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SUBMITTED VIA E-FILING PROCEDURES

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-00001

Re: *Walkersville Southern Railroad, Inc.—Discontinuance of Service Exemption—
Frederick County, MD*, STB Docket No. AB 1339X

Dear Ms. Brown:

Attached for e-filing is the Joint Appeal of the Maryland Transit Administration (“MTA”) and Frederick County, Maryland (“Frederick County”) in the above-referenced proceeding.

Pursuant to 49 C.F.R. § 1002.2(f)(61)(i), a \$350.00 filing fee has been paid via Pay.gov. Pursuant to 49 C.F.R. § 1002.2(e)(1), MTA and Frederick County as public entities respectfully request a waiver of the filing fee.

Please do not hesitate to contact me with any questions.

Sincerely,



W. Eric Pilsk

Enclosure

FILED
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB 1339X

**WALKERSVILLE SOUTHERN RAILROAD, INC.—DISCONTINUANCE OF SERVICE
EXEMPTION—IN FREDERICK COUNTY, MD**

**JOINT APPEAL OF THE MARYLAND TRANSIT ADMINISTRATION AND
FREDERICK COUNTY, MARYLAND**

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Dated: June 13, 2024

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**WALKERSVILLE SOUTHERN RAILROAD, INC.—DISCONTINUANCE OF SERVICE
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SUMMARY

The Maryland Transit Administration, a modal administration of the Maryland Department of Transportation acting on behalf of the State of Maryland (“MTA”), and Frederick County, Maryland, a body corporate and politic (“Frederick County”), jointly file this appeal and ask the Board to grant the request for issuance of a Notice of Interim Trail Use (“NITU”) pursuant to the National Trails System Act (“Trails Act”), 16 U.S.C. § 1247(d), that was denied in the Board’s order issued on May 24, 2024 (“Decision”).¹ The Decision rests on two errors in concluding that the Board lacked jurisdiction to issue a NITU as requested by Frederick County for a rail line in Frederick County owned by MTA (the “Line”).

First, the Board failed to apply the plain language of the Trails Act and erroneously held that the assumed prior abandonment of the Line also ended the Board’s authority to issue a NITU. Where a discontinuance represents the final termination of the Board’s jurisdiction over a line, the

¹ On June 7, 2024, MTA filed a Motion for leave to file this Appeal late, by no later than June 13, 2024. The Board has not yet ruled on that Motion. In anticipation of a favorable ruling, MTA and Frederick County file this Appeal. If the Board denies MTA’s June 7 motion, MTA respectfully requests that this Appeal be considered as a Petition to Reopen under 48 C.F.R. § 1152.25(e)(4). As MTA and Frederick County will demonstrate, the Director’s errors in the Decision meet the standard of material error required for a petition to reopen.

Trails Act requires the Board to issue a NITU to preserve intact railroad rights-of-way for future railroad use. Second, there is no evidence that MTA, or its predecessor the Penn Central, ever consummated the abandonment. The Board's assumption that the Line had been abandoned therefore lacks any factual basis. Accordingly, the Board should reopen the proceeding and grant the requested NITU.

BACKGROUND

A. Legal Background.

Recognized as “the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails,” the Trails Act allows a state, municipality, or private group to assume financial and managerial responsibility for operating the railroad right-of-way as a recreational trail. *Preseault v. ICC (Preseault II)*, 494 U.S. 1, 5, 6-7 (1990). The Trails Act facilitates interim trail use by requiring the Board to use its exclusive and plenary jurisdiction over the interstate rail network to preempt state laws that might otherwise allow rights-of-way to be disposed of piecemeal or revert to abutting landowners upon termination of railroad use. *Id.* at 8.

Specifically, the Trails Act provides that the Board “shall not permit abandonment or discontinuance inconsistent or disruptive of” interim trail use where a qualifying trail sponsor is prepared to assume full responsibility for interim trail use. 16 U.S.C. § 1247(d). The Board's procedures for granting of interim trail use, provided in 49 C.F.R. § 1152.29, are “essentially ministerial” in that the Board does not have the discretion to deny a properly filed request, and cannot compel trail use where no agreement has been reached. *Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1151 (D.C. Cir. 2001).

The Board has jurisdiction and separate licensing authority over the discontinuance of service over, or abandonment of, a line. 49 U.S.C. § 10903(a)(1). Authorization of discontinuance

allows a railroad to “cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future.” *Preseault II*, 494 U.S. at 5 n.3. Normally, abandonment is considered the final act to remove a line from the interstate rail network, and thus the Board’s jurisdiction. *See id.* at 5 n.3, 7.

Although “as a general proposition” the Board’s jurisdiction terminates upon full abandonment of a line, *see id.* at 5 n.3, occasionally the Board retains or re-asserts jurisdiction over service on a line after abandonment has been approved. One example, applicable here, is where a state or political subdivision of a state has acquired a line that has been abandoned or approved for abandonment. *Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I.C.C. 132, 134-35 (1980); 49 C.F.R. § 1150.22. The Board does not have jurisdiction over a State’s acquisition of a fully abandoned rail line, and has fully exempted a State’s acquisition of a line that has been approved for abandonment but not yet fully abandoned. 49 C.F.R. § 1150.22. Where a State does not seek to operate the line itself but instead contracts for an operator to do so, only the operator is considered to incur a common carrier obligation. *Id.* The operator has the option of either obtaining authorization to operate through the Board’s streamlined Modified Certificate procedures, or by seeking a standard common carrier certificate. *Id.* § 1150.21.

