare and health is not interference with federal authority. [*Board of Hudson River Regulating Dist. v. Fonda, J. & G. R. Co.*, 223 A.D. 358, 228 N.Y.S. 686, 1928 N.Y. App. Div. LEXIS 6215 \(N.Y. App. Div.\)](#), modified, [*249 N.Y. 445, 164 N.E. 541, 1928 N.Y. LEXIS 829 \(N.Y. 1928\)*](#).

12. Stations and terminals

Authority over establishment by railroad companies of union stations in cities by new construction involving extension of main lines and abandonment of main tracks and terminals is vested in Interstate Commerce Commission [now Surface Transportation Board] to exclusion of state commissions by the provisions of the Transportation Act (former 49 USCS § 1). [*Railroad Com. of California v. Southern Pacific Co.*, 264 U.S. 331, 44 S. Ct. 376, 68 L. Ed. 713, 1924 U.S. LEXIS 2512 \(1924\)](#).

Authority residing in state to compel construction of terminals has not been taken away except to extent that approval of federal commission is required; Congress may circumscribe its regulation and occupy limited field, and intention to supersede exercise by state of its authority as to matters not covered by federal legislation is not to be implied unless act of Congress fairly interpreted is in conflict with law of state. [*Atchison, T. & S. F. R. Co. v. Railroad Com. of California*, 283 U.S. 380, 51 S. Ct. 553, 75 L. Ed. 1128, 1931 U.S. LEXIS 869 \(1931\)](#).

13. Stockholder approval

Whether contracts pertaining to use of terminal were illegal under state law in that they were not approved by vote of stockholders was within jurisdiction of Interstate Commerce Commission [now Surface Transportation Board], and, Congress having acted by vesting power in Commission, requirements prescribed by states must yield to paramount control of federal government. [*Pittsburgh & W. V. R. Co. v. United States*, 41 F.2d 806, 1929 U.S. Dist. LEXIS 1876 \(D. Ohio 1929\)](#), aff'd, [*281 U.S. 479, 50 S. Ct. 378, 74 L. Ed. 980, 1930 U.S. LEXIS 730 \(1930\)*](#).

III. SCOPE OF SECTION

A. Persons Covered

14. Generally

Former 49 USCS § 1(18), (19), and (20) are expressly restricted to carriers engaged in transporting persons and property in interstate and foreign commerce. [*Texas v. Eastern T. R. Co.*, 258 U.S. 204, 42 S. Ct. 281, 66 L. Ed. 566, 1922 U.S. LEXIS 2261 \(1922\)](#).

Provisions of former 49 USCS § 1(18) are specifically limited to lines of railroad; this indicates legislative intention that carriers by water are not required to continue and may cease to operate if they see fit. [*Lucking v. Detroit & Cleveland Navigation Co.*, 265 U.S. 346, 44 S. Ct. 504, 68 L. Ed. 1047, 1924 U.S. LEXIS 2613 \(1924\)](#).

Former 49 USCS § 1(18)–(21) relate to construction, acquisition, extension, and abandonment of railroad, and deal primarily with rights sought to be exercised by carrier, not with sidetracks built by shipper. [*Cleveland, C., C. & S. L. R. Co. v. United States*, 275 U.S. 404, 48 S. Ct. 189, 72 L. Ed. 338, 1928 U.S. LEXIS 276 \(1928\)](#).

Noncarrier owning trackage which never had carried any freight, did not have access to a railroad switching station, was made of lightweight stock, and had no communications system, was not a “line of a railroad” and was not subject to the control of the Interstate Commerce Commission [now Surface Transportation Board]. [*Louisiana & A. R. Co. v. Missouri P. R. Co.*, 415 F.2d 751, 1969 U.S. App. LEXIS 11055 \(5th Cir. 1969\)](#), cert. denied, 396 U.S. 1060, 90 S. Ct. 757, 24 L. Ed. 2d 754, 1970 U.S. LEXIS 3118 (1970).

Surface Transportation Board permissibly interpreted statutory freight carriage obligations to include statutory common carrier obligation to transport hazardous materials, and it was not error to have denied railroad application that sought to exclude such transports over its new 800-foot spur at end of existing line. [*Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 407 U.S. App. D.C. 13, 2013 U.S. App. LEXIS 21699 \(D.C. Cir. 2013\)](#).

Acquisition of active rail line and common carrier obligation that goes with it ordinarily requires approval by STB under [49 USCS § 10901](#), even if acquiring entity is noncarrier, including a state. City of Chicago—Petition for Declaratory Order—Cherry Avenue Bridge (8/6/08) STB Finance Docket No. 35154.

Even if transit authority operating electrified passenger line under certificate issued city owner of line were not found subject to Railway Labor Act, Commission [now Surface Transportation Board] might otherwise have entertained complaint by former employees of former railroad owner of line now employed by transit authority, premised on violation of Commission decision which directed that no changes or modifications were to be made in employee protective conditions approved in decision without prior authority of Commission; this responsibility is not to be superficially construed in light of Commission’s express responsibility to require fair and equitable arrangement to protect interests of railroad employees affected by transactions authorized by Commission. *Brotherhood of Loco. Engineers v. Staten Island* (1979) [360 I.C.C. 464](#).

15. Carriers within single state

Congress has not in terms prohibited wholly intrastate carriers from building lines to be used solely in intrastate commerce, and so long as such carrier confines its operations to intrastate commerce it will not violate federal law, although without certificate required as to interstate carriers; mere fact that railroad to lie wholly within one state is to be built by independent corporation does not prevent application of former 49 USCS § 1 ¶¶ (19)–(22). [*Texas & N. O. R. Co. v. Northside B. R. Co.*, 276 U.S. 475, 48 S. Ct. 361, 72 L. Ed. 661, 1928 U.S. LEXIS 292 \(1928\)](#).

State statute requiring all railroads therein to exchange traffic with connecting lines which, as far as they affect interstate traffic, are in conflict with the Interstate Commerce Act (former 49 USCS §§ 1–5, 5b–15a, 16, 17–23, 26, 27, [301–305](#), [306–327](#), 901–923, 1001–1022) cannot make railroad company whose projected line is wholly within state interstate carrier and subject to provisions of former 49 USCS § 1(18). [*Smyth v. Asphalt Belt R. Co.*, 292 F.](#)

[876, 1923 U.S. Dist. LEXIS 1357 \(D. Tex. 1923\)](#), remanded, [267 U.S. 326, 45 S. Ct. 242, 69 L. Ed. 629, 1925 U.S. LEXIS 792 \(1925\)](#).

Intrastate railroad was not required to obtain certificate of convenience and necessity from Interstate Commerce Commission [now Surface Transportation Board]. [Robinson Land & Lumber Co. v. Avera & N. E. R. Co., 157 Miss. 700, 128 So. 738, 1930 Miss. LEXIS 334 \(Miss. 1930\)](#).

Commission [now Surface Transportation Board] has consistently entertained applications by noncarrier corporations proposing to engage in railroad operations; and mere fact that the railroad lies wholly in one State does not prevent application of former § 1(18) since, if it undertakes to engage in interstate commerce, its operation becomes immediately a matter of national concern, within purview of paragraphs (18)–(22). Iowa Term. R. Co. Acquisition and Operation, 312 I.C.C. 546.

B. Activities Covered

1. In General

16. Generally

Former 49 USCS §§ 1–5, 5b–15a, 16, 17–23, 26, 27, [301–305](#), [306–327](#), 901–923, 1001–1022 distinguishes between three sorts of facilities: new lines, or extensions, voluntarily undertaken, former 49 USCS § 1; compulsory extensions within area which carrier has bound itself to serve, former 49 USCS § 1 (21); and spur, industrial, team, switching, or side tracks located wholly within one state, which are left within state control, former 49 USCS § 1 (22). [Interstate Commerce Com. v. Oregon-Washington R. & Navigation Co., 288 U.S. 14, 53 S. Ct. 266, 77 L. Ed. 588, 1933 U.S. LEXIS 966 \(1933\)](#).

New construction by existing carrier might prejudicially affect public by financially hampering that carrier in performing its functions by invading territory already adequately served by causing increase in group rates or by other ways. [Missouri-Kansas-Texas R. Co. v. Northern Oklahoma R., 25 F.2d 689, 1928 U.S. App. LEXIS 3053 \(8th Cir.\)](#), cert. denied, 278 U.S. 610, 49 S. Ct. 13, 73 L. Ed. 536, 1928 U.S. LEXIS 479 (1928).

It cannot be gainsaid that establishment, construction, and operation of joint terminal by interstate carriers falls within provisions of the Transportation Act of 1920 ([41 Stat. 456](#)) and comes within powers of regulation of Commission [now Surface Transportation Board]. [Pittsburgh & W. V. R. Co. v. United States, 41 F.2d 806, 1929 U.S. Dist. LEXIS 1876 \(D. Ohio 1929\)](#), aff'd, [281 U.S. 479, 50 S. Ct. 378, 74 L. Ed. 980, 1930 U.S. LEXIS 730 \(1930\)](#).

Interstate Commerce Commission [now Surface Transportation Board] cannot grant railroad company permission to construct and operate rail line without considering whether construction of line haul will be in compliance with American Indian Religious Freedom Act ([42 USCS § 1996](#)), National Historic Preservation Act ([16 USCS § 470f](#)) and whether the construction of line is in public interest. [New Mexico Navajo Ranchers Asso. v. Interstate Commerce Com., 702 F.2d 227, 226 U.S. App. D.C. 248, 1983 U.S. App. LEXIS 30074 \(D.C. Cir. 1983\)](#), app. after remand, [850 F.2d 729, 271 U.S. App. D.C. 36, 1988 U.S. App. LEXIS 8626 \(D.C. Cir. 1988\)](#).

Where transaction is not consolidation, merger, or acquisition of control within meaning of former [49 USCS § 11343](#), or where transaction involves takeover of line that has been abandoned within meaning of former [49 USCS § 10903](#), acquisition of line of railway is typically governed by former [49 USCS § 10901](#), and decision whether to impose labor protective conditions on acquiring entity in transaction under § 10901 falls within ICC's [now Surface Transportation Board] discretionary authority. [Black v. Interstate Commerce Com., 762 F.2d 106, 246 U.S. App. D.C. 12, 119 L.R.R.M. \(BNA\) 2742, 1985 U.S. App. LEXIS 31408 \(D.C. Cir. 1985\)](#).

ICC [now Surface Transportation Board], which approved lease of small railroad line to non-carrier subsidiary of rail carrier under former [49 USCS § 10901](#), did not commit error by failing to treat transaction under former [49 USCS § 11343](#) or by failing to exercise its discretion to impose labor protection under § 10901, because lease involved no exceptional circumstances, and, contrary to labor organizations' contention that rail carrier formed subsidiary to evade labor protection mandated by § 11343, carrier in fact formed subsidiary for legitimate business reason of avoiding unusual administrative delays associated with § 11343 transactions. [Railway Labor Executives' Ass'n v. ICC, 999 F.2d 574, 303 U.S. App. D.C. 26, 143 L.R.R.M. \(BNA\) 2950, 125 Lab. Cas. \(CCH\) ¶ 10798, 1993 U.S. App. LEXIS 19565 \(D.C. Cir. 1993\).](#)

Former 49 USCS §§ 1–5, 5b–15a, 16, 17–23, 26, 27, [301–305](#), [306–327](#), 901–923, 1001–1022 held inapplicable to construction or extension of logging railroad. [Bank of California v. Clear Lake Lumber Co., 146 Wash. 543, 264 P. 705, 1928 Wash. LEXIS 796 \(Wash. 1928\).](#)

17. Acquisition of operation

Words “operate a line of railroad” as used in former 49 USCS § 1(18) are not limited to operation by other than owner or lessee of line, or to exclusive use; joint use of line by trackage rights is within plenary power of Commission [now Surface Transportation Board] under former 49 USCS § 1(18) to limit interstate carriers' expenditures for construction or operation to lines of railroad reasonably necessary for service of public, even when such joint use commenced prior to enactment of the Transportation Act of 1920. [Transit Com. v. United States, 289 U.S. 121, 53 S. Ct. 536, 77 L. Ed. 1075, 1933 U.S. LEXIS 972 \(1933\).](#)

Operations under trackage contracts, including those entered into prior to passage of the Interstate Commerce Act, are within former 49 USCS § 1. [Thompson v. Texas M. R. Co., 328 U.S. 134, 66 S. Ct. 937, 90 L. Ed. 1132, Bankr. L. Rep. \(CCH\) ¶ 55634, 1946 U.S. LEXIS 3035 \(1946\).](#)

ICC [now Surface Transportation Board] order under former 49 USCS § 5(2) authorizing joint acquisition of formerly independent switching railroad by only two of the four line-haul railroads serving Portland, the acquired interest providing entrance to large industrial complex in the process of development, was reversed and remanded for consideration of its anti-competitive effects, thereby warranting postponement of review of the ICC's denial of one of the railroad's trackage applications under former 49 USCS § 3(5). [Port of Portland v. United States, 408 U.S. 811, 92 S. Ct. 2513, 33 L. Ed. 2d 723, 1972 U.S. LEXIS 121 \(1972\).](#)

Position of ICC [now Surface Transportation Board] that all acquisitions of trackage rights over single lines by noncarriers fall within ambit of 49 USCS § 901 is reasonable, there being no reason to differentiate between noncarrier acquiring new rail line and noncarrier acquiring trackage rights over single line since neither type of transaction implicates anticompetitive concerns. [Railway Labor Executives' Asso. v. United States, 791 F.2d 994, 122 L.R.R.M. \(BNA\) 2850, 104 Lab. Cas. \(CCH\) ¶ 11946, 1986 U.S. App. LEXIS 25295 \(2d Cir. 1986\).](#)

Acquisition by noncarrier of rail assets of two carriers was covered by [49 USCS § 11343](#), providing for Commission [now Surface Transportation Board] approval and protection of workers affected by transaction, rather than [49 USCS § 10901](#), since former specifically refers to noncarrier acquisition of control of carriers, seller carriers survived but without rail assets, and purpose of transaction was to have noncarrier subsidiary of carrier acquire assets to consolidate them with those of parent. [Fox Valley & W. v. ICC, 15 F.3d 641, 145 L.R.R.M. \(BNA\) 2437, 145 L.R.R.M. \(BNA\) 2438, 127 Lab. Cas. \(CCH\) ¶ 10990, 1994 U.S. App. LEXIS 1360 \(7th Cir. 1994\).](#)

ICC [now Surface Transportation Board] could approve acquisition of railroad under former [49 USCS § 10901\(a\)\(3\)](#) or [11343](#), but it was not always clear which statute given transaction should have been classified under; importance of getting classification right was that rights of workers who were made superfluous by transaction differed greatly under two statutes. [Brotherhood of R.R. Signalmen v. ICC, 63 F.3d 638, 150 L.R.R.M. \(BNA\) 2075, 1995 U.S. App. LEXIS 23915 \(7th Cir. 1995\)](#), reh'g, en banc, denied, [1995 U.S. App. LEXIS 27329 \(7th Cir. Sept. 22, 1995\).](#)

49 USCS § 10901

Noncarrier's acquisition of trackage rights were property classified as incidental where they were granted in conjunction with and facilitated overall acquisition of rail lines and thus fell squarely within regulations' definition of incidental trackage rights. [*City of Ottumwa v. Surface Transp. Bd.*, 153 F.3d 879, 1998 U.S. App. LEXIS 20285 \(8th Cir. 1998\)](#).

Because selling carrier reserved freight rights to acquired property permanently and exclusively, intervenor purchaser did not become rail carrier providing transportation and acquisition, and acquisition was not subject to [49 USCS § 10901\(a\)\(4\)](#)'s authorization requirement. [*Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 395 U.S. App. D.C. 32, 190 L.R.R.M. \(BNA\) 2646, 2011 U.S. App. LEXIS 6300 \(D.C. Cir. 2011\)](#), reh'g, en banc, denied, [2011 U.S. App. LEXIS 26370 \(D.C. Cir. May 5, 2011\)](#).

Surface Transportation Board's denial of county's petitions to revoke two exemptions Board granted with respect to freight rail easement over county's property was arbitrary and capricious for failing to address county's claim that notices of exemption, whether or not ultimately false, misleadingly omitted material information. [*Snohomish Cty. v. Surface Transp. Bd.*, 954 F.3d 290, 446 U.S. App. D.C. 56, 2020 U.S. App. LEXIS 9617 \(D.C. Cir. 2020\)](#).

Interstate Commerce Commission [now Surface Transportation Board] had jurisdiction to issue certificate of public convenience and necessity permitting one railroad to operate its through freight trains over lines of another road pursuant to trackage contract providing for former's use of its own crews; but Commission [now Surface Transportation Board] was without jurisdiction or power to determine finally former's right to use its own employees. [*Gulf, M. & N. R. Co. v. Illinois C. R. Co.*, 21 F. Supp. 282, 1937 U.S. Dist. LEXIS 1374 \(D. Tenn. 1937\)](#).

Acquisition of active rail line and common carrier obligation that goes with it ordinarily requires approval by STB under [49 USCS § 10901](#), even if acquiring entity is noncarrier, including a state. City of Chicago—Petition for Declaratory Order—Cherry Avenue Bridge (8/6/08) STB Finance Docket No. 35154.

When one railroad applied to abandon line, and another applied to acquire that line under former [49 USCS § 10901](#), acquisition application did not conflict with theory of abandonment application, since acquisition applicant proposed small, locally owned and managed carrier which would provide more attractive short-line service, while abandonment applicant would operate branch line at loss, creating burden on interstate commerce; abandonment authorization, however, was not essential prerequisite to approval of § 10901 acquisition proposals. Illinois Central Gulf R. Co. (1978) [360 I.C.C. 45](#).

Acquisition by noncarrier of single line from 2 carriers rather than one was not merger or consolidation within meaning of former [49 USCS § 11343](#), and thus was governed by former [49 USCS § 10901](#) rather than § 11343. Re Alabama Southern Railroad Co., Inc. & Alabama Great Southern Railroad Co. (1984) [1 I.C.C.2d 298](#).

Former [49 USCS § 10901](#), rather than former [49 USCS § 11343](#), was applicable to transaction in which single entity, with no existing transportation operations, sought to institute new operation, not to coordinate 2 or more carrier operations. San Diego & Imperial Valley Railroad Co., Inc.—Exemption From [49 USC 10901](#) and [11301](#) (1985) [1 I.C.C.2d 941](#), modified, [*Railway Labor Executives' Asso. v. United States*, 811 F.2d 1327, 1987 U.S. App. LEXIS 2764 \(9th Cir. 1987\)](#).

Proposed acquisition of substantially all of assets of two rail common carriers by non-carrier was governed by former [49 USCS § 11343](#), rather than former [49 USCS § 10901](#), since non-carrier was in actuality acquiring control of two entire carriers, not rail lines. Fox Valley & Western Ltd.—Exemption, Acquisition and Operation (1992) [9 I.C.C.2d 209](#).

Acquisition of line of railroad by non-carrier was governed by former [49 USCS § 10901](#), and not by former [49 USCS § 11343](#); thus, imposition of labor protective provisions on transaction for benefit of employees of selling carrier was discretionary with Commission [Surface Transportation Board] and not mandatory. Genesee & Mohawk Valley Railroad Company—Acquisition and Operation Exemption (1993) [9 I.C.C.2d 1249](#).

49 USCS § 10901

Where noncarrier desires to acquire and operate railroad, Commission [Surface Transportation Board] lacks jurisdiction over purchase under former 49 USCS § 5, however, provisions of former 49 USCS § 1(18) requiring any person or corporation to obtain certificate thereunder before engaging in railroad operations are applicable. *Iowa Term. R. Co. Acquisition and Operation*, 312 I.C.C. 546.

18. Relocation

Differences between mere track relocation for local union stations and compliance with order of state commission requiring expenditure of many millions of dollars for union passenger terminal are more than of mere degree; they constitute change in kind and come within former 49 USCS § 1(18) and following paragraphs and require certificate from Commission [now Surface Transportation Board]. [*Railroad Com. of California v. Southern Pacific Co.*, 264 U.S. 331, 44 S. Ct. 376, 68 L. Ed. 713, 1924 U.S. LEXIS 2512 \(1924\)](#).

Neither state nor federal court had authority to restrain interstate railroad from continuing to operate its line in middle of main street of thriving city, thus preventing civic development, until Interstate Commerce Commission [now Surface Transportation Board] had issued certificate required by former 49 USCS § 1(18), and this is so whether such restraining order required merely relocation of line or total abandonment. [*Des Moines v. Chicago & N. W. R. Co.*, 264 F.2d 454, 1959 U.S. App. LEXIS 5230 \(8th Cir. 1959\)](#).

Railroad's proposal to replace tunnel with new one running parallel to and 90 feet from existing tunnel, in order to accommodate double-stack container cars, was reasonably construed by ICC [now Surface Transportation Board] to be neither extension of nor additional railroad line requiring ICC [now Surface Transportation Board] approval. [*Detroit/Wayne County Port Auth. v. ICC*, 59 F.3d 1314, 313 U.S. App. D.C. 326, 1995 U.S. App. LEXIS 17468 \(D.C. Cir. 1995\)](#).

In determining whether or not proposed abandonment of line submerged by building of federal flood control dam should be ordered, Commission [now Surface Transportation Board] was required to take into account unavoidable cessation of line, and to consider high cost of relocation, and to decide whether, under all circumstances of potential traffic and expense, public interest in interstate transportation would be served by continued operation of road in new location. [*Purcell v. United States*, 41 F. Supp. 309, 1941 U.S. Dist. LEXIS 2659 \(D. Md. 1941\)](#), aff'd, [*315 U.S. 381, 62 S. Ct. 709, 86 L. Ed. 910, 1942 U.S. LEXIS 1082 \(1942\)*](#).

Joint relocation project involving relatively small amount of track construction for purpose of eliminating wasteful duplication of facilities in congested yard, and of facilitating redevelopment of area by city and county required neither approval under former [49 USCS § 10901](#) nor exemption under former [49 USCS § 10505](#), where project would have no effect on service previously provided, use of new connections would not extend operations, there would be no effect on competition or on competitive balance between carriers, and there would be no impact on service to shippers or on any other transportation interest that would trigger application of § 10901. *The Denver and Rio Grande Western Railroad Company—Joint Construction Project—Relocation over Burlington Northern Railroad Company* (1987) [4 I.C.C.2d 95](#).

2. Extensions

19. Generally

Freight depot, which will require construction of track to cross another carrier's main line, is extension within meaning of former 49 USCS § 1. [*Missouri P. R. Co. v. Chicago, R. I. & P. R. Co.*, 41 F.2d 188, 1930 U.S. App. LEXIS 2761 \(8th Cir.\)](#), cert. denied, 282 U.S. 866, 51 S. Ct. 74, 75 L. Ed. 765, 1930 U.S. LEXIS 241 (1930).

Despite fact that track is short and service to be rendered is like that rendered by spur or industry track, line extending interstate carrier's road into new territory is "extension," and this is true even though extension is

proposed solely to harass rival. [*Southern Pac. Co. v. Western P. C. R. Co.*, 61 F.2d 732, 1932 U.S. App. LEXIS 4393 \(9th Cir. 1932\)](#).

20. Completion of existing line

Uncompleted part of railroad, substantially completed before effective date of former 49 USCS § 1(18), is not such a new line or extension as requires certificate of public convenience and necessity. [*Detroit Terminal R. Co. v. Pennsylvania-Detroit R. Co.*, 15 F.2d 507, 1926 U.S. App. LEXIS 2924 \(6th Cir. 1926\)](#), cert. denied, 273 U.S. 758, 47 S. Ct. 472, 71 L. Ed. 877, 1927 U.S. LEXIS 879 (1927).

Construction of railroad tracks was not shown to be continuance of plan adopted before amendment of former 49 USCS § 1(18) by the Transportation Act of 1920 ([*41 Stat. 456*](#)), so as to obviate necessity of certificate of convenience and necessity from Interstate Commerce Commission [now Surface Transportation Board]. [*Seaboard A. L. R. Co. v. Tampa S. R. Co.*, 121 So. 477, 1929 Fla. LEXIS 881 \(Fla. 1929\)](#).

21. Interconnections

Merely requiring railroad company to make switch connections with track leading to coal mine, as authorized by former 49 USCS § 1, does not require compliance with provisions of 18–21 of § 1, on theory that railroad company will thereby be enabled to reach territory served by another carrier whose tracks already reach mines, especially where order gives no trackage rights over coal company's tracks. [*Cleveland, C., C. & S. L. R. Co. v. United States*, 275 U.S. 404, 48 S. Ct. 189, 72 L. Ed. 338, 1928 U.S. LEXIS 276 \(1928\)](#).

Use of lines for passage of trains beyond carrier's own terminus over line and to and from another carrier's terminus, under trackage agreement providing for use jointly with owning line is "extension"; provisions of former 49 USCS § 1(18) apply to such operations under trackage agreements. [*Transit Com. v. United States*, 289 U.S. 121, 53 S. Ct. 536, 77 L. Ed. 1075, 1933 U.S. LEXIS 972 \(1933\)](#).

Railroad extension of 1,500 feet across terminal grounds and four tracks of another carrier, to connect with third carrier's tracks, with which connection was already had through use of second carrier's facilities, is extension for which certificate is required, notwithstanding former 49 USCS § 1(22). [*El Dorado & W. R. Co. v. Chicago, R. I. & P. R. Co.*, 5 F.2d 777, 1925 U.S. App. LEXIS 2753 \(8th Cir. 1925\)](#).

Proposed installation of switch connection, including bridge, between main lines of Norfolk & W. Ry. and Virginian Ry. at considered point in Mercer County, W. Va., so as to permit movement of tonnage trains over Virginian's more favorable grades (including tunnel) across Allegheny Mountains, without helper service required on Norfolk & Western's line, found necessary to most economical and efficient handling of traffic over combined lines after merger; also since, in connection with proposed use of each line's yard at Roanoke, Va., use of present interchange tracks within city is impracticable from operating standpoint, construction of connecting track from Norfolk & Western line just east of the city limits about 2 miles to the Virginian's tracks is necessary for efficient and expeditious movement of trains between applicants' main lines. *Norfolk & Western Ry Co. Merger*, 307 I.C.C. 401.

22. Private rail lines

Railroad built wholly within state to operate from private plant to local railroad does not, while it confines its operations to intrastate commerce, come within the operation of former 49 USCS § 1; mere fact that railroad lies wholly within state and is to be built by independent corporation does not prevent application of former 49 USCS § 1(18 to 22) as amended by the Transportation Act of 1920, chap 91, if it attempts to engage in interstate commerce. [*Texas & N. O. R. Co. v. Northside B. R. Co.*, 276 U.S. 475, 48 S. Ct. 361, 72 L. Ed. 661, 1928 U.S. LEXIS 292 \(1928\)](#).

Coal company owning interstate railroad and intrastate railroad was entitled to extend latter to points within state without obtaining certificate of public convenience and necessity where extension was for private purposes, although it had been denied such certificate to extend its interstate railroad to same points. [*Pennsylvania R. Co. v. Pittsburgh, L. & W. R. Co.*, 83 F.2d 861, 1936 U.S. App. LEXIS 2664 \(6th Cir.\)](#), cert. denied, 299 U.S. 572, 57 S. Ct. 35, 81 L. Ed. 421, 1936 U.S. LEXIS 274 (1936).

Construction by railway wholly-owned by steel manufacturer and engaged in short-distance industrial switching in mining area, of new trackage approximately 2 ½ miles in length from mining area to site of newly constructed electric furnaces in area previously unserved by any rail carrier constituted an “extension” within the meaning of former 49 USCS § 1(18) and district court properly enjoined future operations over new trackage by defendant absent a certificate of public convenience and necessity from the Interstate Commerce Commission [now Surface Transportation Board]. [*Colorado & W. R. Co. v. Colorado & S. R. Co.*, 469 F.2d 483, 1972 U.S. App. LEXIS 8037 \(10th Cir. 1972\)](#).

Operation of trains by carrier over private track owned and maintained by mine or industry, exclusively served by carrier over that track, is not extension of line within meaning of former 49 USCS § 1(18), where carrier does not serve or hold itself out to serve general public over that track. [*New York C. R. Co. v. Southern R. Co.*, 226 F. Supp. 463, 1964 U.S. Dist. LEXIS 8212 \(N.D. Ill.\)](#), aff'd, [*338 F.2d 667, 1964 U.S. App. LEXIS 3798 \(7th Cir. 1964\)*](#).

23. Spur or industrial siding

If purpose and effect of new trackage is to extend, substantially, line of carrier into new territory, proposed trackage constitutes extension of railroad, although line be short and service contemplated be that commonly rendered to industries by means of spurs or industrial tracks; hence railroad line, 7.5 miles long, built from point on main line to serve industrial district, already adequately served, but not theretofore reached by lines of that company, is extension of its line rather than industrial track although service to be rendered was that ordinarily rendered by industrial or spur tracks. [*Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U.S. 266, 46 S. Ct. 263, 70 L. Ed. 578, 1926 U.S. LEXIS 891 \(1926\)](#) ; [*Interstate Commerce Com. v. Piedmont & N. R. Co.*, 51 F.2d 766, 1931 U.S. Dist. LEXIS 1565 \(D.S.C. 1931\)](#), aff'd, [*286 U.S. 299, 52 S. Ct. 541, 76 L. Ed. 1115, 1932 U.S. LEXIS 818 \(1932\)*](#).

Mere fact that sidetrack with which connection is sought extends to industry located on another railroad, does not make switch connection or track of shipper, or both combined, extension of railroad within meaning of former 49 USCS § 1(18) or following paragraphs; mere possibility of use of private sidetrack by carriers other than that with which connection is sought does not constitute such sidetrack extension. [*Cleveland, C., C. & S. L. R. Co. v. United States*, 275 U.S. 404, 48 S. Ct. 189, 72 L. Ed. 338, 1928 U.S. LEXIS 276 \(1928\)](#).

Difference between new lines and extensions and spurs and industrial tracks is that former are tracks over which train movements are made part of actual transportation haul from shipper to consignee, while latter are for loading, unloading, storing, switching cars, and like, merely incidental to regular train haul. [*Detroit & M. R. Co. v. Boyne City, G. & A. R. Co.*, 286 F. 540, 1923 U.S. Dist. LEXIS 1808 \(D. Mich. 1923\)](#).

Despite fact that track is short, and service to be rendered is like that rendered by spur, or industrial track, line extending interstate carrier's road into new territory an “extension,” even though proposed solely to harass rival; such extension requires certificate of convenience and necessity. [*Southern Pac. Co. v. Western P. C. R. Co.*, 61 F.2d 732, 1932 U.S. App. LEXIS 4393 \(9th Cir. 1932\)](#).

Construction of track for distance of 3.15 miles from existing line to hopper site of power plant in area occupied only by power plant and coal mine was “spur” and not extension of railroad where latter held itself out to serve all industry in area immediately adjacent to power plant site. [*Chicago, M., St. P. & P. R. Co. v. Chicago & E. I. R. Co.*, 198 F.2d 8, 1952 U.S. App. LEXIS 4016 \(7th Cir. 1952\)](#).

Evidence established that proposed track construction, 1,877 feet in length, to serve electric power plant, and which service had been requested by it, although served by another railroad, was industrial spur. [*Pennsylvania R. Co. v.*](#)

[*Reading Co.*, 132 F. Supp. 616, 1955 U.S. Dist. LEXIS 3880 \(D. Pa.\)](#), aff'd, [*226 F.2d 958, 1955 U.S. App. LEXIS 4922 \(3d Cir. 1955\)*](#).

Track 5.75 miles in length constructed to serve industrial plant was industrial or “spur” track as defined in the Interstate Commerce Act (former 49 USCS §§ 1–5, 5b–15a, 16, 17–23, 26, 27, [301–305](#), [306–327](#), 901–923, 1001–1022), and no certificate of public necessity was required. [*Jefferson County v. Louisville & N. R. Co.*, 245 S.W.2d 611, 1951 Ky. LEXIS 1264 \(Ky. 1951\)](#).

Proposed new trackage to be employed in interstate commerce required certificate of convenience and necessity from Interstate Commerce Commission [now Surface Transportation Board], although not directly connected with line of carrier. [*Carleton Mining & Power Co. v. West Va. N. R.R.*, 106 W. Va. 126, 145 S.E. 42, 1928 W. Va. LEXIS 145 \(W. Va. 1928\)](#), app. after remand, remanded, [110 W. Va. 631, 159 S.E. 44, 1931 W. Va. LEXIS 137 \(W. Va. 1931\)](#).

Determination of whether particular track segment is railroad line requiring STB authorization under [49 USCS § 10901\(a\)](#) or spur track over which STB does not exercise licensing authority ([49 USCS § 10906](#)) turns on intended use of track segment; exempt spurs are commonly constructed either to improve facilities required by shippers already served by carrier or to supply facilities to others who, being within same territory and similarly situated, are entitled to like service from carrier. Indiana Rail Road Company—Petition for Declaratory Order (4/15/09) STB Finance Docket No. 35181.

24. Terminal services

Operation by railroad carrier of trucks to receive and deliver freight to railroad terminals is not “railroad” or extension of railroad, but is “service,” connected with receipt and delivery of property transported within definition of “transportation”; no certificate of authorization by Commission [now Surface Transportation Board] is required. [*New York Dock Ry. v. Pennsylvania R. Co.*, 62 F.2d 1010, 1933 U.S. App. LEXIS 3910 \(3d Cir.\)](#), cert. denied, 289 U.S. 750, 53 S. Ct. 694, 77 L. Ed. 1495, 1933 U.S. LEXIS 380 (1933).

Certificate of public necessity and convenience was not necessary to initiation of trucking service to freight depot within terminal district already served by railroad. [*Long Island R. Co. v. New York C. R. Co.*, 281 F.2d 379, 1960 U.S. App. LEXIS 3962 \(2d Cir. 1960\)](#).

Certificate of convenience was not required of railroads establishing pickup and delivery service. [*Merchant Truckmen's Bureau v. United States*, 16 F. Supp. 998, 1936 U.S. Dist. LEXIS 1936 \(D.N.Y. 1936\)](#).

Interstate Commerce Commission [now Surface Transportation Board] had authority to effectuate tariffs for railroads furnishing pick-up and delivery service without precedent issuance by Commission [now Surface Transportation Board] of certificates of public convenience and necessity. [*American Trucking Assn., Inc. v. United States*, 17 F. Supp. 655, 1936 U.S. Dist. LEXIS 1673 \(D.D.C. 1936\)](#).

Piggy-back service from railroad terminals in Jersey City to various places in Queens County, New York, did not constitute extension of railroad, but was terminal-area collection-and-delivery activity for which no certificate of convenience and necessity was required. [*Long Island R. Co. v. Delaware, L. & W. R. Co.*, 183 F. Supp. 319, 1960 U.S. Dist. LEXIS 4305 \(E.D.N.Y. 1960\)](#).

Railroad's “pick-up and delivery service” contract with truck line was not invalid as extension of its facilities without certificate of convenience. [*Grace v. Louisville & N. R. Co.*, 19 Tenn. App. 382, 89 S.W.2d 354, 1935 Tenn. App. LEXIS 51 \(Tenn. Ct. App. 1935\)](#).

25. Miscellaneous

Proposed line extending from carrier's main line to cement company's shale beds, distance of 3.75 miles, to move trains from latter's quarry and serve public for loading and shipping other commodities, is "extension" or "branch line," and its construction requires authority from Commission [now Surface Transportation Board]. [Detroit & M. R. Co. v. Boyne City, G. & A. R. Co., 286 F. 540, 1923 U.S. Dist. LEXIS 1808 \(D. Mich. 1923\).](#)

Proposed extension, nearly mile in length, from railroad's main line into territory in which it had no trackage, for direct connection with industrial plants adequately served by other carriers, is extension which cannot be constructed without consent of Interstate Commerce Commission [now Surface Transportation Board]. [Missouri P. R. Co. v. St. Louis S. R. Co., 73 F.2d 21, 1934 U.S. App. LEXIS 2582 \(8th Cir. 1934\).](#)

Certificate of Interstate Commerce Commission [now Surface Transportation Board] was not required where railroad sought to increase its trackage by approximately 5,000 feet to serve new and growing industrial area, court holding under evidence that such increase was not "extension" requiring certificate of Commission. [Missouri, K. & T. R. Co. v. Texas & N. O. R. Co., 172 F.2d 768, 1949 U.S. App. LEXIS 3852 \(5th Cir. 1949\).](#)

Where plaintiff railroad served industrial area by means of main track and spurs but defendant railroad was unable to serve industrial area without construction of new trackage, proposed new trackage was extension and unauthorized in absence of certificate. [Union P. R. Co. v. Denver & R. G. W. R. Co., 198 F.2d 854, 1952 U.S. App. LEXIS 4057 \(10th Cir. 1952\).](#)

Certificate of public necessity and convenience is necessary before railroad builds lead tracks to transport product from phosphate plant where line of track is already in existence. [Georgia S. & F. Ry. v. Atlantic C. L. R.R., 373 F.2d 493, 10 Fed. R. Serv. 2d \(Callaghan\) 1345, 1967 U.S. App. LEXIS 7385 \(5th Cir.\), cert. denied, 389 U.S. 851, 88 S. Ct. 69, 19 L. Ed. 2d 120, 1967 U.S. LEXIS 798 \(1967\).](#)

New rail carrier's proposed rail route never crossed incumbent's right-of-way, but rather it entered incumbent's right-of-way, ran along it for two-thirds of route and then exited on same side from which it entered, so Surface Transportation Board's denial of crossing petition was within its [49 USCS § 10901\(d\)](#) authority. [HolRail, LLC v. STB, 515 F.3d 1313, 380 U.S. App. D.C. 90, 2008 U.S. App. LEXIS 3739 \(D.C. Cir. 2008\).](#)

Trackage proposed by defendant railroad to be constructed constituted extension of line within meaning of former 49 USCS § 1(18) since it extended into area which defendant had not previously served and into area which was being served by plaintiff railroad; construction of that trackage was, therefore, unlawful until and unless defendant should have applied to Interstate Commerce Commission [now Surface Transportation Board] and received certificate of public convenience and necessity. [Chicago, R. I. & P. R. Co. v. Chicago & N. W. R. Co., 188 F. Supp. 549, 1960 U.S. Dist. LEXIS 4324 \(S.D. Ill. 1960\).](#)

Proposed construction and operation of trackage facilities by defendant from its present track on northern side of the Kanawha River into plant of the Union Carbide Metals Company would extend defendant's operations into area not previously served by it which is immediately adjacent to and presently served by plaintiff's line; proposed construction constituted extension of line within meaning of former 49 USCS § 1(18), and construction was enjoined until and unless defendants shall have applied and received proper certificate of convenience and necessity. [New York C. R. Co. v. Norfolk & W. R. Co., 214 F. Supp. 549, 1963 U.S. Dist. LEXIS 6795 \(S.D. W. Va. 1963\).](#)

Construction of large industrial belt line from main track, approximately 7 ½ miles long, to serve industry and facilitate switching did not constitute "extension" of railroad. [Chicago G. W. R. Co. v. Jesse, 249 Minn. 324, 82 N.W.2d 227, 1957 Minn. LEXIS 576 \(Minn. 1957\).](#)

ICC [now Surface Transportation Board] does not have jurisdiction under [49 USCS § 10901](#) over construction of underground railroad tunnel (intended to permit double-stack service) which replaces existing tunnel parallel to new one, because such construction does not involve construction of extension of line or additional line. City of Detroit v Canadian National Railway Company, et al. (1993) [9 I.C.C.2d 1208.](#)

IV. PROCEDURE

A. Federal Proceedings

26. Generally

Findings that Lake Calumet Harbor Port was major deep water port in Chicago with access to lake transportation and future access to ocean transportation, that material increases in tonnage were predicted for future which would create need for substantially broadened rail service, that proposed yard capacity would be 12 times that available at time, that applicant's routing would be more direct, and that it was imperative to develop plan to handle expected needs of port were sufficient to sustain Interstate Commerce Commission's action in issuing certificates authorizing seven railroads to extend their lines to port and to operate in port, and failure of Commission [Surface Transportation Board] to hold hearings on supplemental applications which eliminated exclusionary provision and changed rental fee system did not constitute denial of due process to railroads opposing issuance of certificates. *Illinois C. R. Co. v. Norfolk & W. R. Co.*, 385 U.S. 57, 87 S. Ct. 255, 17 L. Ed. 2d 162, 1966 U.S. LEXIS 2772 (1966).

Issuance of certificate, formality or not, was condition precedent Congress prescribed under [49 USCS § 10901\(d\)\(1\)](#). *Keokuk Junction Ry. v. Surface Transp. Bd.*, 292 F.3d 884, 352 U.S. App. D.C. 180, 2002 U.S. App. LEXIS 11669 (D.C. Cir. 2002).

In approving railroad company's proposal to construct new rail line and upgrade existing rail line, Surface Transportation Board failed to explain fully its reasoning regarding why mitigation for horn noise was unwarranted under National Environmental Policy Act (NEPA), [42 USCS §§ 4321–4370f](#), failed to respond to evidence regarding households experiencing noise and vibration under NEPA, and erred by issuing railroad company license before it completed National Historic Preservation Act, [16 USCS §§ 470 to 470w-6](#), process. *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 2003 U.S. App. LEXIS 20245 (8th Cir. 2003), reh'g denied, reh'g, en banc, denied, [2004 U.S. App. LEXIS 1506 \(8th Cir. Jan. 30, 2004\)](#).

Former [49 USCS § 10901](#) could be invoked when construction authority was obtained through exemption rather than application, and certificate of public convenience and necessity could be summarily issued where other requirements of § 10901(d) were met. Louisville & Jefferson County River Port Authority & CSX Transp., Inc.—Construction & Operation—In Jefferson County, Ky. (1988) [4 I.C.C.2d 749](#).

27. Jurisdiction of Board

Congress never intended to impose upon Commission [Surface Transportation Board] duty of determining whether railway company has corporate power to engage in certain activities before granting or withholding assent to construction of extension. *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 52 S. Ct. 440, 76 L. Ed. 808, 1932 A.M.C. 688, 1932 U.S. LEXIS 816 (1932).

Commission [Surface Transportation Board] is interested in public necessity and convenience in connection with construction of road; it is not interested in minutiae of particular lands to be acquired for right of way for rights of individual owners thereof; and it is immaterial that location of line is slightly varied. *Thunder Bay Limestone Co. v. Detroit & M. R. Co.*, 294 F. 958, 1923 U.S. Dist. LEXIS 1189 (D. Mich. 1923).

Interstate Commerce Act ([49 USCS §§ 10101](#) et seq.) preempted state law claims arising from sale of portion of rail lines in action brought by labor organization representing employees adversely affected by sale of rail lines, where state law actions would obstruct ICC [now Surface Transportation Board] functions and accomplishments, where in essence action was collateral attack upon ICC's decision to exempt sale from regulation, and where Congress intended to delegate to ICC exclusive responsibility to evaluate all aspects, including financial viability, of rail line

transfers. [*Deford v. Soo Line R. Co.*, 867 F.2d 1080, 131 L.R.R.M. \(BNA\) 2625, 110 Lab. Cas. \(CCH\) ¶ 10928, 1989 U.S. App. LEXIS 1384 \(8th Cir. 1989\)](#), cert. denied, 492 U.S. 927, 109 S. Ct. 3265, 106 L. Ed. 2d 610, 131 L.R.R.M. (BNA) 3072, 112 Lab. Cas. (CCH) ¶ 11257, 1989 U.S. LEXIS 3340 (1989), limited, [*In re Wigley*, 951 F.3d 967, 68 Bankr. Ct. Dec. \(LRP\) 119, Bankr. L. Rep. \(CCH\) ¶ 83497, 2020 U.S. App. LEXIS 7215 \(8th Cir. 2020\)](#).

ICC's [now Surface Transportation Board] definition of "switching track," which is type of track falling outside its jurisdiction, was reasonable where definition depends on tenant railroad's use of track; although Commission [Surface Transportation Board] had not squarely addressed issue when two carriers use track in different ways, its reliance on tenant's use for determining identify of switching track was not any less reasonable than any other possible method, such as relying on landlord carrier's use. [*Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718, 322 U.S. App. D.C. 45, 153 L.R.R.M. \(BNA\) 2853, 1996 U.S. App. LEXIS 30256 \(D.C. Cir. 1996\)](#).

ICC [now Surface Transportation Board] did not have jurisdiction under former [49 USCS § 10901](#) over construction of underground railroad tunnel (intended to permit double-stack service) which replaced existing tunnel parallel to new one, because such construction did not involve construction of extension of line or additional line. *City of Detroit v Canadian National Railway Company, et al.* (1993) [9 I.C.C.2d 1208](#).

28. Standing

Power of Interstate Commerce Commission [Surface Transportation Board], under former 49 USCS § 1, paragraph 18, to issue certificate of public convenience and necessity for relocation of tracks, extends to issuance upon application of those who, though not carriers, have proper interest in the subject-matter, in proceeding adverse to carriers affected and over their protest. [*Atchison, T. & S. F. R. Co. v. Railroad Com. of California*, 283 U.S. 380, 51 S. Ct. 553, 75 L. Ed. 1128, 1931 U.S. LEXIS 869 \(1931\)](#).