Because the operator’s exempted authority constitutes the only authorization applicable to the line and no further abandonment authorization is required by the public owner, the Board’s Modified Certificate procedures create the atypical situation where a discontinuance proceeding operates as the authorization for final termination of the Board’s jurisdiction over a line. *Pioneer Industrial Ry.—Discontinuance of Service Exemption—Line in Peoria County, Ill. (Pioneer)*, AB

1066 (Sub-No. 1X) et al., slip op. at 4 (STB served Apr. 16, 2010).² Under these circumstances, the rationale for Board’s general rule that NITUs are unavailable in discontinuances falls away and issuance of a NITU to forestall complete termination of the Board’s jurisdiction is appropriate. *Id.* Indeed, it is required under the plain terms of the Trails Act. 16 U.S.C. § 1247(d).

B. Factual Background.

The Line subject to these proceedings is owned by MTA and is located between milepost 65.17, valuation station 3442+61.4, and milepost 67.38, valuation station 3560+00, north of the City of Frederick, in Frederick County, Maryland. The Line constitutes a segment of the Frederick Secondary Track, which was formerly owned by the Penn Central. The United States Railway Association (“USRA”) included the Frederick Secondary Track in the Final System Plan as part of its examination of the properties of the Penn Central and seven other northeastern railroads that declared bankruptcy in 1970. *See* Decision, slip op. at 2 n.1. Under the Final System Plan, a segment of the Frederick Secondary Track that included the Line was identified as being damaged by flooding due to Hurricane Agnes and the subject of an interim application for abandonment under Section 304(d) of the Regional Railroad Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985 (1973) (“3R Act”).³ *See* USRA, Final System Plan, Vol. II, at 497, 528 (July 26, 1975) (identifying USRA Line No. 199 between milepost 65.0 North of Frederick and milepost 68.8 at Frederick as subject to a § 304 application). However, there is no record that the abandonment

² That the Board’s Trails Act regulations at 49 C.F.R. § 1152.29 reference abandonment only, and not discontinuance, reflects the reality that abandonment nearly always represents the final termination of the Board’s jurisdiction sufficient to trigger application of the Trails Act. However, the Board has applied these provisions to discontinuances in the past. *See Pioneer*, AB 1066 (Sub-No. 1X) et al.; *infra* Section A.

³ The 3R Act, which authorized development of the Final System Plan, was codified at 45 U.S.C. Ch. 16. The Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) (“4R Act”) approved the Final System Plan and amended the 3R Act, but not the requirement under Section 304(b) regarding abandonment notice. *See* 87 Stat. 1008; 90 Stat.134.

was consummated as required under the 3R Act. Verified Statement (V.S.) ¶ 6, attached as **Exhibit A**.⁴

In 1977, the Board's predecessor the Interstate Commerce Commission ("ICC") issued a report at the State of Maryland's (the "State") request evaluating the prospects for service on a number of light-density lines in Maryland, including the Frederick Secondary Track. ICC, *Evaluation of Eight Light-Density Rail Lines in Maryland*, 42 Fed. Reg. 20396, 20402-06 (Apr. 19, 1977).

In 1982, MTA⁵ on behalf of the State acquired a number of rail lines by quitclaim deed from the Penn Central Corporation, including a portion of the Frederick Secondary Track that includes the Line. In the Purchase Agreement for the Line, MTA indicated it "desire[d] to acquire the[] line[] in order to continue rail service." Purchase Agreement Between Penn Central Corporation and the State of Maryland, Dec. 7, 1981, Recitals (Purchase Agreement), excerpts attached as **Exhibit B**. Pursuant to the ICC's order in *Common Carrier Status of States*, MTA's acquisition did not require the ICC's authorization and MTA did not become subject to the ICC's jurisdiction or responsible for a common carrier obligation, regardless of the status of the Line.

In the 1990s, the State facilitated the restoration of the bridge over the Monocacy River, which had been destroyed by Hurricane Agnes in 1972. **Exhibit A**, V.S. ¶ 8. In 1993, MTA leased a segment of the Frederick Secondary Track, including the Line, to the Walkersville Southern Railroad, Inc. ("WSRR") for the purpose of conducting common carrier service. See Walkersville Southern Railroad, Inc., Application to the Interstate Commerce Commission for a Modified Certificate of Public Convenience and Necessity ("WSRR 1993 Application"), FD 32329, App. B

⁴ Because MTA did not believe that it was necessary to prove non-abandonment in filing its consent letter for interim trail use, it did not file information to that effect. MTA does so now in order to assist in explaining why the Director had an insufficient basis for determining the Line was fully abandoned.

⁵ The acquisition was transacted by MTA's predecessor agency, which for brevity will be referred to as MTA.