Other railroads may, as parties in interest, properly be permitted to intervene in suit by Interstate Commerce Commission [Surface Transportation Board] to enjoin construction of extension by railroad company before having obtained from Commission [Surface Transportation Board] certificate of public convenience and necessity required by former 49 USCS § 1. [*Piedmont & N. R. Co. v. Interstate Commerce Com.*, 286 U.S. 299, 52 S. Ct. 541, 76 L. Ed. 1115, 1932 U.S. LEXIS 818 \(1932\)](#).

Union's petition for review of decision of Surface Transportation Board to approve track acquisition was denied because union lacked U.S. Const. art. III standing; union's claimed injury—inability to bargain under Railway Labor Act, [45 USCS §§ 151](#) et seq.—was not fairly traceable to challenged action of board, i.e., exemption of track from [49 USCS § 10901](#); injury was attributable to union having waived its right to bargain over any transaction exempt from § 10901, and such injury being self-inflicted, union lacked standing to seek review. [*Bhd. of Locomotive Eng'rs & Trainmen v. STB*, 457 F.3d 24, 372 U.S. App. D.C. 378, 180 L.R.R.M. \(BNA\) 2001, 153 Lab. Cas. \(CCH\) ¶ 10707, 2006 U.S. App. LEXIS 18563 \(D.C. Cir. 2006\)](#).

Persons other than carriers may commence proceedings under former 49 USCS § 1(18). [*Des Moines v. Chicago & N. W. R. Co.*, 159 F. Supp. 223, 1958 U.S. Dist. LEXIS 4180 \(D. Iowa 1958\)](#), vacated, [264 F.2d 454, 1959 U.S. App. LEXIS 5230 \(8th Cir. 1959\)](#).

29. Hearing procedure

Under provisions of former 49 USCS §§ 1 et seq., one seeking to restrain railroad company from extending its line is not bound to secure determination of Interstate Commerce Commission [Surface Transportation Board] that proposed work is extension, but burden of securing certificate for performance of work, or showing that certificate is not necessary, is upon road undertaking extension. [*Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U.S. 266, 46 S. Ct. 263, 70 L. Ed. 578, 1926 U.S. LEXIS 891 \(1926\)](#).

Under Transportation Act of 1920 ([41 Stat. 456](#)), Commission [Surface Transportation Board] may authorize new construction for purpose of continuing competition; there is no specification former 49 USCS § 1(18) and (20) by which the Commission [Surface Transportation Board] is to be governed in determining whether public convenience and necessity require proposed construction; under the act it is duty of Commission [Surface Transportation Board] to find facts and, in exercise of reasonable judgment, to determine that question. [Chesapeake & O. R. Co. v. United States, 283 U.S. 35, 51 S. Ct. 337, 75 L. Ed. 824, 1931 U.S. LEXIS 866 \(1931\)](#).

When Commission's approval has been obtained for union passenger station required by order of State Commission and its certificate of public convenience and necessity has been issued, in relation to rearrangement, extensions, and abandonment of tracks, and use of terminal facilities involved in proposed plan, nothing further is required by Interstate Commerce Act. [Atchison, T. & S. F. R. Co. v. Railroad Com. of California, 283 U.S. 380, 51 S. Ct. 553, 75 L. Ed. 1128, 1931 U.S. LEXIS 869 \(1931\)](#).

New hearing is not required where during proceedings held before hearing examiner and Interstate Commerce Commission [Surface Transportation Board] to authorize proposed expansion of rail service, operations of railroads within port area were fully considered as integral part of overall plan. [Illinois C. R. Co. v. Norfolk & W. R. Co., 385 U.S. 57, 87 S. Ct. 255, 17 L. Ed. 2d 162, 1966 U.S. LEXIS 2772 \(1966\)](#).

In injunction proceeding filed by competing railroad against railroad seeking to extend its lines, evidence that competing railroad had extended its lines several years prior thereto without securing certificate was not admissible. [Union P. R. Co. v. Denver & R. G. W. R. Co., 198 F.2d 854, 1952 U.S. App. LEXIS 4057 \(10th Cir. 1952\)](#).

Where Surface Transportation Board granted railroad exemption under [49 USCS § 10502](#) and authorized railroad to construct about 35 miles of new rail line, organizations were not procedurally barred from raising their challenge to § 10502 exemption, because issue exhaustion was not required based on informal nature of proceedings and lack of notice. [Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, 43 Env'tl. L. Rep. 20016, 2013 U.S. App. LEXIS 1478 \(9th Cir. 2013\)](#).

Auto-ferry operator established need under former 49 USCS § 1(18) for service between Louisville, Ky., and Sanford, Fla., by popularity of present Alexandria, Va. to Sanford service showing public demand for this type of rail service, Florida State survey indicating great numbers of Florida tourists from Midwest, and several hundred letters expressing interest in Midwestern auto-ferry service to Florida. Auto-Train Operation between Louisville & Sanford (1974) [347 I.C.C. 261](#), modified, [354 I.C.C. 707](#).

30. Collateral estoppel

Collateral estoppel did not preclude court from reviewing contention that sale of railroad to non-carrier was both abandonment under former [49 USCS § 10903](#) and acquisition under former [49 USCS § 10901](#); mutuality of estoppel did not exist since interests of different parties were at stake; since agency was not required to accept adverse determination of agency's statutory construction by Circuit Courts of Appeals as binding on agency for all similar cases throughout United States, it would have been wholly inequitable to permit agency to use collateral estoppel to prevent a petitioner from seeking review of agency's statutory construction. [Railway Labor Executives' Asso. v. Interstate Commerce Com., 784 F.2d 959, 121 L.R.R.M. \(BNA\) 3246, 1986 U.S. App. LEXIS 22840 \(9th Cir. 1986\)](#), amended, [122 L.R.R.M. \(BNA\) 2721 \(9th Cir. 1986\)](#), app. after remand, [811 F.2d 1327, 1987 U.S. App. LEXIS 2764 \(9th Cir. 1987\)](#).

31. Res judicata

Judgment of federal court determining that permission to construct connecting track was not matter within jurisdiction of Interstate Commerce Commission [Surface Transportation Board] was conclusive in subsequent action between same parties. [Union P. R. Co. v. Missouri P. R. Co., 136 Kan. 166, 13 P.2d 276, 1932 Kan. LEXIS 37 \(Kan. 1932\)](#).

32. Injunctive relief

Aid of Interstate Commerce Commission [Surface Transportation Board] need not be sought before jurisdiction of court is invoked to enjoin violations of former 49 USCS §§ 1 et seq. authorizing issuance of certificates of convenience and necessity. [*Yonkers v. United States*, 320 U.S. 685, 64 S. Ct. 327, 88 L. Ed. 400, 1944 U.S. LEXIS 1243 \(1944\)](#).

Where line was constructed before application was filed and injunction against its operation was sought by interested carrier it was denied in absence of threat to operate in interstate commerce. [*Texas & N. O. R. Co. v. North Side Belt R. Co.*, 8 F.2d 153, 1925 U.S. Dist. LEXIS 1584 \(D. Tex. 1925\)](#), *aff'd*, 16 F.2d 782, 1927 U.S. App. LEXIS 3643 (5th Cir. 1927).

Where auto-railroad company has been required to obtain certificate of convenience and necessity but has failed to do so and prepared to commence service, was enjoined, and appealed, company may dismiss its appeal because financially unable to continue operations and wishes to abandon its operations. [*Arlington & Fairfax Auto R. Co. v. Capital Transit Co.*, 109 F.2d 345, 71 App. D.C. 53, 1939 U.S. App. LEXIS 4899 \(D.C. Cir. 1939\)](#).

33. Effect of denial of certificate

Where owner of railroad extension conveys same to railroad company subject to approval of Interstate Commerce Commission [Surface Transportation Board], and such approval is denied, such owner may sue in equity to cancel sale and for accounting of profits. [*Carleton Mining & Power Co. v. West Va. N. R.R.*, 110 W. Va. 631, 159 S.E. 44, 1931 W. Va. LEXIS 137 \(W. Va. 1931\)](#), *app. after remand*, [*113 W. Va. 20, 166 S.E. 536, 1932 W. Va. LEXIS 260 \(W. Va. 1932\)*](#).

34. Discretion of Board

By provisions of former 49 USCS § 1(18), (19) and (20) Congress not only imposed upon Commission [Surface Transportation Board] grave responsibility but reposed in it broad discretion, commensurate with novel undertaking to effectively and economically carry on everywhere business of interstate transportation, and one not lightly to be disturbed by courts. [*Pennsylvania R. Co. v. United States*, 40 F.2d 921, 1930 U.S. Dist. LEXIS 2085 \(D. Pa. 1930\)](#).

Under former 49 USCS §§ 1 et seq., Congress imposed upon Commission [Surface Transportation Board] duty of providing country as whole with adequate transportation system, with power to authorize construction and abandonment; granting or refusing of certificate of public convenience and necessity, which authorizes such construction, is exercise of administrative judgment under such authority. [*Indian Valley R. v. United States*, 52 F.2d 485, 1931 U.S. Dist. LEXIS 1654 \(D. Cal. 1931\)](#), *aff'd*, 292 U.S. 608, 54 S. Ct. 775, 78 L. Ed. 1469, 1934 U.S. LEXIS 769 (1934).

Because ICC [now Surface Transportation Board] interpretation of former [49 USCS § 10901](#) as granting it discretionary authority to impose labor protections in new-carrier line acquisition was reasonable interpretation of statute Congress empowered ICC to administer, court had to defer to that interpretation. [*Railway Labor Executives' Assn. v. Interstate Commerce Com.*, 784 F.2d 959, 121 L.R.R.M. \(BNA\) 3246, 1986 U.S. App. LEXIS 22840 \(9th Cir. 1986\)](#), *amended*, [*122 L.R.R.M. \(BNA\) 2721 \(9th Cir. 1986\)*](#), *app. after remand*, [*811 F.2d 1327, 1987 U.S. App. LEXIS 2764 \(9th Cir. 1987\)*](#).

ICC's [now Surface Transportation Board] refusal to exercise its statutory discretion to impose labor protections on line purchasers because financial burden of labor protection would seriously endanger acquirers' ability to offer long-term regular service was rational, supported by previous ICC [now Surface Transportation Board] practice sanctioned by courts, and was not arbitrary, capricious, or manifestly contrary to statute; however, ICC's failure to

articulate any reason for refusing to impose labor protections on would-be abandoning vendor railroad rendered that part of its orders arbitrary and capricious. [*Railway Labor Executives' Asso. v. Interstate Commerce Com.*, 784 F.2d 959, 121 L.R.R.M. \(BNA\) 3246, 1986 U.S. App. LEXIS 22840 \(9th Cir. 1986\)](#), amended, [*122 L.R.R.M. \(BNA\) 2721 \(9th Cir. 1986\)*](#), app. after remand, [*811 F.2d 1327, 1987 U.S. App. LEXIS 2764 \(9th Cir. 1987\)*](#).

Petition for review of Surface Transportation Board's (Board) decision approving expansion of railroad line to transport coal from Powder River Basin into Minnesota and South Dakota was denied; Board had complied with [49 USCS § 10901](#) and National Environmental Policy Act, [42 USCS §§ 4321–4347](#); Board had relied on reasonable findings in determining public benefit and financial soundness of construction project; also, Board's environmental impact report more than adequately considered reasonably foreseeable significant adverse effects of increased coal consumption on human environment. [*Mayo Found. v. STB*, 472 F.3d 545, 37 Envtl. L. Rep. 20006, 2006 U.S. App. LEXIS 31887 \(8th Cir. 2006\)](#).

Interstate Commerce Commission [Surface Transportation Board], in making a determination as to the existence of necessity is allowed broad discretion and the scope of judicial review is exceedingly narrow. [*Denver & R. G. W. R. Co. v. United States*, 312 F. Supp. 329, 1970 U.S. Dist. LEXIS 11761 \(D. Colo.\)](#), aff'd, 400 U.S. 921, 91 S. Ct. 188, 27 L. Ed. 2d 182, 1970 U.S. LEXIS 369 (1970).

35. —Labor protective conditions

ICC's [now Surface Transportation Board] refusal to impose labor protective conditions on acquisition of rail line by entity operating as "feeder line" under [49 USCS § 10910](#) was not arbitrary or capricious. [*Black v. Interstate Commerce Com.*, 762 F.2d 106, 246 U.S. App. D.C. 12, 119 L.R.R.M. \(BNA\) 2742, 1985 U.S. App. LEXIS 31408 \(D.C. Cir. 1985\)](#).

Where transaction was not consolidation, merger, or acquisition of control within meaning of former [49 USCS § 11343](#), or where transaction involved takeover of line that had been abandoned within meaning of former [49 USCS § 10903](#), acquisition of line of railway was typically governed by former [49 USCS § 10901](#), and decision whether to impose labor protective conditions on acquiring entity in transaction under § 10901 fell within ICC's [now Surface Transportation Board] discretionary authority. [*Black v. Interstate Commerce Com.*, 762 F.2d 106, 246 U.S. App. D.C. 12, 119 L.R.R.M. \(BNA\) 2742, 1985 U.S. App. LEXIS 31408 \(D.C. Cir. 1985\)](#).

In order for former [49 USCS § 11343](#) to be applicable, it was necessary that railway acquisition involve at least 2 carriers; in order to qualify as carrier under § 11343, acquiring entity had to be one providing transportation subject to jurisdiction of ICC [now Surface Transportation Board]; where acquiring corporation was "feeder line operation" exempt from regulation under former [49 USCS § 10910\(g\)\(1\)](#), it was not "carrier," and ICC [now Surface Transportation Board] was under no mandatory duty to impose labor protective conditions on its acquisition of railroad. [*Black v. Interstate Commerce Com.*, 762 F.2d 106, 246 U.S. App. D.C. 12, 119 L.R.R.M. \(BNA\) 2742, 1985 U.S. App. LEXIS 31408 \(D.C. Cir. 1985\)](#).

Interstate Commerce Commission [Surface Transportation Board] properly declined to impose labor protective conditions under its broad discretion under former [49 USCS § 10901](#), since ICC [now Surface Transportation Board] had long standing and judicially approved policy of not imposing costs of labor protection on fledgling rail operators that seek to continue service over lines that were subject to abandonment, where ICC [now Surface Transportation Board] was aware that railroad had stated it would hire vast majority of former employees who filed applications. [*CMC Real Estate Corp. v. Interstate Commerce Com.*, 807 F.2d 1025, 257 U.S. App. D.C. 110, 1986 U.S. App. LEXIS 36454 \(D.C. Cir. 1986\)](#).

Interstate Commerce Commission [Surface Transportation Board] properly dismissed complaints by railroad union arising from earlier decision of ICC [now Surface Transportation Board] awarding trackage and construction rights to railroad to allow it to consolidate freight classification yards, where union claimed that earlier decision did not empower railroads to transfer rate classification operations and provided inadequately for protection of interests of employees, and ICC was not required to adjudicate labor issues upon which parties could not come to terms, and

underlying transaction would not be stymied during pending negotiations and arbitration, subject to obligation on railroad to thereafter make employees whole. [*Brotherhood of Locomotive Engineers v. Interstate Commerce Com.*, 808 F.2d 1570, 257 U.S. App. D.C. 289, 124 L.R.R.M. \(BNA\) 2308, 1987 U.S. App. LEXIS 1618 \(D.C. Cir. 1987\)](#).

Interstate Commerce Commission [Surface Transportation Board] was properly acting within its discretion when it refused to impose labor protective conditions on rail carrier, since carrier was new carrier which had contracted to operate tracks of existing line, and was therefore exempt under former [49 USCS § 10901](#) from mandatory labor protective provisions. [*Railway Labor Executives' Asso. v. United States*, 811 F.2d 1327, 1987 U.S. App. LEXIS 2764 \(9th Cir. 1987\)](#).

Imposition of labor protection was discretionary, where Interstate Commerce Commission [Surface Transportation Board] properly treated acquisition of trackage as acquisition by noncarrier subject to former [49 USCS § 10901](#), since acquirer was financially independent of and not financially guaranteed by parent corporation, and was thus independent subsidiary. [*Railway Labor Executives' Asso. v. Interstate Commerce Com.*, 819 F.2d 1172, 260 U.S. App. D.C. 373, 125 L.R.R.M. \(BNA\) 2564, 1987 U.S. App. LEXIS 7064 \(D.C. Cir. 1987\)](#).

Interstate Commerce Commission's decision not to impose labor protective conditions on transfer of railroad property was arbitrary and capricious where ICC [now Surface Transportation Board] failed to apply law of specific facts to case, where ICC [now Surface Transportation Board] failed to present any carefully articulated, reasoned balancing of factors pertinent to particular acquisition. [*Railway Labor Executives Asso. v. Interstate Commerce Com.*, 825 F.2d 238, 125 L.R.R.M. \(BNA\) 2179, 126 L.R.R.M. \(BNA\) 2179, 1987 U.S. App. LEXIS 10988 \(9th Cir. 1987\)](#), app. after remand, 921 F.2d 280, 1990 U.S. App. LEXIS 25478 (9th Cir. 1990).

Grant of exemption from regulatory requirements to rail operator by Interstate Commerce Commission [Surface Transportation Board] under former [49 USCS § 10901](#) was proper, where substantial evidence supported finding that line had been formerly abandoned by previous operator who had filed application and followed ICC's formal abandonment requirements, and thus failure of ICC to impose employee protective conditions on new operator on grounds that purpose and operation of line was acquisition pursuant to former [49 USCS § 11343](#), subject to labor protective requirements of former [49 USCS § 11347](#), was proper, and no exceptional circumstances were shown by union to require discretionary employee protective conditions under former [49 USCS § 10901](#). [*Winter v. Interstate Commerce Com.*, 828 F.2d 1320, 1987 U.S. App. LEXIS 12357 \(8th Cir. 1987\)](#).

Interstate Commerce Act ([49 USCS §§ 10101](#) et seq.) provisions governing labor protective agreements superseded mandatory bargaining requirements of Railway Labor Act ([45 USCS §§ 151](#) et seq.); thus, railroad which sold rail line to new carrier was properly exempted from prior approval requirements of Interstate Commerce Act, and was not obligated to bargain with unions over transfer and to maintain status quo until bargaining was concluded. [*Railway Labor Executives' Ass'n v. Chicago & Northwestern Transp. Co.*, 848 F.2d 102, 128 L.R.R.M. \(BNA\) 2534, 109 Lab. Cas. \(CCH\) ¶ 10542, 1988 U.S. App. LEXIS 7224 \(8th Cir. 1988\)](#), vacated, remanded, 492 U.S. 901, 109 S. Ct. 3207, 106 L. Ed. 2d 558, 131 L.R.R.M. (BNA) 2759, 112 Lab. Cas. (CCH) ¶ 11231, 1989 U.S. LEXIS 3147 (1989).

Courts, not Interstate Commerce Commission [Surface Transportation Board], decide whether Railway Labor Act ([45 USCS §§ 151](#) et seq.) and Norris-LaGuardia Act ([29 USCS §§ 101](#) et seq.) must be accommodated to authority of ICC [now Surface Transportation Board] under [49 USCS § 10901](#) in regard to implementation of labor protective conditions. [*Railway Labor Executives' Asso. v. Interstate Commerce Com.*, 888 F.2d 1227, 132 L.R.R.M. \(BNA\) 2912, 113 Lab. Cas. \(CCH\) ¶ 11699, 1989 U.S. App. LEXIS 16457 \(8th Cir. 1989\)](#), cert. denied, 494 U.S. 1079, 110 S. Ct. 1808, 108 L. Ed. 2d 938, 133 L.R.R.M. (BNA) 3112, 115 Lab. Cas. (CCH) ¶ 10111, 1990 U.S. LEXIS 1961 (1990).

Evidence supported finding by ICC [now Surface Transportation Board] that corporation was noncarrier formed for legitimate business purpose and could avoid imposition of protective labor conditions in its acquisition of carrier, pursuant to exemption under former [49 USCS § 10901](#), where holding company created subsidiary noncarrier as independent corporate entity and as ongoing enterprise, noncarrier assumed nearly all financial risks and

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obligations involved in acquisition of carrier, and subsidiary noncarrier's performance was not guaranteed by parent holding company. [*Brotherhood of Locomotive Engineers v. ICC*, 909 F.2d 909, 134 L.R.R.M. \(BNA\) 3057, 1990 U.S. App. LEXIS 12585 \(6th Cir. 1990\)](#).

ICC [now Surface Transportation Board] reasonably concluded that corporation was created by parent as noncarrier under former [49 USCS § 10901](#) for purposes of labor protective conditions, where record confirmed that corporation, although created by another corporation that controlled rail lines, was formed for legitimate and substantial business reasons, and corporation would own and operate acquired line under its own name, publish its own tariffs, have its own employees and equipment, and assume sole responsibility for operating liabilities. [*Railway Labor Executives' Ass'n v. ICC*, 914 F.2d 276, 286 U.S. App. D.C. 220, 135 L.R.R.M. \(BNA\) 2566, 116 Lab. Cas. \(CCH\) ¶ 10298, 1990 U.S. App. LEXIS 16307 \(D.C. Cir. 1990\)](#).

ICC [now Surface Transportation Board], which approved lease of small railroad line to non-carrier subsidiary of rail carrier under former [49 USCS § 10901](#), did not commit error by failing to treat transaction under former [49 USCS § 11343](#) or by failing to exercise its discretion to impose labor protection under § 10901, because lease involved no exceptional circumstances, and, contrary to labor organizations' contention that rail carrier formed subsidiary to evade labor protection mandated by § 11343, carrier in fact formed subsidiary for legitimate business reason of avoiding unusual administrative delays associated with § 11343 transactions. [*Railway Labor Executives' Ass'n v. ICC*, 999 F.2d 574, 303 U.S. App. D.C. 26, 143 L.R.R.M. \(BNA\) 2950, 125 Lab. Cas. \(CCH\) ¶ 10798, 1993 U.S. App. LEXIS 19565 \(D.C. Cir. 1993\)](#).

Substantial evidence supported ICC's [now Surface Transportation Board] conclusion that non-carrier holding company formed subsidiary for legitimate business purpose unrelated to labor protection—to avoid delay, and that railroad line lease for which it was formed to be lessee and to operate involved no exceptional circumstances warranting imposition of labor protection. [*Railway Labor Executives' Ass'n v. ICC*, 999 F.2d 574, 303 U.S. App. D.C. 26, 143 L.R.R.M. \(BNA\) 2950, 125 Lab. Cas. \(CCH\) ¶ 10798, 1993 U.S. App. LEXIS 19565 \(D.C. Cir. 1993\)](#).