(ICC filed July 26, 1993) (operating agreement between MTA and WSRR). That same year, WSRR also obtained authority to operate common carrier service over a 4.8-mile line of railroad between valuation station 3316+02 and valuation station 3560+00, which included the Line, through a Notice of Exemption from the ICC. See *Walkersville S. R.R.—Operation Exemption—Line Owned by the State of Md. (Walkersville Southern)*, FD 32329, slip op. at 1 n.1 (ICC served Sept. 30, 1993). Although WSRR originally sought a Modified Certificate to operate the Line, the ICC declined to accept WSRR’s application for a Modified Certificate and instead granted a Notice of Exemption on the basis that “[a] modified certificate is not appropriate here because no operations have been conducted since 1982 when the line was acquired by Maryland.” *Walkersville Southern*, slip op. at 1 n.1. However, WSRR has maintained operating rights over the Line pursuant to operating agreements with MTA since 1993. V.S. ¶ 9. Although WSRR and the ICC offhandedly characterized the line as abandoned during the course of these 1993 proceedings, neither WSRR nor the ICC cited to any documents or other evidence showing that abandonment had been consummated; nor did MTA, as owner, characterize the line in this fashion. See WSRR 1993 Application at 5; *Walkersville Southern*, FD 32329, slip op. at 1 n.1.

On March 18, 2024, WSRR filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments and Discontinuances of Service to discontinue service over the Line. On the same day, in accordance with the Board’s Trails Act regulations, Frederick County filed a request for issuance of a NITU, and MTA filed a reply consenting to Frederick County’s request for interim trail use. See 49 § C.F.R. 1152.29(a). On April 5, 2024, the Board’s Director of its Office of Proceedings (“Director”) served the Notice of Exemption granting discontinuance, which acknowledged the pending NITU request and stated that “Frederick County’s request will be addressed in a subsequent Board decision.” *Walkersville Southern R.R., Inc.—Discontinuance of Service Exemption—in Frederick County, Md.*, AB 1339X (STB served Apr. 5, 2024).

On May 24, 2024, the Director issued an order denying Frederick County’s NITU request on the basis that the Line was already fully abandoned and “remains outside the Board’s jurisdiction.” Decision, slip op. at 2. Recounting the history of the Line, the Director noted that “the Board’s predecessor, the Interstate Commerce Commission, previously found that a rail line that encompasses the Line was abandoned.” *Id.* at 1. The Director explained that “where the Board does not have jurisdiction over a rail line itself, it cannot issue a NITU under the Trails Act for that line.” *Id.* at 2. This was because “[w]hen authority to abandon a rail line is consummated, the line is removed from the national rail system and the Board’s jurisdiction over the line terminates.” *Id.* The Director further noted that in the case where “a party that does not own the underlying right-of-way subsequently is authorized to operate over an abandoned line, the transportation service becomes subject to the Board’s jurisdiction, but the underlying right-of-way does not return to the Board’s jurisdiction.” *Id.* (citations omitted). The Director concluded that “[b]ecause the Line has been abandoned . . . the Line remains outside the Board’s jurisdiction despite WSRR’s post-abandonment service over it,” and therefore “the Board cannot issue the NITU requested by the County.” *Id.* (citations omitted).

MTA and Frederick County now bring this appeal pursuant to 49 C.F.R. §§ 1101.2(a)(7) and 1152.25(e)(1)(iii).⁶ For the reasons provided below, MTA and Frederick County believe the Director erred in denying the NITU request and the Board should now grant the request.⁷

⁶ MTA notes that on June 10, 2024, the National Association of Reversionary Property Owners (“NARPO”) filed an unverified opposition to MTA’s petition for leave to file this Appeal late. NARPO’s assertions of prejudice are unsubstantiated and appear to be based on speculation. MTA respectfully disagrees that the small delay of 10 days in filing an appeal constitutes any prejudice. Moreover, ensuring the Board’s full consideration of the important issue raised in this proceeding is a compelling cause to hear this Appeal.

⁷ In the event that the Board denies MTA’s motion for leave to appeal and considers this submission as a Petition to Reopen, MTA and Frederick County further believe that the Director’s decision was material error. 49 C.F.R. § 1152.25(e)(4).

ARGUMENT

A. The Director Committed Material Error Because the Trails Act Requires Issuance of a NITU for a Discontinuance That Will Completely Terminate Board Jurisdiction.

The purpose of the Trails Act is to “preserve established railroad rights-of-way for future reactivation of rail service.” 16 U.S.C. § 1247(d). To accomplish that, Congress explicitly prohibited the Board from “permit[ting] abandonment *or discontinuance* inconsistent or disruptive” of interim trail use, *id.* (emphasis added), thereby preventing railroad rights-of-way from being lost under state property law when rail service ended. *Preseault II*, 494 U.S. at 8; *Birt v. STB*, 90 F.3d 580, 582-83 (D.C. Cir. 1996). The Trails Act prohibits the Board from allowing abandonment *or discontinuance* when presented with a trail use request because both abandonment and discontinuance can represent the end of Board jurisdiction and its preemptive effect. *See Preseault v. ICC (Preseault I)*, 853 F.2d 145, 150 (2d. Cir. 1988) (noting discontinuance authority required even where abandoning railroad’s fee simple interest allows it to make non-railroad uses of the corridor).