ICC [now Surface Transportation Board] was not confined to choosing between no worker-protective conditions and New York Dock conditions; although former [49 USCS § 10901\(e\)](#) read literally appeared to confine Commission [Surface Transportation Board] to such choice, scope of (e) was not coextensive with entire statute because it was limited to construction, whereas (a) included other transactions to which statute applied and only source of power to protect workers was (c), which was not in terms limited to New York Dock conditions. [*Brotherhood of R.R. Signalmen v. ICC*, 63 F.3d 638, 150 L.R.R.M. \(BNA\) 2075, 1995 U.S. App. LEXIS 23915 \(7th Cir. 1995\)](#), reh'g, en banc, denied, [1995 U.S. App. LEXIS 27329 \(7th Cir. Sept. 22, 1995\)](#).

B. State Proceedings

36. Generally

The Due Process and Equal Protection Clauses of [USCS Constitution, Amendment 14](#) are not violated by order of state commission requiring railroads to construct union terminal, though at large expense, when full hearings have been given both by state and federal Commissions, inadequacy of existing facilities has been shown, relative merits of various plans have been subject of elaborate study, expense involved in adopted plan considered in relation to importance of interests affected and to be served, is not so large as to be condemned as unreasonable. [*Atchison, T. & S. F. R. Co. v. Railroad Com. of California*, 283 U.S. 380, 51 S. Ct. 553, 75 L. Ed. 1128, 1931 U.S. LEXIS 869 \(1931\)](#).

Where carrier, located wholly in Virginia, sought to compel, by mandamus, Public Service Commission to indicate route in city of Washington which carrier might follow in pick-up and delivery service for passengers to and from Virginia, and question of whether such proposed service would be classed as line haul, requiring certificate of convenience and necessity by Interstate Commerce Commission [Surface Transportation Board], or "terminal service," had not been determined by application to Commerce Commission [Surface Transportation Board], public

service commission could not be compelled to act. [*United States ex rel. Arlington & F. Auto R. Co. v. Elgen*, 98 F.2d 264, 68 App. D.C. 392, 1938 U.S. App. LEXIS 4841 \(D.C. Cir. 1938\)](#).

Since Louisiana Public Service Commission had authority to render order requiring railroad to restore passenger service between Slidell, Louisiana, and New Orleans, and since law of Louisiana provides for adequate review of that order by state courts, federal district court, as matter of equitable discretion, refused to exercise its jurisdiction. [*Gulf, M. & O. R. Co. v. Louisiana Public Service Com.*, 120 F. Supp. 250, 1954 U.S. Dist. LEXIS 3784 \(D. La. 1954\)](#).

37. Limitations upon state authority

Interstate railroad had procured consent of Interstate Commerce Commission [Surface Transportation Board] to construction of railroad to facilitate its interstate traffic; state court had no jurisdiction to restrain construction of line, without first obtaining certificate of convenience and necessity from state commerce commission. [*People v. Illinois C. R. Co.*, 324 Ill. 591, 155 N.E. 841, 1927 Ill. LEXIS 855 \(Ill.\)](#), cert. denied, 275 U.S. 541, 48 S. Ct. 37, 72 L. Ed. 415, 1927 U.S. LEXIS 461 (1927).

Research References & Practice Aids

Cross References:

This section is referred to in [45 USCS § 904](#); [49 USCS §§ 10906, 11702, 11901](#).

Code of Federal Regulations:

Surface Transportation Board, Department of Transportation—Certificate to construct, acquire, or operate railroad lines, [49 CFR 1150.1](#) et seq.

Am Jur:

[13 Am Jur 2d, Carriers §§ 46](#), 64.

[65 Am Jur 2d, Railroads §§ 93](#), 98, 134, 136.

Federal Procedure:

[5 Administrative Law \(Matthew Bender\), ch 41, Licenses § 41.03](#).

Bankruptcy:

[8 Collier on Bankruptcy \(Matthew Bender 16th ed.\), ch 1172, Contents of Plan ¶ 1172.03](#).

Corporate and Business Law:

10 Kintner, Federal Antitrust Law (Matthew Bender), ch 73, Exemptions for Transportation Companies and Organizations § 73.7.

Other Treatises:

4 [Energy Law & Transactions \(Matthew Bender\), ch 80](#), Rates and Tariffs § 80.03.

4 [Energy Law & Transactions \(Matthew Bender\), ch 85](#), Oil Pipelines § 85.05.

Hierarchy Notes:

[49 USCS, Subtit. IV](#)

[49 USCS, Subtit. IV, Pt. A](#)

[49 USCS, Subtit. IV, Pt. A, Ch. 109](#)

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1. [49 USCS § 10903](#)

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[49 USCS § 10903](#)

Current through Public Law 118-46, approved March 22, 2024, with a gap of Public Law 118-42.

United States Code Service > TITLE 49. TRANSPORTATION (§§ 101 — 80504) > Subtitle IV. Interstate Transportation (Pts. A — C) > Part A. Rail (Chs. 101 — 119) > CHAPTER 109. Licensing (§§ 10901 — 10936)

§ 10903. Filing and procedure for application to abandon or discontinue

(a)

(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part [\[49 USCS §§ 10101 et seq.\]](#) who intends to—

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter [\[49 USCS §§ 10901 et seq.\]](#).

(2) When a rail carrier providing transportation subject to the jurisdiction of the Board under this part [\[49 USCS §§ 10101 et seq.\]](#) files an application, the application shall include—

(A) an accurate and understandable summary of the rail carrier's reasons for the proposed abandonment or discontinuance;

(B) a statement indicating that each interested person is entitled to make recommendations to the Board on the future of the rail line; and

(C) (i) a statement that the line is available for subsidy or sale in accordance with section 10904 of this title [\[49 USCS § 10904\]](#), (ii) a statement that the rail carrier will promptly provide to each interested party an estimate of the annual subsidy and minimum purchase price, calculated in accordance with section 10904 of this title [\[49 USCS § 10904\]](#), and (iii) the name and business address of the person who is authorized to discuss the subsidy or sale terms for the rail carrier.

(3) The rail carrier shall—

(A) send by certified mail notice of the application to the chief executive officer of each State that would be directly affected by the proposed abandonment or discontinuance;

(B) post a copy of the notice in each terminal and station on each portion of a railroad line proposed to be abandoned or over which all transportation is to be discontinued;

(C) publish a copy of the notice for 3 consecutive weeks in a newspaper of general circulation in each county in which each such portion is located;

(D) mail a copy of the notice, to the extent practicable, to all shippers that have made significant use (as designated by the Board) of the railroad line during the 12 months preceding the filing of the application; and

(E) attach to the application filed with the Board an affidavit certifying the manner in which subparagraphs (A) through (D) of this paragraph have been satisfied, and certifying that subparagraphs (A) through (D) have been satisfied within the most recent 30 days prior to the date the application is filed.

(b)

49 USCS § 10903

(1) Except as provided in subsection (d), abandonment and discontinuance may occur as provided in section 10904 [[49 USCS § 10904](#)].

(2) The Board shall require as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under sections 11326(a) and 24706(c) of this title [[49 USCS §§ 11326\(a\)](#) and [24706\(c\)](#)] before May 31, 1998.

(c)

(1) In this subsection, the term “potentially subject to abandonment” has the meaning given the term in regulations of the Board. The regulations may include standards that vary by region of the United States and by railroad or group of railroads.

(2) Each rail carrier shall maintain a complete diagram of the transportation system operated, directly or indirectly, by the rail carrier. The rail carrier shall submit to the Board and publish amendments to its diagram that are necessary to maintain the accuracy of the diagram. The diagram shall—

(A) include a detailed description of each of its railroad lines potentially subject to abandonment; and

(B) identify each railroad line for which the rail carrier plans to file an application to abandon or discontinue under subsection (a) of this section.

(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part [[49 USCS §§ 10101](#) et seq.] may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(e) Subject to this section and sections 10904 and 10905 of this title [[49 USCS §§ 10904](#) and [10905](#)], 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; or

(2) fails to find public convenience and necessity, it shall deny the application.

History

HISTORY:

Added Dec. 29, 1995, *P. L. 104-88*, Title I, § 102(a), *109 Stat. 823*; July 6, 2012, *P. L. 112-141*, Div C, Title II, Subtitle I, Part III, § 32932(b), *126 Stat. 829*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:**Explanatory notes:****Effective date of section:****Amendment Notes****2012.****Other provisions:****References in text:**

“Section 24706(c)”, referred to in this section, was repealed by § 142(a) of Act Dec. 2, 1997, *P. L. 105-134*.

Explanatory notes:

A prior § 10903 (Act Oct. 17, 1978, *P. L. 95-473*, § 1, *92 Stat. 1403*; Oct. 14, 1980, *P. L. 96-448*, Title IV, § 402(a), *94 Stat. 1941*; Feb. 14, 1984, *P. L. 98-216*, § 2(14), *98 Stat. 5*; July 5, 1994, *P. L. 103-272*, § 5(m)(24), *108 Stat. 1378*) was omitted in the general revision of this Subtitle by Act Dec. 29, 1995, *P. L. 104-88*, Title I, § 102(a), *109 Stat. 804*, effective Jan. 1, 1996, with certain exceptions, as provided by § 2 of such Act (*49 USCS § 1301* note). Such section related to authorizing abandonment and discontinuance of railroad lines and rail transportation.

Effective date of section:

This section took effect on Jan. 1, 1996, pursuant to Act Dec. 29, 1995, *P. L. 104-88*, § 2, *109 Stat. 804*, which appears as *49 USCS § 1301* note.

Amendment Notes**2012.**

Act July 6, 2012 (effective 10/1/2012, as provided by § 3(a) of such Act, which appears as 23 USCS § 101 note), in subsec. (b)(2), inserted “before May 31, 1998”.

Other provisions:

Railroad branchline abandonments by Burlington Northern Railroad in North Dakota. Act Dec. 23, 1981, *P. L. 97-102*, Title IV, § 402, *95 Stat. 1465*; Oct. 28, 1991, *P. L. 102-143*, Title III, § 343, *105 Stat. 948*, provides: “Notwithstanding any other provision of law or of this Act, none of the funds provided in this or any other Act shall hereafter be used by the Interstate Commerce Commission to approve railroad branchline abandonments in the State of North Dakota by the entity generally known as the Burlington Northern Railroad, or its agents or assignees, in excess of a total of 350 miles, except that exempt abandonments and discontinuances that are effectuated pursuant to *section 1152.50 of title 49 of the Code of Federal Regulations* after the date of enactment of the Department of Transportation and Related Agencies Appropriations Act, 1992 [enacted Oct. 28, 1991], shall not apply toward such 350-mile limit: *Provided*, That this section shall be in lieu of section 311 (amendment numbered 93) as set forth in the conference report and the joint explanatory statement of the committee of conference on the Department of Transportation and Related Agencies Appropriations Act, 1982 (H.R. 4209), filed in the House of Representatives on November 13, 1981 (H. Rept. No. 97-331) [unclassified].”.

Similar provisions were contained in Act Dec. 15, 1981, [P. L. 97-92](#), Title IV, § 115, [95 Stat. 1196](#).

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Authorization from Interstate Commerce Commission [now Surface Transportation Board] to abandon railroad line is prerequisite to court's determination that railroad has abandoned right of way for purposes of quiet title action by adjacent landowner under [43 USCS § 912](#), in light of reasonableness of ICC's [now Surface Transportation Board] determination that its authorization is prerequisite to § 912 abandonment. [Phillips Co. v. Denver & R.G.W. R.R., 97 F.3d 1375, 1996 U.S. App. LEXIS 27094 \(10th Cir. 1996\)](#), cert. denied, 521 U.S. 1104, 117 S. Ct. 2480, 138 L. Ed. 2d 989, 1997 U.S. LEXIS 3884 (1997).

Railroad was not required to obtain abandonment authority before it could remove any trackage from rail line it purchased where it never provided common carrier service over that line, since its lease of line to another railway company which did provide such service for three years was insufficient to confer common carrier obligation on lessor railroad. [Wisconsin Cent. Ltd. v. Surface Transp. Bd., 112 F.3d 881, 1997 U.S. App. LEXIS 9321 \(7th Cir. 1997\)](#).

In Fifth Amendment taking actions, landowners were entitled to just compensation owed on each parcel was difference between fair market value of estate held in fee simple and fair market value of same estate burdened with easement, where rail line was abandoned under [49 USCS § 10903](#). [Rogers v. United States, 101 Fed. Cl. 287, 2011 U.S. Claims LEXIS 2102 \(Fed. Cl. Oct. 31, 2011\)](#).

To be relieved of its common carrier duty to provide service on reasonable request ([49 USCS § 11101\(a\)](#)), railroad must seek discontinuance or abandonment authorization under [49 USCS § 10903](#); thus, valid embargo is appropriate defense to action for breach of common carrier's duty, but embargo cannot be used by railroad to unilaterally abandon or discontinue service on line at its own election. *Bar Ale, Inc. v California Northern Railroad Co. and Southern Pacific Transportation Company* (7/20/01) Finance Docket No. 32821, [2001 STB LEXIS 633](#).

Although, under [49 USCS § 10903](#), rail line may not be abandoned without Board's prior approval, under [49 USCS § 10502](#), Board must exempt transaction or service from regulation when it finds that continued regulation is not necessary to carry out rail transportation policy of [49 USCS § 10101](#), and either transaction or service is of limited scope, or regulation is not necessary to protect shippers from abuse of market power. *Pittsburgh & Shawmut Railroad, LLC—Abandonment Exemption—In Armstrong and Jefferson Counties, PA* (9/15/05) STB Docket No. AB-976X.

2. Discretion of Board

Determining how far carrier engaged in interstate commerce should be required to continue service at constantly increasing loss where great numbers of people served have abandoned transportation by rail for other methods is

matter particularly within province of Commission [now Surface Transportation Board]. [*Inlet v. New York C. R. Co.*, 7 F. Supp. 781, 1934 U.S. Dist. LEXIS 2012 \(D.N.Y. 1934\)](#).

In proceeding on railroad's request to abandon two and one-half miles of track, weight to be given to evidence and various factors comprising public convenience and necessity were for Interstate Commerce Commission [now Surface Transportation Board]. [*Northwestern P. R. Co. v. United States*, 228 F. Supp. 690, 1964 U.S. Dist. LEXIS 8248 \(N.D. Cal. 1964\)](#), aff'd, [*379 U.S. 133, 85 S. Ct. 278, 13 L. Ed. 2d 333, 1964 U.S. LEXIS 154 \(1964\)*](#), reh'g denied, *379 U.S. 984, 85 S. Ct. 641, 13 L. Ed. 2d 577 (1965)*.

Since former 49 USCS § 1a(3), provided that Interstate Commerce Commission [now Surface Transportation Board] should, upon petition, or upon own initiative, cause investigation of abandonment proposal to be conducted, if petition to investigate was filed by any person, Commission had no discretion but to institute investigation; because institution of investigation is mandatory upon filing of petition to investigate, regulations provide for filing of comments as alternative means for interested persons to become participants to abandonment proceeding. Abandonment of R. Lines & Discontinuance of Service (1976) [*354 I.C.C. 129*](#).

Decision to allow amendment of application prior to hearing has not prejudiced protestants' case, since there is no basis for restricting proceeding to entire trackage originally proposed for abandonment; and if railroad subsequently seeks to abandon portion of trackage deleted by amendment, Commission [now Surface Transportation Board] at that time will weigh public interest against concerns of railroad in reaching decision, and present amendment will not help or harm railroad in subsequent proceeding. *Illinois Central Gulf R. Co.* (1978) [*360 I.C.C. 161*](#).

Policy statement containing procedures for handling related rail abandonment applications will not be adopted, because: (1) there is no mechanism to procure information from railroads necessary for adequate regional analysis; (2) recent legislative events eliminated need for proposal; and (3) it is likely to confuse and prolong proceeding. Related Rail Abandonment Applications (1980) [*360 I.C.C. 752*](#).

II. FACTORS CONSIDERED

3. Generally

Former 49 USCS § 1, paras. (18), (19) and (20) show that what was intended is to regulate interstate and foreign commerce and to effect intrastate commerce only incidentally: Hence railroad owning only one line, situated within single state, cannot abandon its line so far as interstate commerce is concerned. [*Texas v. Eastern T. R. Co.*, 258 U.S. 204, 42 S. Ct. 281, 66 L. Ed. 566, 1922 U.S. LEXIS 2261 \(1922\)](#) ; [*Railroad Com. of Texas v. Eastern T. R. Co.*, 264 U.S. 79, 44 S. Ct. 247, 68 L. Ed. 569, 1924 U.S. LEXIS 2480 \(1924\)](#).

Charter of railroad does not oblige it to operate at loss, and if it appears reasonably certain that future operation of road will be at loss, it may, in absence of contract, dismantle its road and realize its salvage value. [*Brownwood N. & S. R. Co. v. Railroad Com. of Texas*, 16 F.2d 297, 1926 U.S. Dist. LEXIS 1586 \(D. Tex. 1926\)](#).

Factually, determination of whether abandonment occurs revolves around intent of railroad; abandonment, unlike embargo, implies intention to indefinitely or permanently cease all service. [*Interstate Commerce Com. v. Chicago, R. I. & P. R. Co.*, 501 F.2d 908, 1974 U.S. App. LEXIS 7493 \(8th Cir. 1974\)](#), cert. denied, *420 U.S. 972, 95 S. Ct. 1393, 43 L. Ed. 2d 652, 1975 U.S. LEXIS 3835 (1975)*.

Surface Transportation Board (STB) acted arbitrarily and capriciously under [*5 USCS § 706\(2\)\(A\)*](#) when it granted city development corporation's application for adverse abandonment of railroad's rail operations, pursuant to [*49 USCS § 10903*](#), because it failed to provide "adequate explanation" to allow it to ignore factors and reasoning it had previously and consistently found controlling, including that adverse abandonment would not be granted when carrier was operating over line and because STB failed to properly balance competing interests where it (1) apparently overlooked railroad's interest, (2) improperly elevated city's interest to premier status, (3) failed to, itself,

determine “public convenience and necessity,” (4) improperly shifted burden to objecting railroad and shippers to come forward with sufficient evidence of hardship or harm, (5) improperly evaluated interests of shippers, and (6) neglected to mention its statutory duty to preserve and promote continued rail service. [*New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 362 U.S. App. D.C. 352, 2004 U.S. App. LEXIS 14304 \(D.C. Cir. 2004\)](#).

In abandonment proceedings, Surface Transportation Board weighs relative burdens that continuing or ceasing rail service would have on all of potentially affected interests, including railroad, owners of property if different from carrier, shippers, national rail network, and broader public; there are thus articulated at least four interests to balance: (1) railroad; (2) owner and/or public; (3) shippers; and (4) interstate commerce and rail system in general. [*New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 362 U.S. App. D.C. 352, 2004 U.S. App. LEXIS 14304 \(D.C. Cir. 2004\)](#).

Problem of Commission [now Surface Transportation Board] in abandonment proceedings is to determine how far carrier engaged in interstate commerce should be required to continue service at constantly increasing loss where great numbers of persons served have abandoned rail transportation for travel by private motors and busses; solution of such problem is matter particularly within competence and province of Commission [now Surface Transportation Board], when supported by substantial evidence. [*Inlet v. New York C. R. Co.*, 7 F. Supp. 781, 1934 U.S. Dist. LEXIS 2012 \(D.N.Y. 1934\)](#).

Criterion to be applied by Interstate Commerce Commission [now Surface Transportation Board] in exercise of its authority to issue certificate of abandonment of railroad line is not general welfare, but adequacy of transportation service to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities. [*Purcell v. United States*, 41 F. Supp. 309, 1941 U.S. Dist. LEXIS 2659 \(D. Md. 1941\)](#), aff’d, [*315 U.S. 381, 62 S. Ct. 709, 86 L. Ed. 910, 1942 U.S. LEXIS 1082 \(1942\)*](#).

Commission [now Surface Transportation Board] may authorize railroad to abandon operation and obligation in interest of general public. [*New York C. R. Co. v. Central N. E. R. Co.*, 264 Mass. 128, 162 N.E. 324, 1928 Mass. LEXIS 1250 \(Mass. 1928\)](#), aff’d, [*279 U.S. 415, 49 S. Ct. 358, 73 L. Ed. 770, 1929 U.S. LEXIS 350 \(1929\)*](#).

Former 49 USCS § 1a(3) placed burden of proof as to public convenience and necessity upon applicant in abandonment proceedings. Abandonment of R. Lines & Discontinuance of Service (1976) [*354 I.C.C. 129*](#).

While applicant has closed bridge due to unsafe conditions resulting from repeated collisions by barges, and to high cost of repair or replacement, thus ending potential for through service over line at issue, use of alternate longer route for movement of overhead traffic cannot be construed adversely to applicant, since earning capacity of overhead traffic is not controlling in most abandonment proceedings, as its routing is matter of managerial discretion; rather, emphasis must be placed on revenues produced by branch and expenses incident to that traffic. [*Seaboard Coast Line R. Co.*, 360 I.C.C. 123](#).

Former 49 USCS § 1(18)–(20) has been construed as conferring jurisdiction upon Commission [now Surface Transportation Board] subject to certain exclusions over abandonment proposals of all railroads engaged in interstate commerce notwithstanding that line being abandoned may lie wholly within single state and requiring that due consideration be given to State and local interests in view of fact that services in interstate and intrastate commerce are inextricably intertwined. [*Washington & Old Dominion R. Abandonment Virginia*, 331 I.C.C. 587](#).

In determining whether public convenience and necessity permit abandonment of railroad line, Commission [now Surface Transportation Board] must weigh burden, at present and in future, that continued operations would impose upon carrier and interstate commerce; historically, Commission [now Surface Transportation Board] has evaluated, among other factors, revenues that may be expected to accrue to carrier from line's operations, carrier's financial ability to continue operations, use being made of line, traffic potential of involved area, and public need for service, with no one factor controlling; where there was no foreseeable prospect of increased traffic to make future operations profitable and continued maintenance and rehabilitation of line would not be economically justified and would impose undue burden upon applicant and interstate commerce, abandonment would be approved. [*Missouri Pac. Abandonment Bet. Bismarck and Whitewater*, 342 I.C.C. 643](#).

4. Burden on interstate commerce

Demonstrated prejudice to interstate commerce and absence of earnings affording reasonable compensation are relevant and may often be controlling, but issuance of certificate is not dependent on specific finding to that effect. [*Colorado v. United States*, 271 U.S. 153, 46 S. Ct. 452, 70 L. Ed. 878, 1926 U.S. LEXIS 905 \(1926\)](#).

Where it is deemed wise to permit abandonment of unprofitable passenger service on lines which railroads continue to operate for hauling freight, Congress can authorize Interstate Commerce Commission [now Surface Transportation Board] to permit such abandonment notwithstanding charter requirements and regulatory orders of State Commissions, but until Congress acts courts are without power to afford relief merely because of burden on interstate commerce which such service entails. [*Southern R. Co. v. South Carolina Public Service Com.*, 31 F. Supp. 707, 1940 U.S. Dist. LEXIS 3459 \(D.S.C. 1940\)](#).

In reaching its determination on issue of abandonment of branch line, Interstate Commerce Commission [now Surface Transportation Board] need not determine with mathematical exactness extent of burden imposed upon interstate commerce by operation of line, but rather former 49 USCS §§ 1–5, 5b–15a, 16, 17–23, 26, 27, [301–305](#), [306–327](#), 901–923, 1001–1022 contemplates that Commission [now Surface Transportation Board] should make considered balance of respecting conflicting interests, its effort being to decide what fairness to all concerned demands. [*Woodruff v. United States*, 40 F. Supp. 949, 1941 U.S. Dist. LEXIS 2816 \(D. Conn. 1941\)](#).

Under former 49 USCS § 1(18) and (20) it is left to Interstate Commerce Commission [now Surface Transportation Board] to determine whether proposed abandonment will further interest of transportation by protecting interstate commerce from undue burdens. [*Purcell v. United States*, 41 F. Supp. 309, 1941 U.S. Dist. LEXIS 2659 \(D. Md. 1941\)](#), aff'd, [315 U.S. 381, 62 S. Ct. 709, 86 L. Ed. 910, 1942 U.S. LEXIS 1082 \(1942\)](#).

5. Cost or availability of funds

Magnitude of required outlay for elimination of grade crossings under order of state, on branch line which applicant seeks to abandon, as compared with value of whole property of carrier, and resulting effect on company's revenue, were facts properly taken into account by Commission in passing on application for abandonment of branch line. [*Transit Com. v. United States*, 284 U.S. 360, 52 S. Ct. 157, 76 L. Ed. 342, 1932 U.S. LEXIS 983 \(1932\)](#).

Since embargoed segment of rail line could not be used unless rest of line was at lowest operating standards, Surface Transportation Board correctly focused on cost of resuming services at pre-embargo levels when it examined cost to repair petitioner city's line to appropriate standards. [*Decatur County Comm'rs v. Surface Transp. Bd.*, 308 F.3d 710, 2002 U.S. App. LEXIS 21488 \(7th Cir. 2002\)](#).

Surface Transportation Board was not required to make specific finding that railroad had funds to repair line and requirement for such finding was not stated factor of balancing test to determine reasonableness of rail line embargo. [*Decatur County Comm'rs v. Surface Transp. Bd.*, 308 F.3d 710, 2002 U.S. App. LEXIS 21488 \(7th Cir. 2002\)](#).

6. Displaced employees

Final rule adopted by Surface Transaction Board, codified at 49 C.F.R. § 1180(d)(8), which adopted class exemption for temporary trackage rights agreements that provided streamlined means by which carriers could obtain Board authorization for agreements that would expire by their terms on specified date within year of their start, was vacated and remanded to Board where rule failed to provide employee protective conditions, which were statutorily required on discontinuation of trackage rights and contrary to [49 USCS § 11326\(a\)](#), [49 USCS § 10502\(g\)](#), and [49 USCS § 10502\(g\)](#); sweeping language in rule that all transactions were subject to applicable statutory labor

49 USCS § 10903

protective conditions did not satisfy Board's obligations because Board had adopted narrow definition of "transaction" for purposes of labor protection with regard to trackage rights that included acquisition by railroad of trackage rights. [United Transp. Union-General Comm. of Adjustment v. Surface Transp. Bd., 363 F.3d 465, 361 U.S. App. D.C. 29, 174 L.R.R.M. \(BNA\) 2804, 2004 U.S. App. LEXIS 6496 \(D.C. Cir. 2004\).](#)

Statutory "discontinuance provisions" do not lose their application simply because Surface Transportation Board chooses to exercise its regulatory authority for specific set of transactions generically and in advance; Board's exercise of its authority over discontinuance via generic exemption necessarily triggers employee protective conditions as would any other Board-approved discontinuance. [United Transp. Union-General Comm. of Adjustment v. Surface Transp. Bd., 363 F.3d 465, 361 U.S. App. D.C. 29, 174 L.R.R.M. \(BNA\) 2804, 2004 U.S. App. LEXIS 6496 \(D.C. Cir. 2004\).](#)

Because respondent Surface Transportation Board failed to reasonably explain and justify its deviation from its longstanding entire-system exception and required petitioner rail carrier to pay dismissal allowances to dismissed employees after authorizing discontinuation of carrier's entire service, Board's decision was arbitrary and capricious under Administrative Procedure Act, and decision was vacated. [Mfrs. Ry. Co. v. Surface Transp. Bd., 676 F.3d 1094, 400 U.S. App. D.C. 157, 193 L.R.R.M. \(BNA\) 2116, 2012 U.S. App. LEXIS 7444 \(D.C. Cir. 2012\).](#)

Protection of displaced employees is within authority conferred by former 49 USCS § 10(20), and portion of abandonment order of Interstate Commerce Commission [now Surface Transportation Board] refusing any conditions for protection of displaced employees should be set aside with directions to Commission to take such action thereon as in its discretion was proper. [Railway Labor Executives' Asso. v. United States, 38 F. Supp. 818, 1941 U.S. Dist. LEXIS 3337 \(D.D.C. 1941\)](#), aff'd, [315 U.S. 373, 62 S. Ct. 717, 86 L. Ed. 904, 10 L.R.R.M. \(BNA\) 378, 1942 U.S. LEXIS 1073 \(1942\).](#)

Although STB, under [49 USCS § 10502\(g\)](#), may not use its exemption authority to relieve carrier of its statutory obligation to protect interests of its employees, STB does not normally impose employee protective conditions when carrier abandons its entire line ([49 USCS § 10903](#)) unless evidence shows existence of corporate affiliate that will continue substantially similar rail operations, or corporate parent that will realize substantial financial benefits over and above relief from burden of deficit operations by its subsidiary railroad. County of Coahoma, Mississippi—Abandonment Exemption (6/15/01) STB Docket No. AB-579X, [2001 STB LEXIS 563](#).

Although Commission [now Surface Transportation Board] has not generally imposed employee protective conditions in cases involving abandonment of entire line of railroad, there is no statutory prohibition on its doing so, and where circumstances make such action reasonable and in public interest, it is Commission's duty to afford protection to employees who may be adversely affected by such abandonment; ultimate objective and primary justification for such conditions are not private benefit of particular employees, but strengthening of national transportation system through avoidance of unstabilizing effects which result from displacement of labor without protection. Seaboard Air Line R. Co. Trackage Rights, 312 I.C.C. 797.

Commission [now Surface Transportation Board] refuses to impose employee protective conditions on bankrupt railroad which is abandoning its entire line of railroad or on those carriers seeking control of portions of the abandoned line, since any adverse effect on involved employees was caused by previous cessation of all operations by bankrupt, for which its financially bankrupt condition renders it unable to assume responsibility and there is no discernible benefit to three railroads seeking acquisition of line abandoned herein and thus no justification for imposition of employee protective conditions, especially as such imposition would block acquisition of involved line and deny much needed rail service to shippers [Tennessee Central Ry. Co. Abandonment, 334 I.C.C. 235.](#)

Commission [now Surface Transportation Board] has power to impose labor protective conditions in both partial and entire line abandonments to alleviate any potential detriment to employees. [Marianna & Blountstown R. Abandonment, 348 I.C.C. 507.](#)

7. Environmental factors

In action by shippers association to set aside orders of Interstate Commerce Commission [now Surface Transportation Board] which permitted abandonment by defendant railroad of particular part of its rail line, Commission, in determining that abandonment would cause no significant environmental effect, fairly weighed relevant considerations and reached its decision after full, good faith consideration of environmental factors made under standards set forth in National Environmental Policy Act ([42 USCS § 4332\(2\)\(c\)](#)). [Iowa City--Montezuma Railroad Shippers Asso. v. United States](#), 357 F. Supp. 321, 1972 U.S. Dist. LEXIS 10587 (S.D. Iowa 1972).

Since Interstate Commerce Commission [now Surface Transportation Board] is required to make finding, based on its own analysis, of effect of abandonment on environment, Commission must require submission of environmental information by applicant at inception of process; this requirement (49 CFR § 1121.32(f)) does not constitute attempt to transfer Commission's responsibilities under National Environmental Protection Act to railroads. [Abandonment of R. Lines & Discontinuance of Service](#), 354 I.C.C. 129.

8. Existence of alternate facilities

There was no public necessity for railroad passenger train services formerly provided by Illinois railroad corporation between East St. Louis, Illinois, and Savannah, Illinois, because communities involved had provided themselves with system of improved highways, with one automobile for every four persons, and with numerous certificated common carrier busses and trucks—with result that radically larger portion of their passenger transportation needs and services have been transferred from local railroad passenger train to motor vehicles on highway, thereby rendering local railroad passenger trains obsolete form of transportation. [Chi., B. & Q. Co. v. Ill. Commerce Comm'n](#), 82 F. Supp. 368, 1949 U.S. Dist. LEXIS 1717 (D. Ill. 1949).

9. Insufficient traffic

In deciding adverse abandonment or discontinuance application by private entity, Surface Transportation Board analyzes applicant's asserted interests and record and makes its own findings regarding public interest; Board cannot abdicate its responsibility to make independent assessment of relevant factors, whether applicant be private or public. [New York Cross Harbor R.R. v. Surface Transp. Bd.](#), 374 F.3d 1177, 362 U.S. App. D.C. 352, 2004 U.S. App. LEXIS 14304 (D.C. Cir. 2004).

Discontinuance of tugboat operations by railroad because of lack of demand for service was not abandonment requiring certificate of public convenience and necessity therefor. [McGrody v. Baltimore & O. R.](#), 217 F. Supp. 252, 1963 U.S. Dist. LEXIS 6950 (E.D. Pa. 1963).

Unpublished decision: Court of appeals found that transportation company did not provide false or misleading information when it asked Surface Transportation Board (STB) for exemption from procedures that were normally used to abandon railroad lines, based on its claim that no local traffic had moved over line for two years and that no complaint regarding cessation of service had been decided in favor of complainant or was pending, and it held that STB did not act arbitrarily and capriciously when it rejected complaint filed by warehouse company, seeking order invalidating decision to abandon line and damages; in reaching its decision, court noted that warehouse company did not show that it or any other shipper requested service after transportation company placed embargo on line, until date it abandoned line. [Terminal Warehouse, Inc. v. CSX Transp.](#), 175 Fed. Appx. 715, 2006 FED App. 0262N, 2006 U.S. App. LEXIS 9481 (6th Cir. 2006).

Rebuttable presumption in favor of abandonment is created when fewer than 34 carloads of traffic per mile are carried over line during year preceding filing of application; 34-carload rule does not shift burden of persuasion from carrier as party claiming affirmative relief but does shift to protestants burden of going forward with evidence; opposing parties can refute this presumption by evidence showing more than 34 carloads carried over line or that

benefits to communities and shippers outweigh burden upon carrier and interstate commerce. [*Marianna & Blountstown R. Abandonment*, 348 I.C.C. 507.](#)

10. Local or community interests

Benefit of abandonment to one must be weighed against loss to another; conversely, benefits to particular communities and commerce of continued operation must be weighed against burden imposed on other commerce. [*Colorado v. United States*, 271 U.S. 153, 46 S. Ct. 452, 70 L. Ed. 878, 1926 U.S. LEXIS 905 \(1926\)](#) ; [*Transit Com. v. United States*, 284 U.S. 360, 52 S. Ct. 157, 76 L. Ed. 342, 1932 U.S. LEXIS 983 \(1932\).](#)

In determining whether or not proposed abandonment of line submerged by building of federal flood control dam would further interests of transportation by protecting interstate commerce from undue burdens, Commission [now Surface Transportation Board] must consider extent of whole transportation and dependence of community affected upon particular means of transportation which it is proposed to eliminate and must balance respective interests and decide whether injury to community affected outweighs burdens imposed upon carrier. [*Purcell v. United States*, 41 F. Supp. 309, 1941 U.S. Dist. LEXIS 2659 \(D. Md. 1941\)](#), *aff'd*, [*315 U.S. 381, 62 S. Ct. 709, 86 L. Ed. 910, 1942 U.S. LEXIS 1082 \(1942\).*](#)

In implementing standard provided in [49 USCS § 10903\(d\)](#), Surface Transportation Board must balance competing benefits and burdens of abandonment or discontinuance on all interested parties, including railroad, shippers on line, communities involved, and interstate commerce generally. Yakima Interurban Lines Association—Adverse Abandonment—In Yakima County, WA (11/19/04) [STB Docket No. AB-, 2004 STB LEXIS 741.](#)

11. Operating loss

Whatever may be the form required by local law of company desiring to discontinue its railroad business, it cannot authorize railroad commission or court to do what Constitution forbids, which is the effect of an order of the one and an injunction of the other compelling it to operate, although at a loss. Corporation which has granted to public interest in use of its railroad, may withdraw such grant by discontinuing use, when it can be kept up only at loss, and, corporation operating railroad in connection with other business, cannot be compelled to continue operation of railroad at loss, merely because return from its entire business is reasonable. [*Brooks-Scanlon Co. v. Railroad Com. of Louisiana*, 251 U.S. 396, 40 S. Ct. 183, 64 L. Ed. 323, 1920 U.S. LEXIS 1675 \(1920\).](#)

Carrier's charter does not oblige it to operate at loss, and if it appears reasonably certain that future operation of road will be at loss, it may, in absence of contract, dismantle its road. [*Brownwood N. & S. R. Co. v. Railroad Com. of Texas*, 16 F.2d 297, 1926 U.S. Dist. LEXIS 1586 \(D. Tex. 1926\).](#)

Railroad cannot be permitted to take law in its own hands and may not utilize extraordinary remedy of embargo, which should be temporary measure, to rid itself of marginal operation of railroad line and at same time deny public protection which former 49 USCS §§ 1(18) and 1(20) were designed to afford. [*Interstate Commerce Com. v. Maine C. R. Co.*, 505 F.2d 590, 1974 U.S. App. LEXIS 6396 \(2d Cir. 1974\).](#)

Because of strong statutory and Surface Transportation Board policies favoring preservation of rail-to-rail competition and provision of adequate service for shippers, Board will not deprive shipper of availability of rail service options that it already has, absent very strong showing that such action is in public interest; trustee has burden of proving that benefit of existing competitive service option available to shipper from active carrier is outweighed by other harms. [*New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 362 U.S. App. D.C. 352, 2004 U.S. App. LEXIS 14304 \(D.C. Cir. 2004\).](#)

There can be no doubt that Commission [now Surface Transportation Board] could authorize abandonment of wholly profitless enterprise, continuance of which on its own behalf would inevitably result in immediate loss of all its property; Commission [now Surface Transportation Board] might properly find that short branch line might be

abandoned without improper sacrifice of public convenience when it has always shown large deficit in operation, has lost half its former business, and is now paralleled by state road traversed by automobiles and busses. [*Inlet v. New York C. R. Co.*, 7 F. Supp. 781, 1934 U.S. Dist. LEXIS 2012 \(D.N.Y. 1934\)](#).

Commission [now Surface Transportation Board] may authorize abandonment of portion of railroad line upon showing that that portion of line is unproductive; it is not necessary to show deficit upon entire line. [*Georgia v. United States*, 28 F. Supp. 749, 1939 U.S. Dist. LEXIS 2417 \(D. Va. 1939\)](#).

Applicant bears burden of proof on issue of cost of future maintenance of line. [*Seaboard Coast Line R. Co.*, 360 I.C.C. 123](#).

While protestants argue that abandonment should be denied because law judge and Commission [now Surface Transportation Board] division did not accurately indicate exact condition of line in terms of operating costs, avoidable losses, and rehabilitation costs, such factors are not exact figures that can be pinpointed; law judge has duty and discretion to consider financial data submitted by applicant as well as comments of protestants and then exercise his judgment to arrive at determination of weight given applicant's financial data. [*Illinois Central Gulf R. Co.*, 360 I.C.C. 165](#).

System line revenue and costs attributable to line are necessary to demonstrate impact of proposed abandonment on railroad's net operating income. [*Baltimore & O. R. Co.*, 360 I.C.C. 681](#).

12. Shippers' interests

In implementing standard provided in [49 USCS § 10903\(d\)](#), Surface Transportation Board must balance competing benefits and burdens of abandonment or discontinuance on all interested parties, including railroad, shippers on line, communities involved, and interstate commerce generally. Yakima Interurban Lines Association—Adverse Abandonment—In Yakima County, WA (11/19/04) [STB Docket No. AB-, 2004 STB LEXIS 741](#).

Interests of shippers are matters of substantial importance in determining question of public convenience and necessity. [*Burlington Northern, Inc. Construction and Oper.*, 348 I.C.C. 388](#).

13. State laws

District court in passing on plan of reorganization of railroad company approved by Commission [now Surface Transportation Board] does not have to consider state laws relative to curtailment of service. [*Commission of Dep't of Public Utilities v. New York, N. H. & H. R. Co.*, 178 F.2d 559, Bankr. L. Rep. \(CCH\) ¶ 56560, 1949 U.S. App. LEXIS 3864 \(2d Cir. 1949\)](#), cert. denied, 339 U.S. 943, 70 S. Ct. 796, 94 L. Ed. 1359, 1950 U.S. LEXIS 2087 (1950), reh'g denied, 339 U.S. 972, 70 S. Ct. 995, 94 L. Ed. 1379, 1950 U.S. LEXIS 2004 (1950).

In non-adverse abandonment, petitioning railroad's interest, as well as current and projected profitability of line, are routinely considered. [*New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 362 U.S. App. D.C. 352, 2004 U.S. App. LEXIS 14304 \(D.C. Cir. 2004\)](#).

In Fifth Amendment takings action arising from conversion of railroad right-of-way, summary judgment was not appropriate as to claims where intervening public road was situated completely within railroad right-of-way because centerline presumption did not apply where abandoned railroad easement adjoined public road right-of-way. Government was entitled to summary judgment on claims where parcels were adjacent to railroad right of way, but property owners were entitled to summary judgment on two others because road and railroad right-of-way were not situated side by side, but instead overlapped, and thus, properties were adjoining and property owners owned property to centerline of railroad right-of-way. [*Brooks v. United States*, 138 Fed. Cl. 371, 2018 U.S. Claims LEXIS 771 \(Fed. Cl. June 27, 2018\)](#).

While States may be better equipped to deal with problem of proposed use of abandoned properties for other public purposes, carrier is required to present its view on issue in order to assure that issue is clearly presented (49 CFR § 1121.32(e)(5)), but it would be unduly burdensome to require applicant to include history of ownership of line and description of any leases and reversionary interests, although applicant must disclose any restriction upon title to properties, including reversionary interests, which it may be aware would affect transfer or use of properties. [*Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 129.](#)

14. Other factors

Fact that state was given option to purchase part of reorganized railroad company's group lines in event company should elect to discontinue passenger service on line acquired by reorganization does not have any bearing on question whether company had right to discontinue passenger service in part if option was not inserted into plan until after company's right to discontinue service had been fully established. [*Commission of Dep't of Public Utilities v. New York, N. H. & H. R. Co.*, 178 F.2d 559, Bankr. L. Rep. \(CCH\) ¶ 56560, 1949 U.S. App. LEXIS 3864 \(2d Cir. 1949\)](#), cert. denied, 339 U.S. 943, 70 S. Ct. 796, 94 L. Ed. 1359, 1950 U.S. LEXIS 2087 (1950), reh'g denied, 339 U.S. 972, 70 S. Ct. 995, 94 L. Ed. 1379, 1950 U.S. LEXIS 2004 (1950).

If Railroads A and B wanted to conclude sale of railroad line under former [49 USCS § 10901](#), in transaction which could occur only after Railroad A had already abandoned line, ICC [now Surface Transportation Board] could not properly rely on results of proposed sale in determining whether to permit abandonment in first instance. [*Black v. Interstate Commerce Com.*, 737 F.2d 643, 1984 U.S. App. LEXIS 21493 \(7th Cir. 1984\)](#).

Challenging Surface Transportation Board's denial of their application for adverse abandonment of two railroad lines on ground that there was reasonable potential for future use of lines, city and religious brotherhood (petitioners), argued that record did not support Board's conclusion because evidence, public statement of former rail customer recorded in newspaper article and railroad's submission, indicated that customer had no present interest in receiving coal by rail; however, shipping coal by rail was generally more efficient than by truck, so customer's practice of receiving about 14 truck loads of coal every weekday was not economically rational, and customer's public statement showed that it might have been interested in receiving coal shipments if political and social pressures diminished in future; thus, newspaper article presented plausible explanation—unchallenged by petitioners—why customer had not resumed economically rational practice; accordingly, by denying petitioners' application and allowing reasonable period of time for another railroad to acquire lines, invest in rehabilitating them, address local concerns, and pursue shippers, Board acted reasonably and in furtherance of its statutory duty to preserve and promote continued rail service under [49 USCS §§ 10101\(4\)](#), [10501\(b\)](#), and [10903\(d\)](#), which was neither arbitrary nor capricious pursuant to [5 USCS § 706\(2\)\(A\)](#). [*City of S. Bend v. Surface Transp. Bd.*, 566 F.3d 1166, 386 U.S. App. D.C. 120, 2009 U.S. App. LEXIS 11503 \(D.C. Cir. 2009\)](#).

It was not arbitrary, capricious, or abuse of discretion for Surface Transportation Board to exempt middle segment from [49 USCS § 10904](#) because there was no shipper on middle segment, and Department of Transportation (DOT) represented that any delays in highway project could cost it millions of dollars and jeopardize safety of motorists; in view of likely costs and limited demand for rail service, Board acted reasonably to enable DOT to relocate highway along its planned route. [*Kessler v. Surface Transp. Bd.*, 635 F.3d 1, 394 U.S. App. D.C. 288, 2011 U.S. App. LEXIS 5013 \(D.C. Cir. 2011\)](#).

Interstate Commerce Commission [now Surface Transportation Board] had authority to issue certificate that abandonment of operations by intervening railroad under trackage rights contract with another road was permitted by public convenience and necessity, abandonment relating principally to transportation of iron ore instead of to usual and ordinary railroad operation. [*Escanaba & L. S. R. Co. v. United States*, 21 F. Supp. 151, 1937 U.S. Dist. LEXIS 1337 \(D. Mich. 1937\)](#), aff'd, [303 U.S. 315, 58 S. Ct. 556, 82 L. Ed. 867, 1938 U.S. LEXIS 358 \(1938\)](#).