Accordingly, the Board in the past has issued a NITU to preserve even a previously abandoned railroad right-of-way that is the subject of a discontinuance request. *See Pioneer*, AB 1066 (Sub-No. 1X) et al., slip op. at 4 (“The line in question was fully abandoned when the Cities acquired it in 1984. [Citation omitted.] This . . . means that only discontinuance authority is necessary here to remove agency jurisdiction.”); *Chillicothe-Brunswick Rail Maintenance Authority—Discontinuance Exemption—in Livingston, Linn, & Chariton Counties, Mo. (Chillicothe)*, AB 1001X et al., slip op. at 3 (STB served Jan. 15, 2008) (“[D]iscontinuance

authority is the only authority that would be needed to abandon the line, and . . . accordingly, the Trails Act is available.”).⁸

The Director erred by failing to issue the NITU to Frederick County in response to WSRR’s discontinuance request. Even assuming that the Line had been abandoned (which MTA and Frederick County dispute as discussed below), service was restarted in 1993 when the ICC granted WSRR exemption authority, granting the Board jurisdiction over transportation on the Line. Discontinuance by WSRR would end all common carrier service on the Line and would terminate all Board jurisdiction over the Line and service on the Line. Discontinuance is the last step to complete termination of the Board’s jurisdiction and therefore triggers the Board’s obligation to issue a NITU upon request.

The Director’s error is clear. Congress prohibited the Board from allowing a discontinuance that would be disruptive or inconsistent with interim trail use. WSRR sought to discontinue service, which would end all Board jurisdiction over the Line and service on the Line. Frederick County made a valid request for a NITU. The Trails Act therefore required the Director to issue the NITU. In denying Frederick County’s request for a NITU, the Board has acted inconsistently with the Trails Act by refusing to allow interim trail use, which is exactly what Congress intended to prevent. The Director’s failure to perform its non-discretionary “ministerial” duty to allow interim trail use is error and compels a different result.

B. The Board’s Distinction Between Jurisdiction Over “Transportation Service” Versus the “Underlying Right-of-Way” Does Not Justify Denying the NITU.

Unmoored from the plain terms of the Trails Act, the Decision rests on the proposition that the prior abandonment of the Line ended all Board jurisdiction over the right-of-way. The Director

⁸ Subsequent Board decisions have cast doubt on the reasoning in *Pioneer* and *Chillicothe*. As discussed in Section C, *infra*, however, MTA believes those later decisions do not apply here.

interpreted the 1993 exemption to mean that “the transportation service becomes subject to the Board’s jurisdiction, but the underlying right-of-way does not return to the Board’s jurisdiction.” Decision, slip op. at 2. Although that distinction is immaterial under the plain terms of the Trails Act as explained above, it is also an erroneous basis to deny the NITU under the Board’s own logic because Board jurisdiction over “transportation service” necessarily includes jurisdiction over the property over which the service is provided.

Congress defined “transportation” broadly to include:

a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, *property, facility, instrumentality, or equipment of any kind* related to the movement of passengers or property, or both, by rail, *regardless of ownership or an agreement concerning use.*

49 U.S.C. § 10102(9)(A) (emphasis added). By definition, therefore, the Board’s admitted jurisdiction over WSRR’s “transportation service” necessarily includes jurisdiction over the property on which WSRR operates, even if another entity, such as MTA, owns that property. The terms of the statute make clear that when the Board authorizes rail service, it assumes jurisdiction over “transportation,” including each listed facet of transportation.

The unity of jurisdiction over an operator, and the property it uses, is reflected elsewhere in the Board’s authorizing statutes. For example, when the Board licenses a person to operate common carrier service over a line, it authorizes that person to “provide transportation over . . . [a] railroad line.” 49 U.S.C. § 10901(a)(3). Similarly, allowing a carrier to discontinue a rail line necessarily entails authorizing “a rail carrier providing transportation subject to the jurisdiction of the Board” to “discontinue the operation of all rail transportation over any part of its railroad lines.” 49 U.S.C. § 10903(d). These provisions make clear that “transportation service” may not be untethered from the underlying right-of-way when approving, abandoning, or discontinuing rail service, or when authorizing interim trail use under the Trails Act.

Similarly, the Board's requirement that railroads identify a line that is to be authorized for operation or discontinuance with the same specificity as one for acquisition or abandonment also reflects the parity of jurisdiction with respect to the underlying property. *See* 49 C.F.R. §§ 1150.4 (requiring detailed information regarding the location of the line in both acquisition and operation proceedings), 1152.22(a)(4), (b) (same for both discontinuance and abandonment proceedings). These provisions reflect the practical impossibility of regulating a common carrier's service—including ensuring such service is not interfered with through the operation of state property law—without also regulating the use of the property over which that carrier operates.