Railroad was not estopped from abandoning track line of another railroad which it controlled because of alleged promises which railroad officials made to plaintiffs' representatives never to abandon line when control was acquired ten years earlier. [*Burke County, Georgia v. United States*, 206 F. Supp. 586, 1962 U.S. Dist. LEXIS 4815](#)

[\(S.D. Ga. 1962\)](#) ; [Nebraska ex rel. Nebraska S. R. Com. v. United States, 255 F. Supp. 718, 1966 U.S. Dist. LEXIS 8246 \(D. Neb. 1966\).](#)

Railroad, servicing small portion of New York Harbor, operating under lease with parent corporation, suffering extensive financial losses spanning a decade, and drifting into dilapidated physical condition, was granted abandonment petition over contentions that parent should absorb the “bookkeeping” losses, that small businesses would collapse, and that use of replacement trucks would cause more air pollution; ICC [now Surface Transportation Board] directed to prepare impact statement under [42 USCS § 4332\(2\)\(c\)](#) and to consider on remand belated offer of user’s association to subsidize railroad transport; considering late raising of NEPA issues, abandonment order would stand pending filing of report. [New York v. United States, 337 F. Supp. 150, 3 Env’t Rep. Cas. \(BNA\) 1570, 2 Env’tl. L. Rep. 20275, 1972 U.S. Dist. LEXIS 15462 \(E.D.N.Y. 1972\).](#)

When subsequent to filing application, applicant railroad was merged into parent railroad, but railroads were operated as single system, parent is treated as successor in interest to initial applicant. [Texas & Pac. Ry. Co., 360 I.C.C. 31.](#)

While protestants argue that Commission [now Surface Transportation Board] should consider that another railroad allegedly desires to acquire abandoning railroad, when that allegation is unsupported and other railroad has made no statement to that effect, it will be given little weight. [Illinois Central Gulf R. Co., 360 I.C.C. 165.](#)

Even if applicant acquired considered line primarily for purpose of effectuating its abandonment in order to avoid or exterminate competition, motives that may have influenced acquisition of line are not material in abandonment proceeding nearly 40 years later. Southern Pac. Co. Abandonment, 312 I.C.C. 685.

III. EFFECT OF BOARD DECISION

15. Generally

Where district court’s order sustaining Interstate Commerce Commission’s act in authorizing abandonment of branch line of railroad was reversed by the United States Supreme Court without consideration of merits, but Supreme Court refused to grant stay of original abandonment order and stayed effective date of its own mandate until Commission’s new abandonment order became effective, cessation of service on such branch line was continuously lawful. [Public Service Com. v. United States, 56 F. Supp. 351, 1944 U.S. Dist. LEXIS 2186 \(D.N.Y.\), aff’d, 323 U.S. 675, 65 S. Ct. 130, 89 L. Ed. 548, 1944 U.S. LEXIS 115 \(1944\).](#)

Where Interstate Commerce Commission [now Surface Transportation Board] decided that railroad, involved in receivership proceedings in federal court, should be abandoned, proceedings should be dismissed. [Gross v. Missouri & A. R. Co., 74 F. Supp. 242, 1947 U.S. Dist. LEXIS 2062 \(D. Ark. 1947\).](#)

In ejectment action where plaintiff referred to certificate of abandonment, and proceedings in connection therewith before Interstate Commerce Commission [now Surface Transportation Board], certificate should have been pleaded. [Lacy v. East B. T. R. & C. Co., 168 Pa. Super. 351, 77 A.2d 706, 1951 Pa. Super. LEXIS 283 \(Pa. Super. Ct. 1951\).](#)

16. Contract rights and duties

Certificate authorizing abandonment of branch line did not relieve railroad from its liability for sums payable annually under trackage agreement not performed after abandonment. [Central N. E. R. Co. v. Boston & A. R. Co., 279 U.S. 415, 49 S. Ct. 358, 73 L. Ed. 770, 1929 U.S. LEXIS 350 \(1929\).](#)

49 USCS § 10903

Order granting certificate permitting abandonment of portion of railroad is good defense to action by another carrier for breach of contract for exchange of traffic with latter line, such contract between carriers being necessarily deemed to have been made subject to provisions of existing law and to power of Congress over matters pertaining to interstate commerce. [*Western P. R. Co. v. Nevada-California-Oregon R.*, 40 F.2d 731, 1930 U.S. Dist. LEXIS 2073 \(D. Cal. 1930\)](#).

Order of Interstate Commerce Commission [now Surface Transportation Board] that branch line of railroad should be abandoned and district court's refusal to enjoin operation of such order would have no effect on rights of injured shipper to compensation. [*Purcell v. United States*, 41 F. Supp. 309, 1941 U.S. Dist. LEXIS 2659 \(D. Md. 1941\)](#), aff'd, [*315 U.S. 381, 62 S. Ct. 709, 86 L. Ed. 910, 1942 U.S. LEXIS 1082 \(1942\)*](#).

Coal company was not entitled to damages from railroad upon abandonment of a railroad line because of the deterioration of a tunnel which the Interstate Commerce Commission [now Surface Transportation Board] decided need not be restored. [*Asbury v. Chesapeake & O. R. Co.*, 314 F. Supp. 310, 1970 U.S. Dist. LEXIS 11996 \(D.D.C. 1970\)](#).

Where nature of property rights obtained by railroad were fee simple interests, under Iowa law grantor landowners did not retain reversionary interests in property, and had not suffered taking of any reversionary interests entitling them to compensation in rail banking transaction under [16 USCS § 1247\(d\)](#) and [49 USCS § 10903](#), [*Rasmuson v. United States*, 109 Fed. Cl. 267, 2012 U.S. Claims LEXIS 1862 \(Fed. Cl. Feb. 8, 2012\)](#).

Although railroad obtained order from Interstate Commerce Commission [now Surface Transportation Board] authorizing it to abandon portion of its branch line as public convenience and necessity no longer required its operation, and after due notice line was abandoned, abandonment was not voluntary on part of the railroad so as to make it liable as breach of right-of-way deed requiring it to maintain a switch on grantor's premises. [*Meacham v. Louisville & N. R. Co.*, 293 Ky. 642, 169 S.W.2d 830, 1943 Ky. LEXIS 678 \(Ky. 1943\)](#).

Railroad that abandoned line with permission of federal and state authorities, and which transferred property to state for water storage reservoir, pursuant to contract, was entitled to recover consideration as against defense that expenditure had not been approved by governor and council as required by state statutes. [*Boston & A. R. Co. v. Commonwealth*, 296 Mass. 426, 6 N.E.2d 613, 1937 Mass. LEXIS 693 \(Mass. 1937\)](#).

Sale of railway easement, even if not authorized by Interstate Commerce Commission [now Surface Transportation Board], did not destroy such easement. [*Hennick v. Kansas City S. R. Co.*, 364 Mo. 883, 269 S.W.2d 646, 1954 Mo. LEXIS 583 \(Mo. 1954\)](#).

IV. SYSTEM DIAGRAM

17. Generally

Neither system design requirements of former [49 USCS § 10904](#) nor regulations promulgated thereunder applied to applications for abandonment filed prior to promulgation of regulations. [*Illinois v. Interstate Commerce Com.*, 615 F.2d 743, 1979 U.S. App. LEXIS 10206 \(7th Cir. 1979\)](#).

18. Duty to update

System diagram which carriers were required to maintain under former [49 USCS § 10904](#) had to be updated to reflect proposed abandonments in sufficient time to avoid harming potential protestants. [*Illinois v. Interstate Commerce Com.*, 615 F.2d 743, 1979 U.S. App. LEXIS 10206 \(7th Cir. 1979\)](#).

ICC [now Surface Transportation Board] did not act arbitrarily or capriciously in concluding that railroad's rerouting of all "overhead" (nonlocal) traffic from line was in anticipation of abandonment of that line and that employees adversely affected were thus entitled to labor protection; line contained nine tunnels that were too small to accommodate railroad's modern freight cars and no local traffic had originated or terminated on line since at least 1983. [*CSX Transp. v. Surface Transp. Bd.*, 75 F.3d 696, 316 U.S. App. D.C. 114, 1996 U.S. App. LEXIS 2378 \(D.C. Cir. 1996\)](#).

V. PRACTICE AND PROCEDURE

19. Jurisdiction

ICC's [now Surface Transportation Board] failure to issue final decision within time limitations of former [49 USCS § 10904](#) did not divest agency of jurisdiction, where ICC tolled time limit for deciding appeals by reopening record prior to expiration of 255 day deadline. [*Marshall Durbin Food Corp. v. ICC*, 959 F.2d 915, 6 Fla. L. Weekly Fed. C 506, 1992 U.S. App. LEXIS 8507 \(11th Cir. 1992\)](#).

Railroad right-of-way was abandoned when ICC's first notice of interim use expired, hence Board lacked jurisdiction to issue second notice of interim use. [*Becker v. Surface Transp. Bd.*, 132 F.3d 60, 328 U.S. App. D.C. 5, 28 Env'tl. L. Rep. 20533, 1997 U.S. App. LEXIS 36323 \(D.C. Cir. 1997\)](#).

Surface Transportation Board loses jurisdiction over rail line once it becomes severed from interstate rail system so that it may not subsequently issue trail condition. [*RLTD Ry. Corp. v. Surface Transp. Bd.*, 166 F.3d 808, 1999 FED App. 0034P, 29 Env'tl. L. Rep. 20615, 1999 U.S. App. LEXIS 1039 \(6th Cir. 1999\)](#).

Bankruptcy court does not have authority under [11 USCS § 1170](#) to adversely abandon lines or trackage rights of non-debtor on petition of debtor railroad who owned those lines at time of bankruptcy; such authority lies, instead, within jurisdiction of Surface Transportation Board under [49 USCS § 10903](#). [*Howard v. Surface Transp. Bd.*, 389 F.3d 259, 43 Bankr. Ct. Dec. \(LRP\) 260, Bankr. L. Rep. \(CCH\) ¶ 80196, 2004 U.S. App. LEXIS 24480 \(1st Cir. 2004\)](#).

Where bankruptcy trustee filed application with Surface Transportation Board (STB) for abandonment of railway company's trackage rights and easement over rail line owned by debtor railroad at time of bankruptcy, STB had jurisdiction to issue binding decision under [49 USCS § 10903](#) denying trustee's application; STB was not limited to issuing only advisory report under [11 USCS § 1170](#). [*Howard v. Surface Transp. Bd.*, 389 F.3d 259, 43 Bankr. Ct. Dec. \(LRP\) 260, Bankr. L. Rep. \(CCH\) ¶ 80196, 2004 U.S. App. LEXIS 24480 \(1st Cir. 2004\)](#).

Because petitioner railroad argued Embankment it sought to abandon was not line of railroad transferred to it under Final System Plan of Regional Rail Reorganization Act of 1973, [45 USCS §§ 701](#) et seq., and could be abandoned under [49 USCS § 10906](#) without approval of respondent Surface Transportation Board as would otherwise have been required under [49 USCS § 10903\(a\)\(1\)](#), Board lacked jurisdiction over such petition. [*Conrail v. Surface Transp. Bd.*, 571 F.3d 13, 387 U.S. App. D.C. 13, 2009 U.S. App. LEXIS 13947 \(D.C. Cir. 2009\)](#).

Surface Transportation Board has exclusive and plenary jurisdiction over abandonments in order to protect public from unnecessary discontinuance, cessation, interruption or obstruction of available rail service; accordingly, Board preserves and promotes continued rail service where carrier has expressed desire to continue operations and has taken reasonable steps to acquire traffic, but Board does not allow its jurisdiction to be used to shield carrier from legitimate processes of state law where no overriding federal interest exists. Yakima Interurban Lines Association—Adverse Abandonment—In Yakima County, WA (11/19/04) [STB Docket No. AB-, 2004 STB LEXIS 741](#).

Notice of interim trail use, which prevented abandonment, effected Fifth Amendment taking of reversionary interests under Indiana law as to some adjacent properties because deeds conveyed easements, not fee simple title, to railroad company as shown by language describing land as railroad right of way and stating conveyance was for

railroad purposes; however, owners of lot in subdivision could not obtain summary judgment because fact issue existed as to whether right of way was common area. [*Schulenburg v. United States*, 137 Fed. Cl. 79, 2018 U.S. Claims LEXIS 201 \(Fed. Cl. Mar. 26, 2018\)](#).

Some landowners were entitled to partial summary judgment on takings claims regarding notice of interim trail use, which maintained jurisdiction and prevented abandonment of railroad line, because railroad held only easement under Kansas law as to land obtained by condemnation and as to land conveyed under deeds measuring from railway's center line and referring to right of way; government obtained partial summary judgment for parcels conveyed in fee, and fact issues existed as to other parcels. [*Arnold v. United States*, 137 Fed. Cl. 524, 2018 U.S. Claims LEXIS 305 \(Fed. Cl. Apr. 10, 2018\)](#).

Tucker Act jurisdiction was proper in rails-to-trails case because complaint sufficiently alleged compensable taking of property interests upon notice of interim trail use, which prevented abandonment, and abutting landowners' alternative claim of adverse possession under Washington State law did not require actions against third parties; ownership could not be determined without trial because deeds did not conclusively establish whether abutting owners had fee title to railroad corridor land. [*Beres v. United States*, 143 Fed. Cl. 27, 2019 U.S. Claims LEXIS 356 \(Fed. Cl. Apr. 16, 2019\)](#).

Former 49 USCS § 1(18–20) has been construed as conferring jurisdiction upon Commission [now Surface Transportation Board] subject to certain exclusions over abandonment proposals of all railroads engaged in interstate commerce notwithstanding that the line being abandoned may lie wholly within a single state and requiring that due consideration be given to State and local interests in view of the fact that services in interstate and intrastate commerce are inextricably intertwined. [*Washington & Old Dominion R. Abandonment Virginia*, 331 I.C.C. 587](#).

20. Standing

Right to apply for leave of the Interstate Commerce Commission [now Surface Transportation Board] to abandon operation of line of railroad, required by former 49 USCS § 1(18) is not limited to carrier whose operations are sought to be abandoned, and may be exercised by railroad company over whose lines another company has trackage rights. [*Thompson v. Texas M. R. Co.*, 328 U.S. 134, 66 S. Ct. 937, 90 L. Ed. 1132, Bankr. L. Rep. \(CCH\) ¶ 55634, 1946 U.S. LEXIS 3035 \(1946\)](#).

That improvements along railroad have been made by others in expectation of continued operation does not result in implied obligation to operate, and no cause of action will lie against road by individuals affected by its abandonment. [*Brownwood N. & S. R. Co. v. Railroad Com. of Texas*, 16 F.2d 297, 1926 U.S. Dist. LEXIS 1586 \(D. Tex. 1926\)](#).

Shippers of freight and owners of buildings served by railroad were parties in interest entitled to injunction restraining proposed abandonment of its line without obtaining requisite certificate from Interstate Commerce Commission [now Surface Transportation Board]. [*Meyers v. Jay Street Connecting R. Co.*, 259 F.2d 532, 1958 U.S. App. LEXIS 4971 \(2d Cir. 1958\)](#).

Plaintiff city had U.S. Const. art. III standing to challenge defendant railroad's failure to obtain Surface Transportation Board (STB) approval under [49 USCS § 10903\(a\)](#) to abandon property, as such proceedings could have afforded city certain protections, such as opportunity to acquire or protect property through public use conditions STB could grant under [49 USCS § 10905](#). [*City of Jersey City v. CONRAIL*, 668 F.3d 741, 399 U.S. App. D.C. 196, 42 Env'tl. L. Rep. 20035, 2012 U.S. App. LEXIS 2106 \(D.C. Cir. 2012\)](#).

Abutting owner or shipper has no substantive interest in railroad line which is entitled to protection against abandonment by carrier pursuant to certificate or against issuance of certificate by Commission [now Surface Transportation Board], and therefore, cannot complain of errors in Commission's procedure. [*Woodruff v. United States*, 40 F. Supp. 949, 1941 U.S. Dist. LEXIS 2816 \(D. Conn. 1941\)](#).

49 USCS § 10903

Owner of line of railroad which was being operated by another railroad pursuant to trackage rights agreement had standing to invoke former 49 USCS § 1(18) and apply for abandonment authorization. [Chicago & NWT Transp. Co.—Abandonment, 354 I.C.C. 205.](#)

21. Application

Surface Transportation Board (STB) had no authority over regulation of spur and industrial tracks as opposed to main railroad lines; that authority was left entirely to railroad management who could contract services as they saw fit, and, as result, there was no requirement that railroad request authorization for abandonment from STB. [Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 2008 U.S. App. LEXIS 5149 \(10th Cir. 2008\).](#)

In order for railroad corridor to be “railbanked” under National Trails System Act, [16 USCS § 1247\(d\)](#), railroad needed to go through regulatory abandonment process by filing abandonment application under [49 USCS § 10903](#) or by seeking exemption under [49 USCS § 10502](#). [Caldwell v. United States, 57 Fed. Cl. 193, 2003 U.S. Claims LEXIS 169 \(Fed. Cl. June 30, 2003\)](#), aff’d, [391 F.3d 1226, 2004 U.S. App. LEXIS 25926 \(Fed. Cir. 2004\)](#).

Since statutory time limits force Interstate Commerce Commission [now Surface Transportation Board] to require that virtually entire case-in-chief be submitted by each applicant with initial filing of application, and since certain data are required to enable persons interested in acquiring or subsidizing line to make necessary cost and revenue determination, regulations (49 CFR § 1121.32) would require full and complete information about carriers’ proposal; former 49 USCS § 1a(3) provided that 60 day period afforded Commission to issue certificate in uncontested and noninvestigatory proceeding would not begin to run until completed application had been submitted. [Abandonment of R. Lines & Discontinuance of Service, 354 I.C.C. 129.](#)

22. —Amendments

ICC [now Surface Transportation Board] regulation precluding amendment of application for abandonment without consent of protestants was meant to, and does, apply only to short form applications utilized when applicant does not anticipate significant and material objection; regulations concerning system diagram do not apply to applications for abandonment filed prior to effective date of such regulations. [Illinois v. Interstate Commerce Com., 615 F.2d 743, 1979 U.S. App. LEXIS 10206 \(7th Cir. 1979\).](#)

Amendments to application for abandonment are within discretion of ICC [now Surface Transportation Board], since such applications are pleadings within 49 CFR § 1100.5(e), amendments to which are committed to discretion of ICC under 49 CFR § 1100.18. [Illinois v. Interstate Commerce Com., 615 F.2d 743, 1979 U.S. App. LEXIS 10206 \(7th Cir. 1979\).](#)

23. Notice of exemption

Where carrier seeking to abandon rail line ([49 USCS § 10903](#)), in order to obtain expedited class exemption ([49 USCS § 10502](#)), filed with Surface Transportation Board notice of exemption which certified that no local traffic had moved over line for at least two years ([49 CFR § 1152.50\(b\)](#)), another carrier submitted offer of financial assistance proposing to purchase line to be abandoned ([49 USCS § 10904](#)), and Board approved sale of line to such other carrier, Board regulation which provides that notice of exemption containing false or misleading information is void ab initio and must be summarily rejected by Board ([49 CFR § 1152.50\(d\)\(3\)](#)), did not require Board to reject notice and nullify sale where false statement in carrier’s notice was not brought to Board’s attention until long after notice had been filed and line was sold, because purchasing carrier, who was bona fide purchaser, would be unfairly disadvantaged, such action would discourage use of offers of financial assistance in future, and party that had brought falsity of notice to Board’s attention had waited almost two years to register its objection. [Buffalo Crushed Stone, Inc. v. Surface Transp. Bd., 194 F.3d 125, 338 U.S. App. D.C. 335, 1999 U.S. App. LEXIS 27980 \(D.C. Cir. 1999\).](#)

24. Witnesses

In abandonment proceeding, procedure adopted by Interstate Commerce Commission [now Surface Transportation Board] in delegating to state commission task of taking testimony was in no respect in conflict with underlying law, but amounted to scarcely more than judicially recognized device of taking testimony of distant witnesses by deposition. [*Woodruff v. United States*, 40 F. Supp. 949, 1941 U.S. Dist. LEXIS 2816 \(D. Conn. 1941\)](#).

25. Injunctive relief

Where, inter alia, there had been delay of 19 months in processing of carrier's petition for abandonment by ICC [now Surface Transportation Board], ICC was not entitled to preliminary injunction against carrier for purpose of restraining carrier from its alleged illegal abandonment of particular segment of its track. [*Interstate Commerce Com. v. Baltimore & A. R. Co.*, 64 F.R.D. 337, 1974 U.S. Dist. LEXIS 7012 \(D. Md. 1974\)](#).

26. Attorneys' fees

Petition for allowance of attorney fees by intervening plaintiff in prior action which granted injunction against abandonment of car ferry, was denied, since there was no provision for such fees in the Interstate Commerce Act and there were no exceptional circumstances calling for their allowance in order to do justice between the parties. [*Michigan Public Service Com. v. Mackinac Transp. Co.*, 43 F.R.D. 202, 1966 U.S. Dist. LEXIS 10724 \(D. Mich. 1966\)](#).

27. Judicial review

Fact that Interstate Commerce Commission [now Surface Transportation Board] failed to make finding on jurisdictional question of whether railroad, abandonment of which was sought, was within exception of former 49 USCS § 1(22) did not preclude reviewing court from making that determination initially; but in cases involving review of orders of Commission [now Surface Transportation Board] it is essential for courts to decline to make that determination without basic jurisdictional findings having first been made by Commission [now Surface Transportation Board]. [*Yonkers v. United States*, 320 U.S. 685, 64 S. Ct. 327, 88 L. Ed. 400, 1944 U.S. LEXIS 1243 \(1944\)](#).

District court properly declined jurisdiction of railroad's action for declaratory relief against city, in which railroad alleged that order of State Railroad Commission, in proceeding initiated by city, would require railroad to abandon certain track mileage without certificate of Interstate Commerce Commission [now Surface Transportation Board], because administrative order complained of was based upon predominantly local factors, and federal right was merely incidental, and adequate state court review was available; intervention of federal court was not necessary to protect federal rights. [*Atlantic C. L. R. Co. v. St. Petersburg*, 242 F.2d 613, 1957 U.S. App. LEXIS 2837 \(5th Cir. 1957\)](#).

Court of Appeals would have jurisdiction to review ICC's [now Surface Transportation Board] rules and regulations where issue is whether ICC has statutory duty under National Environmental Policy Act to have its staff prepare impact statements when required by National Environmental Policy Act prior to any hearing with respect to abandonment of railroad lines; such would be proper case for "action in the nature of mandamus" under [*28 USCS § 1361*](#). [*Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328, 6 Env't Rep. Cas. \(BNA\) 1855, 4 Env'tl. L. Rep. 20638, 1974 U.S. App. LEXIS 8077 \(2d Cir. 1974\)](#).

Federal Courts may determine whether embargo has been transmitted into illegal abandonment without prior resort to Interstate Commerce Commission [now Surface Transportation Board]; mere presence of embargo does not

preclude finding that line has been abandoned and District Court could properly conclude that railroad intended to cease service permanently or indefinitely from fact that line had deteriorated below safety standards due to insufficient maintenance, though funds for such maintenance were available, and that railroad had no intention to resume service on line pending outcome of abandonment petition before Commission. [Interstate Commerce Com. v. Chicago & North Western Transp. Co., 533 F.2d 1025, 1976 U.S. App. LEXIS 12142 \(8th Cir. 1976\).](#)

Decision of Surface Transportation Board which denied petition to reopen abandonment proceeding and refused to reopen proceeding was reviewable by court, since purpose of petition to reopen was not to challenge Board's reasoning but to bring new material to its attention. [Jost v. Surface Transp. Bd., 194 F.3d 79, 338 U.S. App. D.C. 289, 1999 U.S. App. LEXIS 26582 \(D.C. Cir.\), dismissed, Buffalo Crushed Stone, Inc. v. Surface Transp. Bd., 194 F.3d 125, 338 U.S. App. D.C. 335, 1999 U.S. App. LEXIS 27980 \(D.C. Cir. 1999\).](#)

Finding of Interstate Commerce Commission [now Surface Transportation Board] that branch line, abandonment of which was sought was electrically operated branch of general steam railroad system, and as such not within exemption of former 49 USCS § 1(22) sufficiently showed jurisdiction of Commission to enter abandonment order, and in action to set aside such order was entitled to at least prima facie weight. [Public Service Com. v. United States, 56 F. Supp. 351, 1944 U.S. Dist. LEXIS 2186 \(D.N.Y.\), aff'd, 323 U.S. 675, 65 S. Ct. 130, 89 L. Ed. 548, 1944 U.S. LEXIS 115 \(1944\).](#)

Federal court, appointing receivers for railroad, had no jurisdiction over question of abandonment prior to decision of such issue by Interstate Commerce Commission [now Surface Transportation Board]. [Gross v. Missouri & A. R. Co., 74 F. Supp. 242, 1947 U.S. Dist. LEXIS 2062 \(D. Ark. 1947\).](#)

While defendant carrier had filed petition for certificate of abandonment, issue in proceeding for permanent injunction under former 49 USCS §§ 1(18) and 1(20) is not whether abandonment should be granted or denied but rather question is whether "abandonment" has occurred within meaning of former 49 USCS § 1(18); if there has been abandonment, then court, in its discretion, may issue injunction restraining such abandonment; unless and until ICC [now Surface Transportation Board] grants certificate permitting carrier to abandon all or part of its railroad, no abandonment of operations is permitted by former 49 USCS § 1(18). [Interstate Commerce Com. v. Baltimore & A. R. Co., 64 F.R.D. 337, 1974 U.S. Dist. LEXIS 7012 \(D. Md. 1974\).](#)

Unpublished decision: Refusal by Surface Transportation Board (STB) to reopen prior decision that railway right-of-way was properly railbanked was unreviewable absent evidence of changed circumstances; STB's approval of motion for substitution of trail sponsor did not reopen railbanking order for all purposes, as substitution proceeding was brought as separate action, and therefore did not make STB's denial of reopening reviewable. [Wheeler v. Material Recovery of Erie Inc., 398 Fed. Appx. 786, 2010 U.S. App. LEXIS 20367 \(3d Cir. 2010\).](#)

28. Miscellaneous

Petition for review of Surface Transportation Board decision, which approved offer of financial assistance (OFA), was denied because decision had support in record, comported with agency precedent, and did not violate Fifth Amendment; OFA was for continued freight service, finding that clearly signified that salvage company's OFA represented more than mere attempt at railbanking. [Borough of Columbia v. Surface Transp. Bd., 342 F.3d 222, 2003 U.S. App. LEXIS 17808 \(3d Cir. 2003\).](#)

Appellate court held that plaintiff was not bound by any contractual promise to keep providing rail services to defendant for indefinite future because to extent that plaintiff was a common carrier rather than independent contractor of defendant, which was carrier from passengers' perspective, it had authority to discontinue any particular service without agency's approval. [Union Pac. R.R. Co. v. Reg'l Transp. Auth., 74 F.4th 884, 2023 U.S. App. LEXIS 19133 \(7th Cir. 2023\).](#)

49 USCS § 10903

Where railroad had applied under [49 USCS § 10903](#) to abandon service along rail corridor and Surface Transportation Board had issued Notice of Interim Trail Use, but no trail had yet been constructed, adjacent property owners had no Fifth Amendment claim for physical taking of reversionary rights in property underlying right-of-way; abandonment process was not complete, and owners had not suffered physical invasion of property in which they claimed interest. [Ladd v. United States, 90 Fed. Cl. 221, 2009 U.S. Claims LEXIS 328 \(Fed. Cl. Oct. 14, 2009\)](#), rev'd, remanded, [630 F.3d 1015, 2010 U.S. App. LEXIS 25443 \(Fed. Cir. 2010\)](#).

Court could not grant partial summary judgment on issue of how compensation should be calculated in alleged taking under Rails-to-Trails Act, [16 USCS §§ 1241–1251](#), as existence of genuine issues of material fact precluded court from determining, as matter of South Carolina law, that railroad easements on properties in question were abandoned prior to alleged takings so as to leave plaintiffs' property unencumbered as of time of issuance of Notice of Interim Trail Use. [Carolina Plating Works, Inc. v. United States, 102 Fed. Cl. 555, 2011 U.S. Claims LEXIS 2369 \(Fed. Cl. Dec. 19, 2011\)](#).

To be relieved of its common carrier duty to provide service on reasonable request ([49 USCS § 11101\(a\)](#)), railroad must seek discontinuance or abandonment authorization under [49 USCS § 10903](#); thus, valid embargo is appropriate defense to action for breach of common carrier's duty, but embargo cannot be used by railroad to unilaterally abandon or discontinue service on line at its own election. *Bar Ale, Inc. v California Northern Railroad Co. and Southern Pacific Transportation Company* (7/20/01) Finance Docket No. 32821, [2001 STB LEXIS 633](#).

110-day deadline (STB has 110 days from date of filing petition or application for abandonment to issue decision on merits) challenges parties protesting abandonments to prepare and submit their evidence and arguments soon after petition or application is filed, and equity demands that same deadlines apply to carriers. *The Cincinnati, New Orleans and Texas Pacific Railway Company—Abandonment Exemption—In Roane County, TN* (12/2/05) STB Docket No. AB-290 (Sub-No. 236X).

In Rails-to-Trails Fifth Amendment takings actions brought by property owners with lands abutting railroad corridor, court granted government's motion for summary judgment because property owners did not appear to own land underlying railroad corridor at issue. The court looked to Florida state law, which created and defined scope of reversionary or real property interest, holding that center-line presumption was rebutted because original subdivision owners did not include railroad corridor as part of their platted subdivision and thus, subdivision owners did not intend to pass title to railroad corridor to grantees of subdivision parcels adjacent to railroad corridor. [Castillo v. United States, 138 Fed. Cl. 707, 2018 U.S. Claims LEXIS 785 \(Fed. Cl. June 29, 2018\)](#), rev'd in part, remanded, [950 F.3d 1362, 2020 U.S. App. LEXIS 5151 \(Fed. Cir. 2020\)](#).

While Commission [now Surface Transportation Board] has no jurisdiction over labor disputes, it does not follow that it may not in proper performance of its statutory duties authorize abandonment of rail line, merely because carrier is involved in labor dispute; no provision of law requires that decision in instant proceeding be deferred pending settlement of existing dispute between applicant and its employees where record does not support contention that filing of application is merely device for breaking current strike and extricating carrier from its labor difficulties. *Rutland Ry. Corp. Abandonment of Entire Line*, 317 I.C.C. 393.

Where parties raise issue of whether proposal involves partial discontinuance or curtailment of service, on one hand, or abandonment of service on other, it is one that is appropriate for Commission [now Surface Transportation Board] to make administrative determination based on record; Commission [now Surface Transportation Board] is not required to remain mute in investigation and suspension proceeding when tariff proposal contemplates action which may or may not constitute either abandonment or curtailment of service. [Lighterage at New York Harbor, B&O and CNJ, 343 I.C.C. 658](#).

Research References & Practice Aids

Cross References:

49 USCS § 10903

This section is referred to in [45 USCS § 748](#); [49 USCS § 10904](#), [10905](#), [10907](#), [11702](#), [11901](#).

Code of Federal Regulations:

Surface Transportation Board, Department of Transportation—Procedures for implementation of environmental laws, [49 CFR 1105.1](#) et seq.

Surface Transportation Board, Department of Transportation—Abandonment and discontinuance of rail lines and rail transportation under [49 U.S.C. 10903](#), [49 CFR 1152.1](#) et seq.

Surface Transportation Board, Department of Transportation—Railroad acquisition, control, merger, consolidation project, trackage rights, and lease procedures, [49 CFR 1180.0](#) et seq.

Am Jur:

[13 Am Jur 2d, Carriers §§ 52](#), 64.

[65 Am Jur 2d, Railroads §§ 51](#), 188.

Federal Procedure:

[5 Administrative Law \(Matthew Bender\), ch 41, Licenses § 41.03](#).

Bankruptcy:

[8 Collier on Bankruptcy \(Matthew Bender 16th ed.\), ch 1170, Abandonment of Railroad Line ¶ 1170.01](#).

Hierarchy Notes:

[49 USCS, Subtit. IV](#)

[49 USCS, Subtit. IV, Pt. A](#)

[49 USCS, Subtit. IV, Pt. A, Ch. 109](#)

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Document (1)

1. [49 USCS § 10904](#)

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[49 USCS § 10904](#)

Current through Public Law 118-46, approved March 22, 2024, with a gap of Public Law 118-42.

United States Code Service > TITLE 49. TRANSPORTATION (§§ 101 — 80504) > Subtitle IV. Interstate Transportation (Pts. A — C) > Part A. Rail (Chs. 101 — 119) > CHAPTER 109. Licensing (§§ 10901 — 10936)

§ 10904. Offers of financial assistance to avoid abandonment and discontinuance

(a) In this section—

(1) the term “avoidable cost” means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

- (A) working capital and required capital expenditure;
- (B) expenditures to eliminate deferred maintenance;
- (C) the current cost of freight cars, locomotives, and other equipment; and
- (D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes; and

(2) the term “reasonable return” means—

- (A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Board; and
- (B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Board.

(b) Any rail carrier which has filed an application for abandonment or discontinuance shall provide promptly to a party considering an offer of financial assistance and shall provide concurrently to the Board—

- (1) an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;
- (2) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance;
- (3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance which would be required to continue rail transportation over that part of the railroad line; and
- (4) any other information that the Board considers necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.

(c) Within 4 months after an application is filed under section 10903 [[49 USCS § 10903](#)], any person may offer to subsidize or purchase the railroad line that is the subject of such application. Such offer shall be filed concurrently with the Board. If the offer to subsidize or purchase is less than the carrier's estimate stated pursuant to subsection (b)(1), the offer shall explain the basis of the disparity, and the manner in which the offer is calculated.

(d)

49 USCS § 10904

(1) Unless the Board, within 15 days after the expiration of the 4-month period described in subsection (c), finds that one or more financially responsible persons (including a governmental authority) have offered financial assistance regarding that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued, abandonment or discontinuance may be carried out in accordance with section 10903 [[49 USCS § 10903](#)].

(2) If the Board finds that such an offer or offers of financial assistance has been made within such period, abandonment or discontinuance shall be postponed until—

(A) the carrier and a financially responsible person have reached agreement on a transaction for subsidy or sale of the line; or

(B) the conditions and amount of compensation are established under subsection (f).

(e) Except as provided in subsection (f)(3), if the rail carrier and a financially responsible person (including a governmental authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Board establish the conditions and amount of compensation.

(f)

(1) Whenever the Board is requested to establish the conditions and amount of compensation under this section—

(A) the Board shall render its decision within 30 days;

(B) for proposed sales, the Board shall determine the price and other terms of sale, except that in no case shall the Board set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services); and

(C) for proposed subsidies, the Board shall establish the compensation as the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line.

(2) The decision of the Board shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Board's decision. In such a case, the abandonment or discontinuance may be carried out immediately, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a rail carrier receives more than one offer to subsidize or purchase, it shall select the offeror with whom it wishes to transact business, and complete the subsidy or sale agreement, or request that the Board establish the conditions and amount of compensation before the 40th day after the expiration of the 4-month period described in subsection (c). If no agreement on subsidy or sale is reached within such 40-day period and the Board has not been requested to establish the conditions and amount of compensation, any other offeror whose offer was made within the 4-month period described in subsection (c) may request that the Board establish the conditions and amount of compensation. If the Board has established the conditions and amount of compensation, and the original offer has been withdrawn, any other offeror whose offer was made within the 4-month period described in subsection (c) may accept the Board's decision within 20 days after such decision, and the Board shall require the carrier to enter into a subsidy or sale agreement with such offeror, if such subsidy or sale agreement incorporates the Board's decision.

(4)

(A) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the rail carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

49 USCS § 10904

(B) No subsidy arrangement approved under this section shall remain in effect for more than one year, unless otherwise mutually agreed by the parties.

(g) Upon abandonment of a railroad line under this chapter [[49 USCS §§ 10901](#) et seq.], the obligation of the rail carrier abandoning the line to provide transportation on that line, as required by section 11101(a) [[49 USCS § 11101\(a\)](#)], is extinguished.

History

HISTORY:

Added Dec. 29, 1995, *P. L. 104-88*, Title I, § 102(a), *109 Stat.* 825.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Effective date of section:

Explanatory notes:

A prior § 10904 (Act Oct. 17, 1978, [P. L. 95-473](#), § 1, [92 Stat. 1404](#); Oct. 14, 1980, [P. L. 96-448](#), Title IV, § 402(b), [94 Stat. 1941](#), [1942](#); Feb. 14, 1984, [P. L. 98-216](#), § 2(5), [98 Stat. 5](#)) was omitted in the general revision of this Subtitle by Act Dec. 29, 1995, *P. L. 104-88*, Title I, § 102(a), *109 Stat.* 804, effective Jan. 1, 1996, with certain exceptions, as provided by § 2 of such Act ([49 USCS § 1301](#) note). Such section provided for filing and procedure for applications to abandon or discontinue. For similar provisions, see [49 USCS § 10903](#).

Effective date of section:

This section took effect on Jan. 1, 1996, pursuant to Act Dec. 29, 1995, *P. L. 104-88*, § 2, *109 Stat.* 804, which appears as [49 USCS § 1301](#) note.

NOTES TO DECISIONS

1. Generally

2. Relationship with other laws

3. “Avoidable cost”

4. Offers of financial assistance

5. Subsidy calculations

6. Labor protective conditions to sale

7.Sale price set by Board**8.Finality of sale****9.Certificate of abandonment; timing****10.Postponement of abandonment proceeding****11.Reopening abandonment proceeding****12.Jurisdiction of Board****13.Judicial review****1. Generally**

Because 1980 amendments to former [49 USCS § 10905](#) gave railroads faster abandonment procedure than Fifth Amendment entitled them to, it was reasonable that railroads should have been asked to give up something in return, which was opportunity to engross values created by political process that weighed preferences of railroad passengers more heavily than market did. [Chicago & North Western Transp. Co. v. United States, 678 F.2d 665, 1982 U.S. App. LEXIS 19809 \(7th Cir. 1982\)](#).

Unpublished decision: Surface Transportation Board's decision to allow railroad to abandon track and exempt track from forced sale requirements did not warrant reversal as: (1) track was needed for valid public purpose since Maryland Transit Administration operated its passenger rail service along line during most hours of day and used line for staging and other purposes at other times; (2) abandonment was necessary to ensure safety of passenger service; (3) there was no overriding public need for continued rail service since no freight traffic had occurred on track since 2005, two of three former shippers on track supported abandonment proposal, and no actual shipper opposed request; and (4) evidence of future demand was speculative. [Lowe v. Surface Transp. Bd., 540 Fed. Appx. 6, 2013 U.S. App. LEXIS 22325 \(D.C. Cir. 2013\)](#).

2. Relationship with other laws

Argument that petitioners' right to due process was violated because Surface Transportation Board failed to give him notice and opportunity for comment before granting railway company exemption from offer of financial assistance procedures was at odds with record because Board published notice of, and sought comments regarding, railway company's proposal to relocate middle segment specifically in order to make way for major highway project, and petitioners took opportunity to comment; further process would not have afforded greater clarity regarding any relevant matter. [Kessler v. Surface Transp. Bd., 635 F.3d 1, 394 U.S. App. D.C. 288, 2011 U.S. App. LEXIS 5013 \(D.C. Cir. 2011\)](#).

Commission's [now Surface Transportation Board] issuance of authority under former [49 USCS § 10905](#) was "ministerial" act, not "major Federal" action, and was not licensing proceeding, and National Environmental Policy Act ([42 USCS § 4332](#)) did not apply to § 10905 transactions resulting in new service proposals that were within scope of prior carrier's existing license. Napa Valley Wine Train, Inc.—Petition for Declaratory Order (1988) [4 I.C.C.2d 720](#), modified, [Napa Valley Wine Train Incorporated Petition for Declaratory Order, 5 I.C.C.2d 1122 \(Jan. 9, 1989\)](#), rev'd, [Napa Valley Wine Train Incorporated-petition for declaratory order, 7 I.C.C.2d 954 \(July 18, 1991\)](#).

Subsidy agreement entered into by State agency and railroad under former [49 USCS § 10905\(b\)](#) was governed by State law except to extent inconsistent with or governed by any Federal laws, rules, or regulations thereunder; Federal law governed very existence of agreement. [Chicago & N.W. Transp. Co., 360 I.C.C. 647](#).

3. “Avoidable cost”

Interstate Commerce Commission [now Surface Transportation Board] regulations providing that in both subsidy and abandonment determinations labor costs should be treated as avoidable costs notwithstanding any obligation of railroad to provide employee protection for employees after abandonment was inconsistent with former [49 USCS § 10905\(a\)\(1\)](#) defining “avoidable cost” to include cash outflows incurred by rail carrier as result of not abandoning or discontinuing transportation. [Illinois Commerce Com. v. Interstate Commerce Com., 776 F.2d 355, 249 U.S. App. D.C. 389, 1985 U.S. App. LEXIS 31480 \(D.C. Cir. 1985\).](#)

Rehabilitation costs cannot be included in computation of avoidable costs unless track under consideration does not meet minimum FRA class I safety standards (49 CFR 1121.42(b)); thus, when track meets higher FRA class III standards and shippers have not demonstrated need for higher level service, railroad’s avoidable costs should not include rehabilitation costs. [Baltimore & O. R., 360 I.C.C. 681.](#)

4. Offers of financial assistance

When ICC [now Surface Transportation Board] decided to reopen decision whether to permit abandonment of railroad line on basis of new evidence, it should have published its subsequent findings in Federal Register pursuant to former [49 USCS § 10905\(c\)](#), thus triggering another 10-day period during which offers of financial assistance or offers to purchase line could be received. [Black v. Interstate Commerce Com., 737 F.2d 643, 1984 U.S. App. LEXIS 21493 \(7th Cir. 1984\).](#)

When read as whole, it is not unreasonable for STB to conclude that Congress retained original aim of offer of financial assistance (OFA) procedure in enacting Interstate Commerce Commission Termination Act of 1995; thus, STB may consider continuation of rail service in OFA approval process. [Redmond-Issaquah R.R. Preservation Ass’n v. Surface Transp. Bd., 223 F.3d 1057, 2000 Cal. Daily Op. Service 7693, 2000 D.A.R. 10209, 2000 U.S. App. LEXIS 23208 \(9th Cir. 2000\).](#)

Read as whole, [49 USCS § 10904](#) indicates congressional intent that Surface Transportation Board may consider likelihood of continued rail freight service as factor in approving disputed offers of financial assistance. [Kulmer v. Surface Transp. Bd., 236 F.3d 1255, 2001 Colo. J. C.A.R. 310, 2001 U.S. App. LEXIS 167 \(10th Cir. 2001\).](#)

Read as whole, [49 USCS § 10904](#) indicates congressional intent that Surface Transportation Board may consider likelihood of continued rail freight service as factor in approving disputed offers of financial assistance. [Kulmer v. Surface Transp. Bd., 236 F.3d 1255, 2001 Colo. J. C.A.R. 310, 2001 U.S. App. LEXIS 167 \(10th Cir. 2001\).](#)

Petition for review of Surface Transportation Board decision, which approved offer of financial assistance (OFA), was denied because decision had support in record, comported with agency precedent, and did not violate Fifth Amendment; OFA was for continued freight service, finding that clearly signified that salvage company’s OFA represented more than mere attempt at railbanking. [Borough of Columbia v. Surface Transp. Bd., 342 F.3d 222, 2003 U.S. App. LEXIS 17808 \(3d Cir. 2003\).](#)

Notice of interim trail use or abandonment effected compensable taking as to railroad easements because adjoining owners’ claim accrued upon issuance of notice, which occurred when United States Surface Transportation Board imposed trail use condition upon concluding town was not financially responsible offeror of financial assistance, although abandonment was not yet completed; takings claims failed for lack of property interest as to other strips of land that had been conveyed in fee simple. [Memmer v. United States, 122 Fed. Cl. 350, 2015 U.S. Claims LEXIS 853 \(Fed. Cl. July 10, 2015\), remanded, 2017 U.S. App. LEXIS 25600 \(Fed. Cir. Nov. 16, 2017\).](#)

5. Subsidy calculations

Interstate Commerce Commission [now Surface Transportation Board] regulation providing that railroads could treat pro rata share of their state property tax liability attributable to line to be abandoned or subsidized as avoidable cost even where taxes were not levied on ad valorem basis could not lawfully be applied to subsidy calculations under former [49 USCS § 10905](#) but could be lawfully applied to determination of permissibility of abandonment under former [49 USCS § 10903](#). *Illinois Commerce Com. v. Interstate Commerce Com.*, 776 F.2d 355, 249 U.S. App. D.C. 389, 1985 U.S. App. LEXIS 31480 (D.C. Cir. 1985).

Subsidy required by shipper to prevent abandonment of 9.2 miles of carrier's line did not have to require shipper to fully indemnify railroad for cost of any accident that might occur on subsidized line in order to be adequate since carrier was self-insured for tort liability up to \$36.25 million—point well beyond any plausible estimate of potential liability exposure on sparsely traveled 9.2 mile line. *Grand Prairie Coop. v. ICC*, 16 F.3d 789, 1994 U.S. App. LEXIS 8515 (7th Cir. 1994).