Moreover, adopting the Director's interpretation leads to absurd results that are inconsistent with the language and policy of the Trails Act. The purpose of the Trails Act is to preserve railroad rights-of-way for future railroad use. Under the Board's theory a line that had been dormant for years but not legally abandoned could be railbanked, while a line that had been abandoned but reactivated and used under service exemption authority would not be eligible for railbanking. The Director's theory would preserve an unused line but allow an active line to be lost for future use, which is exactly what Congress intended to prevent. Nothing in the Trails Act, or in the statutes authorizing the Board's jurisdiction over the interstate rail network, compels making a distinction that severs the Board's jurisdiction over common carrier service from the underlying right-of-way. Quite the opposite, doing so is directly contrary to the central purpose of Trails Act to preserve railroad rights-of-way and to not let them lapse through abandonment or discontinuance.

C. The Precedent Cited by the Director Does Not Override the Plain Language of the Trails Act.

As noted above, the Board has issued NITUs in discontinuance proceedings in the past, clearly recognizing that the Trails Act authorizes issuing a NITU in a discontinuance context.

Supra Section A (citing *Pioneer*, AB 1066 (Sub-No. 1X) et al., slip op. at 4; *Chillicothe*, AB 1001X et al., slip op. at 3). Nonetheless, the Director incorrectly relied upon *Iowa Traction Ry. Co.—Discontinuance of Service Exemption—In Cerro Gordo County, Iowa*, AB 1269 (Sub-No. 1X), slip op. at 5 (STB served Apr. 2020)⁹ and *Wisc. Cent. Ltd. v. STB (Wisconsin Central)*, 112 F.3d 881, 890 (7th Cir. 1997), *pet. for partial reopening granted sub nom. Wisc. & Mich. Ry.—Discontinuance of Serv. Exemption—in Ashland & Iron Ctys., Wisc. & Gogebic Cty., Mich.*, AB 440X (STB served Oct. 22, 1997), to support the Decision. Decision, slip op. at 2.

Those decisions do not provide the correct rule in this case because they fail to apply the plain language of the Trails Act, which expressly requires issuing a NITU in a discontinuance case that would fully terminate the Board’s jurisdiction regardless of a prior abandonment. The Trails Act authorizes the Board to issue a NITU if it retains jurisdiction over the line or service on the line without respect to regulation of the line’s owner. Even if abandonment ends the Board’s jurisdiction over the owner of a line, the Trails Act expressly states that the Board’s jurisdiction over common carrier service on the line obligates it to issue a properly requested NITU in a discontinuance case to halt complete termination of the Board’s jurisdiction. The Decision, and the cases it relied upon, simply fail to apply the plain language of the Trails Act.

Furthermore, a careful analysis of the cases reveals that the outcomes were driven by other legal questions, not authority to issue a NITU under the Trails Act. The driving factor in that line of cases was assuring that an owner of a fully abandoned line that does not hold itself out as providing common carrier service on the line does not assume a common carrier obligation for the line when it leases the line to another carrier who does. See *Wisconsin Central*, 112 F.3d at 890

⁹ *Iowa Traction* stated that *Pioneer* and *Chillicothe* were incorrectly decided. Decision, slip op. at 2. See also *Dakota Rail, Inc.—Petition for Exemption from 49 U.S.C. 10901, 10903, & 11301*, FD 30721, 1985 ICC LEXIS 102* (ICC served Nov. 14, 1985), *aff’d sub nom. Winter v. ICC*, 828 F.2d 1320 (8th Cir. 1987), discussed in *Wisconsin Central*, 112 F.3d at 889-90.

(holding that that ICC precedent “quite clearly appears to foreclose the attribution of any residual common carrier obligation on [the owning railroad] as the result of its lease to [the operating railroad]”); *Dakota Rail*, 1985 ICC LEXIS 102, at *5 (determining the ICC “no longer have jurisdiction over the right-of-way” owned by a railroad that had abandoned a rail line and leased it to another railroad). That principle remains intact if the Board grants a NITU here, because the basis of the Board’s jurisdiction is the Trails Act requirement to issue a NITU, not the statute’s relation to acquiring and abandoning lines.

The fundamental error in the Decision, repeated in the line of cases above, is to assume that the lack of jurisdiction to compel the line’s owner to assume a common carrier obligation implies to the lack of jurisdiction to issue a NITU. This observation is borne out by the ICC’s disposition of *Wisconsin Central* following the Seventh Circuit’s decision remanding the case to the ICC. The ICC reasoned that “[w]e cannot conclude that we have no jurisdiction over the line for one purpose (imposing a common carrier obligation), but find that we have jurisdiction for another purpose (authorizing trail use).” *Wisconsin & Michigan Railway*, AB 440X, slip op. at 2. Similarly, in *Dakota Rail*, the ICC denied a NITU request on the basis that the owning railroad “received unconditional approval to abandon the line and has consummated the abandonment” so that that ICC had “no jurisdiction over the underlying property.” *Dakota Rail*, 1985 ICC LEXIS 102, at *9. As a result, the ICC concluded “we can no longer condition [the owning railroad’s] disposal of [the line] should [the operating railroad] discontinue service.” *Id.* That logic was relied on in *Iowa Traction*, cited in the Decision, and in several other decisions, largely without further analysis, issued since 2019.¹⁰

¹⁰ See, e.g., *City of Peoria, Ill.—Discontinuance of Service Exemption—In Peoria County, Ill.*, AB 1066 (Sub-No. 3X), slip op. at 3 (STB served June 6, 2023) (“[B]ecause the Line was previously abandoned, the Board need not consider trail use requests under 16 U.S.C. § 1247(d) or requests to negotiate for public use of the Line under 49 U.S.C. § 10905.”); *Providence and Worcester R.R. Co.—Discontinuance of Service Exemption—in Middlesex County*,

That logic is not correct, however, because the limits on Board jurisdiction to impose a common carrier obligation or to otherwise regulate an abandoned line under the Board's general authority do not control here where the Trails Act expressly confers jurisdiction to issue a NITU when a line is to be abandoned *or* service is to be discontinued. The statute must govern.

Moreover, complying with the Trails Act and granting a NITU here is completely consistent with related principles. Granting a NITU here is consistent with the general rule that interim trail use is not available in typical discontinuance proceedings where there has been no abandonment, because Board jurisdiction would continue until abandonment terminated its jurisdiction over a line. Issuing the NITU here does not disturb the principle that the Board lacks jurisdiction over an entity that acquires a fully abandoned line and does not hold itself out as a common carrier, because the Board's jurisdiction here is tied to its discontinuance authority, not ownership of the line. *See Wisconsin Central*, 112 F.3d at 890; *Winter*, 828 F.2d at 1323 ("An abandoned line no longer functions in interstate or foreign commerce, and its acquisition is therefore not subject to Commission jurisdiction. [Citations omitted.] In these circumstances, the operation of the rail line by the new carrier is subject to section 10901."). And, where the Board has not otherwise authorized common carrier service over an abandoned line, a fully abandoned line remains completely outside of the Board's jurisdiction and unavailable for interim trail use under the Trails Act. *See Becker v. STB*, 132 F.3d 60, 62-63 (D.C. Cir. 1997).

Nor does issuing the NITU here increase the scope of the Board's preemptive jurisdiction over the Line because the Board's authorization of common carrier service on a line already preempts unreasonable interference with a common carrier's service over a particular right-of-

Conn., AB 254 (Sub-No. 11X), slip op. at 3 (STB served July 3, 2019) (same); *Ohio Rail Development Commission—Petition for Declaratory Order*, FD 36387, slip op. at 7 n.14 (STB served Dec. 22, 2020) ("[T]he Board would not entertain requests for interim trail use/rail banking in the discontinuance docket.").

way, regardless of ownership of the underlying property or physical assets. *Thompson v. Tex. Mex. Ry.*, 328 U.S. 134, 146 (1946) (“Whatever may be the powers of the [ICC] . . . over the terms of the trackage agreement . . . it is clear that the [ICC] has jurisdiction over the operations.”). Issuing the NITU would not force or create contractual or property rights because a railroad’s responsibility to acquire the necessary property rights to conduct common carrier service—whether as an owner or an operator—is always a matter of state law separate and apart from the Board’s permissive grant of authority, see *Ohio River Partners LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC*, FD 35984, slip op. at 3 (STB served Apr. 1, 2016), and because issuing a NITU never compels trail use, which is always a completely voluntary agreement between the property owner and the trail sponsor. *Nat’l Wildlife Fed. v. ICC*, 850 F.2d 694, 697 (D.C. Cir. 1988).

While the distinctions between “service” and “line” and an “operator” and an “owner” may have served to clarify the Board’s jurisdiction for purposes of locating the common carrier obligation in past decisions, those distinctions obscure, and are contrary to, the Board’s authority to issue a NITU under the Trails Act. Because the Trails Act expressly requires the Board to issue a NITU in the case of *both* abandonment *and* discontinuance, all distinctions between “service” and “line,” between “abandonment” and “discontinuance,” and between Board jurisdiction over “line owner” and “operator” are immaterial in this particular context. Where the Board’s jurisdiction will otherwise completely terminate, the Trails Act compels the Board to issue a NITU in a discontinuance proceeding upon request in order to prevent the reversion of the line and preserve the line for potential reactivation of rail service. Because the Board failed to follow the plain language of the Trails Act, it should reverse the Decision and issue the NITU to Frederick County as properly requested.

D. The Director Erred in Concluding That the Line in This Proceeding Was Abandoned.

The Director's decision to deny Frederick County's NITU request was based on the mistaken assumption that the Line was abandoned. That is not so. Although the Line was authorized for abandonment, the abandonment was never consummated, and there is no evidence that MTA or Penn Central have taken the steps necessary to do so. WSRR's suggestion to the contrary in 1993 is the kind of unsubstantiated statement the Board has previously declined to credit. *Norfolk & W. Ry.—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN*, AB-290 (Sub-No. 168X), slip op. at 6 (STB served May 4, 2005).

Abandonment requires two steps. First, a railroad must obtain abandonment authorization from the Board (or, before 1996, the ICC), either through an application or an exemption. *Landowners—Mot. for Dec. Order and Injunctive Relief*, AB 1065 (Sub-No. 1X), slip op. at 4 (STB served Jan. 27, 2020). That authority is “permissive,” not self-executing, and the railroad has “the right to decide whether to exercise” the abandonment authority. *Id.* at 5.