Since subsidy requirements could vary yearly for variety of reasons, ICC [now Surface Transportation Board] would not prescribe specific subsidy amount under former [49 USCS § 10905\(f\)\(1\)\(B\)](#). *Missouri Pacific Railroad Company—Abandonment* (1993) [9 I.C.C.2d 875](#).

6. Labor protective conditions to sale

Interstate Commerce Commission [now Surface Transportation Board] was neither authorized nor required to impose labor-protective conditions on either or both parties to sale under former [49 USCS § 10905](#). *Simmons v. Interstate Commerce Com.*, 760 F.2d 126, 118 L.R.R.M. (BNA) 3099, 1985 U.S. App. LEXIS 31404 (7th Cir.), app. after remand, [766 F.2d 1177](#), 120 L.R.R.M. (BNA) 2314, 1985 U.S. App. LEXIS 31445 (7th Cir. 1985).

In voluntary sale under former [49 USCS § 10905](#), Interstate Commerce Commission [now Surface Transportation Board] was unable to impose labor-protective conditions; ICC [now Surface Transportation Board] lacked authority to impose such condition in “forced” or “involuntary” sale in which ICC determined price and other terms of sale pursuant to former [49 USCS § 10905\(f\)\(1\)\(C\)](#); ICC properly denied petition to intervene by legislative director for collective bargaining representative of majority of persons employed by railroad, where intervention was sought solely for purpose of seeking imposition of labor-protective conditions in impending § 10905 transaction. *Simmons v. Interstate Commerce Com.*, 766 F.2d 1177, 120 L.R.R.M. (BNA) 2314, 1985 U.S. App. LEXIS 31445 (7th Cir. 1985), cert. denied, 474 U.S. 1055, 106 S. Ct. 791, 88 L. Ed. 2d 769, 121 L.R.R.M. (BNA) 2208, 1986 U.S. LEXIS 2312 (1986).

ICC [now Surface Transportation Board] interpretation of former [49 USCS § 10905](#) as prohibiting imposition of labor protective conditions in sales under that provision was reasonable in view of silence of § 10905 regarding imposition of labor protective conditions, in contrast to express authority given ICC for imposition of such conditions under other provisions governing rail line acquisitions and because ICC construction was consistent with purpose of preserving rail service over line which otherwise would be abandoned. *Railway Labor Executives' Asso. v. United States*, 791 F.2d 994, 122 L.R.R.M. (BNA) 2850, 104 Lab. Cas. (CCH) ¶ 11946, 1986 U.S. App. LEXIS 25295 (2d Cir. 1986).

Interstate Commerce Commission [now Surface Transportation Board] acted within its authority by exempting, as class, sales to new carriers from requirement of imposing labor protective conditions; ICC's authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as authority was necessary to assure fair wages and working conditions superseded authority of mandatory bargaining provisions of Railway Labor Act ([45 USCS §§ 151](#) et seq.). *Burlington N. R. Co. v. United Transp. Union*, 848 F.2d 856, 128 L.R.R.M. (BNA) 2527, 130 L.R.R.M. (BNA) 2072, 109 Lab. Cas. (CCH) ¶ 10520, 1988 U.S. App. LEXIS 7221 (8th Cir.), reh'g denied en banc 130 L.R.R.M. (BNA) 2072, 1988 U.S. App. LEXIS 13050 (8th Cir. 1988), cert. denied, 488 U.S. 969, 109 S. Ct. 499, 102 L. Ed. 2d 535, 129 L.R.R.M. (BNA) 3072, 110 Lab. Cas. (CCH) ¶ 10863, 1988 U.S. LEXIS 5323 (1988).

7. Sale price set by Board

Remand would be required in action brought by railroad challenging Interstate Commerce Commission [now Surface Transportation Board] order establishing sale price for section of railroad line, since ICC's valuations were unsupported by evidence or requirements of former [49 USCS § 10905](#) to set price at fair market value; ICC improperly valued right-of-ways, tracks and ties, removal from right-of-way that was to be gift to Conservation Board, industrial shop and old car barn operated on property, where ICC did not explain why lowest third estimate was chosen as most reliable as estimate of value of ones offered, and rolling stock, where ICC refused to consider sale of motors for spare parts and scrap value and rejected estimates for box car value, instead accepting railroad line purchaser's statement rather than third party appraisals offered by seller. [Iowa T. R. Co. v. Interstate Commerce Com.](#), 853 F.2d 965, 272 U.S. App. D.C. 34, 1988 U.S. App. LEXIS 18919 (D.C. Cir. 1988).

Once offeror has made offer to purchase rail line being abandoned, and Surface Transportation Board (STB) has made decision setting terms of sale, then sale of rail line is binding upon both rail carrier selling line and offeror, unless offeror withdraws its offer within 10 days of STB's decision setting terms of sale. [R.R. Ventures, Inc. v. Surface Transp. Bd.](#), 299 F.3d 523, 2002 FED App. 0259P, 2002 U.S. App. LEXIS 15405 (6th Cir. 2002).

Surface Transportation Board erred in construing [49 USCS § 10904\(f\)\(1\)\(B\)](#) as implying "rebuttable presumption" under which offer of financial assistance purchaser is entitled to purchase all property interests associated with rail line subject to abandonment petition unless abandoning rail line owner shows that effective rail service can be provided with less than entire rail line. [R.R. Ventures, Inc. v. Surface Transp. Bd.](#), 299 F.3d 523, 2002 FED App. 0259P, 2002 U.S. App. LEXIS 15405 (6th Cir. 2002).

8. Finality of sale

Former [49 USCS § 10905](#) did not permit seller to back out of sale once transaction reached stage where ICC [now Surface Transportation Board] mandated consummation of sale even if one party had option of canceling sale. [Railway Labor Executives' Asso. v. Staten Island R. Corp.](#), 792 F.2d 7, 122 L.R.R.M. (BNA) 2939, 104 Lab. Cas. (CCH) ¶ 11947, 1986 U.S. App. LEXIS 33754 (2d Cir. 1986), cert. denied, 479 U.S. 1054, 107 S. Ct. 927, 93 L. Ed. 2d 978, 125 L.R.R.M. (BNA) 3136, 105 Lab. Cas. (CCH) ¶ 12117, 1987 U.S. LEXIS 329 (1987).

Where carrier seeking to abandon rail line ([49 USCS § 10903](#)), in order to obtain expedited class exemption ([49 USCS § 10502](#)), filed with Surface Transportation Board notice of exemption which certified that no local traffic had moved over line for at least two years ([49 CFR § 1152.50\(b\)](#)), another carrier submitted offer of financial assistance proposing to purchase line to be abandoned ([49 USCS § 10904](#)), and Board approved sale of line to such other carrier, Board regulation which provides that notice of exemption containing false or misleading information is void ab initio and must be summarily rejected by Board ([49 CFR § 1152.50\(d\)\(3\)](#)), did not require Board to reject notice and nullify sale where false statement in carrier's notice was not brought to Board's attention until long after notice had been filed and line was sold, because purchasing carrier, who was bona fide purchaser, would be unfairly disadvantaged, such action would discourage use of offers of financial assistance in future, and party that had brought falsity of notice to Board's attention had waited almost two years to register its objection. [Buffalo Crushed Stone, Inc. v. Surface Transp. Bd.](#), 194 F.3d 125, 338 U.S. App. D.C. 335, 1999 U.S. App. LEXIS 27980 (D.C. Cir. 1999).

Where port authority never withdrew its offer to acquire rail line that railroad company wanted to abandon, sale was binding upon both parties pursuant to [49 USCS § 10904\(f\)\(2\)](#). [R.R. Ventures, Inc. v. Surface Transp. Bd.](#), 299 F.3d 523, 2002 FED App. 0259P, 2002 U.S. App. LEXIS 15405 (6th Cir. 2002).

Township park district could not relitigate issue of whether spur and side tracks on railroad line could be subject of forced sale under [49 USCS § 10904](#), after Surface Transportation Board rejected same argument. [Columbiana County Port Auth. v. Boardman Twp. Park Dist.](#), 154 F. Supp. 2d 1165, 2001 U.S. Dist. LEXIS 16033 (N.D. Ohio 2001).

9. Certificate of abandonment; timing

Commission [now Surface Transportation Board] was required to make its statutory findings under former 49 USCS § 1a(6)—that financially responsible person had offered financial assistance to enable rail service to continue, and that such offer met certain cost criteria—within 30 days of publication of public convenience and necessity finding in Federal Register, and therefore offers of financial assistance had to be filed within 15 days of publication; common carriers by railroad have statutory duty to perform service until issuance of certificate authorizing abandonment, and when statute envisions delay in issuance of certificate pending negotiations of offers for financial assistance, carrier is still under common carrier obligation to perform service, and financial assistance is not available to railroad during maximum 6-month period. [*Abandonment of R. Lines & Discontinuance of Service*, 354 I.C.C. 129.](#)

Under former [49 USCS § 10905](#), Commission [now Surface Transportation Board] could postpone issuance of abandonment certificate for reasonable time, but not to exceed six months; thus, it could not impose condition that applicant keep line physically intact for period of one year. [*Seaboard Coast Line R. Co.*, 360 I.C.C. 123.](#)

Congress expressed in former [49 USCS § 10905\(b\)](#) clear legislative policy that financial assistance negotiations not delay issuance of abandonment by more than six months; and if Congress was so insistent that actual negotiations not drag on beyond six months, clearly Commission [now Surface Transportation Board] could not grant indefinite stay for preparation of studies which might never lead to actual financial assistance negotiations. [*Seaboard Coast Line R. Co.*, 360 I.C.C. 257.](#)

10. Postponement of abandonment proceeding

Abandonment proceedings may be postponed only when purchase agreement is in effect; filing of state court suit could not force postponement. [*Simmons v. Interstate Commerce Com.*, 784 F.2d 242, 1985 U.S. App. LEXIS 26196 \(7th Cir. 1985\).](#)

11. Reopening abandonment proceeding

Former [49 USCS § 10905\(e\)](#) did not prohibit Interstate Commerce Commission [now Surface Transportation Board] from reopening abandonment proceeding where proceeding was previously dismissed on basis of anticipated sale approved by Commission and where sale failed through no fault of railroad seeking abandonment and such railroad continued to experience financial losses. [*Simmons v. Interstate Commerce Com.*, 775 F.2d 854 \(7th Cir.\), amended, reh'g denied, 784 F.2d 242, 1985 U.S. App. LEXIS 26196 \(7th Cir. 1985\).](#)

Subsection (e) of former [49 USCS § 10905](#) did not prohibit Interstate Commerce Commission [now Surface Transportation Board] from reopening abandonment proceeding rather than forcing initiation of new proceedings where railroad seeking abandonment continued to experience financial losses and was not at fault for failure of sale; time limitations applicable to appeals of Commission [now Surface Transportation Board] decisions were not applicable to reopenings. [*Simmons v. Interstate Commerce Com.*, 784 F.2d 242, 1985 U.S. App. LEXIS 26196 \(7th Cir. 1985\).](#)

12. Jurisdiction of Board

Read as whole, [49 USCS § 10904](#) indicates congressional intent that Surface Transportation Board may consider likelihood of continued rail freight service as factor in approving disputed offers of financial assistance. [*Kulmer v. Surface Transp. Bd.*, 236 F.3d 1255, 2001 Colo. J. C.A.R. 310, 2001 U.S. App. LEXIS 167 \(10th Cir. 2001\).](#)

Fact that rail line was acquired under former § 10905 did not subject train's intrastate passenger operations to Commission's [now Surface Transportation Board] jurisdiction. Napa Valley Wine Train, Inc.—Declaratory Order (1991) [7 I.C.C.2d 954.](#)

Commission [now Surface Transportation Board] did not lack authority to exempt industrial development activities from Elkins Act. *Association of American Railroads—Petition to Exempt Industrial Development Activities* (1992) [8 I.C.C.2d 365](#).

13. Judicial review

Issue whether Interstate Commerce Commission [now Surface Transportation Board] properly amended regulations relating to reclassification of return on investment in abandonment and subsidy proceedings from “avoidable” cost to “rate of return” or opportunity cost was ripe for review since ICC [now Surface Transportation Board] intended to significantly alter computation of costs in abandonment and subsidy proceedings, so that change was not too abstract or inconsequential for review; however, remand would be required for ICC [now Surface Transportation Board] to reconsider its reclassification in light of apparent discordance with previous Seventh Circuit decisions holding that for purposes of calculating depreciation of freight cars and locomotives for subsidy purposes, former [49 USCS § 10905\(a\)\(1\)\(C\)](#)’s reference to “current costs” required ICC to use replacement cost rather than original or historic cost. *Association of American Railroads v. Interstate Commerce Com.*, [846 F.2d 1465](#), [270 U.S. App. D.C. 6](#), [1988 U.S. App. LEXIS 6486 \(D.C. Cir. 1988\)](#).

It was not arbitrary, capricious, or abuse of discretion for Surface Transportation Board to exempt middle segment from [49 USCS § 10904](#) because there was no shipper on middle segment, and Department of Transportation (DOT) represented that any delays in highway project could cost it millions of dollars and jeopardize safety of motorists; in view of likely costs and limited demand for rail service, Board acted reasonably to enable DOT to relocate highway along its planned route. *Kessler v. Surface Transp. Bd.*, [635 F.3d 1](#), [394 U.S. App. D.C. 288](#), [2011 U.S. App. LEXIS 5013 \(D.C. Cir. 2011\)](#).

Research References & Practice Aids

Cross References:

This section is referred to in [45 USCS § 748](#); [49 USCS §§ 10903](#), [11702](#), [11901](#).

Code of Federal Regulations:

Surface Transportation Board, Department of Transportation—Procedures for implementation of environmental laws, [49 CFR 1105.1](#) et seq.

Surface Transportation Board, Department of Transportation—Abandonment and discontinuance of rail lines and rail transportation under [49 U.S.C. 10903](#), [49 CFR 1152.1](#) et seq.

Surface Transportation Board, Department of Transportation—Railroad acquisition, control, merger, consolidation project, trackage rights, and lease procedures, [49 CFR 1180.0](#) et seq.

Am Jur:

[13 Am Jur 2d, Carriers §§ 53](#), 64.

Corporate and Business Law:

10 Kintner, *Federal Antitrust Law* (Matthew Bender), ch 73, Exemptions for Transportation Companies and Organizations § 73.3.

Hierarchy Notes:

[49 USCS, Subtit. IV](#)

[49 USCS, Subtit. IV, Pt. A](#)

[49 USCS, Subtit. IV, Pt. A, Ch. 109](#)

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Document (1)

1. [49 USCS § 10905](#)

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[49 USCS § 10905](#)

Current through Public Law 118-46, approved March 22, 2024, with a gap of Public Law 118-42.

United States Code Service > TITLE 49. TRANSPORTATION (§§ 101 — 80504) > Subtitle IV. Interstate Transportation (Pts. A — C) > Part A. Rail (Chs. 101 — 119) > CHAPTER 109. Licensing (§§ 10901 — 10936)

§ 10905. Offering abandoned rail properties for sale for public purposes

When the Board approves an application to abandon or discontinue under section 10903 [[49 USCS § 10903](#)], the Board shall find whether the rail properties that are involved in the proposed abandonment or discontinuance are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Board finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Board. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

History

HISTORY:

Added Dec. 29, 1995, *P. L. 104-88*, Title I, § 102(a), *109 Stat.* 827.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Effective date of section:

Explanatory notes:

A prior § 10905 (Act Oct. 17, 1978, [P. L. 95-473](#), § 1, [92 Stat. 1405](#); Oct. 14, 1980, [P. L. 96-448](#), Title IV, § 402(c), [94 Stat. 1942](#); July 5, 1994, *P. L. 103-272*, § 4(j)(26), [108 Stat. 1369](#)) was omitted in the general revision of this Subtitle by Act Dec. 29, 1995, *P. L. 104-88*, Title I, § 102(a), *109 Stat.* 804, effective Jan. 1, 1996, with certain exceptions, as provided by § 2 of such Act ([49 USCS § 1301](#) note). Such section provided for offers of financial assistance to avoid abandonment and discontinuance. For similar provisions, see [49 USCS § 10904](#).

Effective date of section:

49 USCS § 10905

This section took effect on Jan. 1, 1996, pursuant to Act Dec. 29, 1995, *P. L. 104-88*, § 2, *109 Stat. 804*, which appears as [49 USCS § 1301](#) note.

NOTES TO DECISIONS

1. Constitutionality

2. Construction

3. Relationship to state law

4. Relationship to other federal laws

5. Abandonment or disposal during 180-day period

1. Constitutionality

Congress acted rationally and not unconstitutionally in enacting [16 USCS § 1247\(d\)](#) as reasonable means for preservation and recreational use of railroad rights-of-way which would otherwise be abandoned and lost, given Congress's plenary authority under commerce clause, its enactment of former [49 USCS § 10906](#) to encourage alternate public uses of rights-of-way abandoned but not railbanked, its underlying concern with effect of railroad abandonments on interstate rail network, and its frustration over failure of prior railbanking efforts. [Glosemeyer v. Missouri K. T. R. Co.](#), 685 F. Supp. 1108, 18 Env'tl. L. Rep. 21156, 1988 U.S. Dist. LEXIS 4073 (E.D. Mo. 1988), aff'd, 879 F.2d 316, 19 Env'tl. L. Rep. 21340, 1989 U.S. App. LEXIS 9621 (8th Cir. 1989).

2. Construction

Interstate Commerce Commission [now Surface Transportation Board] interpretation of former [49 USCS § 10906](#), that under former § 10906 ICC lacked power to require sale or imposed terms and conditions of sale of abandoned property for public purposes, was reasonable and permissible interpretation. [Connecticut Trust for Historic Preservation v. Interstate Commerce Com.](#), 841 F.2d 479, 18 Env'tl. L. Rep. 20734, 1988 U.S. App. LEXIS 3175 (2d Cir. 1988).

Plaintiff city had U.S. Const. art. III standing to challenge defendant railroad's failure to obtain Surface Transportation Board (STB) approval under [49 USCS § 10903\(a\)](#) to abandon property, as such proceedings could have afforded city certain protections, such as opportunity to acquire or protect property through public use conditions STB could grant under [49 USCS § 10905](#). [City of Jersey City v. CONRAIL](#), 668 F.3d 741, 399 U.S. App. D.C. 196, 42 Env'tl. L. Rep. 20035, 2012 U.S. App. LEXIS 2106 (D.C. Cir. 2012).

3. Relationship to state law

Former [49 USCS § 10906](#) did not pre-empt state law with respect to disposition of abandoned rail property. [McKinley v. Waterloo R. Co.](#), 368 N.W.2d 131 (Iowa 1985).

4. Relationship to other federal laws

Persons who file under National Trails System Act ([16 USCS §§ 1241](#) et seq.) may also file for public use under [49 USCS § 10905](#); when need for both conditions is established, STB will impose conditions concurrently, subject to

execution of trail use agreement. CSX Transportation, Inc.—Abandonment Exemption (12/22/00) STB Docket No. AB-55 (Sub-No. 580X), [2000 STB LEXIS 771](#).

5. Abandonment or disposal during 180-day period

Statute did not prevent railroad from consummating abandonment of its rail line easement during 180-day public use condition attached to Commission's decision authorizing abandonment; nothing in statutory language refers to staying of abandonment during 180-day period, rather statute simply states that pursuant to 180-day public use condition entity cannot dispose of its rail property during that period unless it has first offered property upon reasonable terms, and, once railroad consummates abandonment of bare easement, it no longer possesses any property interests to transfer. [Fritsch v. ICC, 59 F.3d 248, 313 U.S. App. D.C. 252, 1995 U.S. App. LEXIS 17471 \(D.C. Cir. 1995\)](#), cert. denied, 516 U.S. 1171, 116 S. Ct. 1262, 134 L. Ed. 2d 210, 1996 U.S. LEXIS 1771 (1996).

Landowners' argument that Notice of Interim Trail Use or Abandonment (NITU) did not block their reversionary interest because it contained 180-day public use condition issued pursuant to [49 USCS § 10905](#) was without merit since but for NITU's trail use condition, railroad could have abandoned line immediately and triggered reversion, since public use condition did not itself preclude abandonment; thus, bar on abandonment effected by NITU's trail use condition triggered accrual of cause of action. [Barclay v. United States, 443 F.3d 1368, 2006 U.S. App. LEXIS 8789 \(Fed. Cir. 2006\)](#), reh'g denied, reh'g, en banc, denied, [2006 U.S. App. LEXIS 23750 \(Fed. Cir. Sept. 5, 2006\)](#), reh'g denied, reh'g, en banc, denied, [2006 U.S. App. LEXIS 24389 \(Fed. Cir. Sept. 12, 2006\)](#), cert. denied, 549 U.S. 1209, 127 S. Ct. 1328, 167 L. Ed. 2d 81, 2007 U.S. LEXIS 2126 (2007).

Under former [49 USCS § 10906](#), Commission [now Surface Transportation Board] could preclude disposition of rail properties for not more than 180 days where they were otherwise found to be suitable for use for other public purposes; thus, it could not impose condition that applicant keep line physically intact for period of one year. [Seaboard Coast Line R. Co., 360 I.C.C. 123](#).

Research References & Practice Aids

Cross References:

This section is referred to in [49 USCS §§ 10903, 11702, 11901](#).

Code of Federal Regulations:

Surface Transportation Board, Department of Transportation—Procedures for implementation of environmental laws, [49 CFR 1105.1](#) et seq.

Surface Transportation Board, Department of Transportation—Abandonment and discontinuance of rail lines and rail transportation under [49 U.S.C. 10903, 49 CFR 1152.1](#) et seq.

Surface Transportation Board, Department of Transportation—Railroad acquisition, control, merger, consolidation project, trackage rights, and lease procedures, [49 CFR 1180.0](#) et seq.

Am Jur:

[13 Am Jur 2d, Carriers §§ 54, 64](#).

[27 Am Jur 2d, Eminent Domain § 801](#).

Corporate and Business Law:

49 USCS § 10905

10 Kintner, Federal Antitrust Law (Matthew Bender), ch 73, Exemptions for Transportation Companies and Organizations § 73.3.

Hierarchy Notes:

[49 USCS, Subtit. IV](#)

[49 USCS, Subtit. IV, Pt. A](#)

[49 USCS, Subtit. IV, Pt. A, Ch. 109](#)

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2024, copies of the foregoing Letter and attachment were served by electronic mail on the parties of record on the official service list for Docket No. FD 36710.



Thomas W. Wilcox