Second, the abandonment must be consummated. *Id.* If the Board or ICC has authorized an abandonment but the abandonment has not been consummated, the line remains subject to the Board's jurisdiction. *Md. Transit Admin.—Abandonment Exemption—in Somerset Cnty., MD*, AB 590 (Sub-No. 1X), slip op. at 3 (STB served May 14, 2015).

Today, consummation requires filing a notice of consummation with the Board. However, for abandonments authorized before the notice of consummation requirement was adopted, the Board uses an objective test to determine whether an abandonment has been consummated. *Baros v. Tex. Mex. Ry. Co.*, 400 F.3d 228, 236 (5th Cir. 2005). The objective test requires looking closely at the facts “on a case-by-case basis.” *Md. Transit Admin.*, AB 590 (Sub-No. 1X), slip op. at 3. The key factor in determining that an abandonment has been consummated under the objective

test is “a physical act that shows a clear intention on the part of the rail line owner to remove the line from the national rail system and relinquish the property interest.” *Beaufort R.R.—Modified Rail Certificate*, FD 34943, slip op. at 7 (STB served July 21, 2009). For example, the removal and salvaging of a line’s track might indicate an intent to abandon. *Md. Transit Admin.*, AB 590 (Sub-No. 1X), slip op. at 4. By contrast, “discontinuation of service and lack of maintenance . . . standing alone are not physical acts sufficient to show an intent to relinquish permanently the right to use a line for rail service.” *Beaufort R.R.*, FD 34943, slip op. at 7. No one factor can demonstrate an intent to abandon—in some circumstances, even the removal of tracks is insufficient to show that an abandonment was consummated. *Norfolk & W. Ry*, AB-290 (Sub-No. 168X), slip op. at 7.

The Final System Plan provided that the Line was the subject of an application for abandonment under Section 304 of the 3R Act. *See* Final System Plan, Vol. II, at 528. Section 304 provided accelerated procedures by which railroads could obtain authorization to abandon lines. However, authorizations for abandonment under Section 304 required railroads to provide notice to, among others, local governments and state transportation agencies. 45 U.S.C. § 744(a)(1)(C). Because MTA has found no record that Maryland ever received such notice, it does not believe that the Line completed the first step of the two-step abandonment process.

Even if Penn Central had complied with the notice provisions of the 3R Act, the approval of the Final System Plan and the enactment of the 4R Act could, at most, only *authorize* the Line for abandonment. An abandonment authorized under the 3R Act must still be consummated to take effect, because, like all abandonments, abandonment under the 3R Act is a two-step process and not self-effectuating. *See Md. Transit Admin.*, AB 590 (Sub-No. 1X), slip op. at 3. To actually abandon the Line, Penn Central would have needed to undertake a physical act manifesting its intent to abandon the Line. Without some manifestation of that intent, the abandonment would not be consummated, and the Line would remain subject to the Board’s jurisdiction.

There is no evidence that Penn Central consummated the abandonment, however. All the record evidence shows is that Hurricane Agnes destroyed a bridge over the Monocacy River that connected the Line to the interstate railroad network in 1972, and that damage prompted the discontinuation of service. However, as of 1975 the Final System Plan described the Line only as the subject of a pending application to abandon that had not yet been approved. *See* Final System Plan, Vol. II, at 528; *see also id.* at 526 (explaining that, for the category of lines in which the Line was listed, notice of a proposed abandonment had been published by USRA but “[p]ublication of a notice does not mean that the Association has reached any conclusion as to merits of an application”).

All other available evidence indicates that the Line was intended to remain part of the interstate rail network and that abandonment was not consummated in accordance with the law. Following the authorization provided by the Final System Plan, in 1977, the State asked the ICC to evaluate the economic viability of providing rail service on the Line, along with other lines in Maryland. 42 Fed. Reg. at 20396, 20421. That request demonstrated that the possibility of rail service being provided on the Line was a live one; the State would not have requested that the ICC study the reinstitution of service if Penn Central had already abandoned the Line. The report itself stated that “[t]he line has been operated in the same manner since 1972” without reference to an abandonment. *Id.* at 20419. There is no evidence that Penn Central had consummated abandonment of the Line by the time it conveyed the Line to MTA in 1982.

Moreover, the purchase and sale agreement between Maryland and Penn Central clearly demonstrates that MTA had no intention of abandoning the Line. The Purchase Agreement expressly states that since April 1, 1976 the Line had been leased “for operation and maintenance by an Operator designated by the State,” and that the State “desire[d] to acquire the[] line[] in order to continue rail service,” suggesting that the Line had *not* been abandoned. **Exhibit B** (Purchase

Agreement), Recitals. In addition, after the acquisition of the Line in 1982, there was no physical act undertaken by MTA evincing an intent to abandon the line. Instead, the State and MTA facilitated the restoration of the bridge over the Monocacy River and supported WSRR's application to operate on the Line, which the ICC granted in 1993.

It is true that in a 1993 filing seeking a Modified Certificate of Public Convenience and Necessity pursuant to 49 C.F.R. Part 1150, Subpart C, WSRR stated, that "The State of Maryland owns the line by virtue of a deed dated January 8, 1982 from the Penn Central Corporation and the Baltimore & Eastern Railroad Company. The line was acquired by the State of Maryland after its abandonment during the formation of CONRAIL."¹¹ However, because a Modified Certificate applies to rail lines that have been "fully abandoned, *or approved for abandonment*" 49 C.F.R. § 1150.21 (1993) (emphasis added), WSRR was not required to show abandonment. Instead, WSRR appears to have assumed the Line had been abandoned, or to have used the term "abandonment" casually, and it did not provide any facts to support its statement. Moreover, WSRR was not the owner of the Line. Accordingly, it could not make an admission regarding ownership rights and was without legal authority to determine the status of the Line.

WSRR's conclusory statement fails to prove abandonment. Indeed, the Board has previously declined to rely on parties' claims that a line is "abandoned." In *Norfolk and Western Railway*, landowners abutting a rail line petitioned for reconsideration after the Board issued a NITU for a segment of the line. AB-290 (Sub-No. 168X), slip op. at 1. The landowners claimed that the owner of the line, Norfolk Southern Railway Company ("NSR"), had consummated an abandonment between the grant of that authority in 1996 and the issuance of a NITU in 2004. *Id.*

¹¹ Relying on that statement, the Board stated that the abandonment was effected by the 4R Act in 1976. *Walkersville Southern*, slip op. at 1 n.1. But the 4R Act merely authorized an expedited process for the abandonment; it did not consummate it.

at 2. The landowners noted that deeds conveying the rights-of-way from NSR to the trail sponsor during that period said that the segment at issue was “now abandoned.” *Id.* at 6.

Nevertheless, the Board denied the petition for reconsideration. Because the available evidence showed, in fact, that NSR did not intend to consummate the abandonment, the Board accepted that the deed’s use of the word “abandoned” was merely “careless.” *Id.*; *see also Birt*, 90 F.3d at 586–87 (finding an abandonment not consummated even though its owner’s attorneys called the line “abandoned,” given other indicia of the line owner’s intent). The Board should take the same approach here: MTA consistently sought to reinstitute rail service on the Line before WSRR began operations, so the careless use of the word “abandoned” by WSRR should not determine the Line’s status.

This case is distinguishable from the Board’s decision finding that the abandonment of another line owned by MTA, in Somerset County, Maryland, had been consummated. *See Md. Transit Admin.*, AB 590 (Sub-No. 1X). The tracks on that line had been removed and salvaged, leading to a “deteriorated condition” that made rail operations “implausible.” *Id.* at 4. Accordingly, the Board saw no evidence that Maryland intended to provide service over the line in Somerset County based on its review of the “nearly 40 years since the State acquired it.” *Id.*

Here, in contrast, the record reflects consistent progress toward *restoring* service, not ending it. MTA planned to, and ultimately did, *reconstruct* the bridge over the Monocacy River restoring the connection to the rest of the Frederick Secondary Track. MTA facilitated operations by a new carrier in 1993, which the ICC authorized, and the Line has been leased to a common carrier since that time. Unlike the Somerset line, these actions demonstrate an intent to continue rail service, not abandon it.

Accordingly, the Director's assumption that the Line is abandoned is not supported by the kind of evidence of abandonment that the Board and the law requires. This error provides an independent, alternative ground for reversing the Decision.

CONCLUSION

WHEREFORE, for the reasons set forth above MTA and Frederick County respectfully request that the Board reverse the May 24, 2024 Decision and grant the requested NITU in the above-captioned proceedings, or alternatively that the Board reopen the proceedings and grant the requested NITU.

Dated: June 13, 2024

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June 2024, I caused the foregoing Appeal to be served on the following parties by email:

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W. Eric Pilsch

Dated: June 13, 2024

EXHIBIT A

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. AB 1339X

WALKERSVILLE SOUTHERN RAILROAD, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN FREDERICK COUNTY, MD

EXHIBIT A - VERIFIED STATEMENT OF JOHN BENTLEY THOMAS

1. I am John Bentley Thomas. I am Assistant Director for Rail and Intermodal Freight, employed over 2 years in this position with the Maryland Department of Transportation.
2. In my current role my responsibilities include overseeing and managing freight rail staff, policy, contracts and resources for Maryland Transit Administration ("MTA") owned rail lines and the Maryland Department of Transportation.
3. I make this Verified Statement based on my personal knowledge and familiarity with the records maintained by MTA.
4. The Line subject to these proceedings is owned by MTA and located between milepost 65.17, valuation station 3442+61.4 and milepost 67.38, valuation station 3560+00, north of the City of Frederick, in Frederick County, Maryland. The Line is a segment of the rail line known as the Frederick Secondary Track, which was formerly owned by the Penn Central Corporation.
5. In 1982 the State of Maryland through MTA's predecessor agency acquired a number of rail lines, including a portion of the Frederick Secondary Track that includes the Line, from the Penn Central Corporation by quitclaim deed. This transaction was documented through a purchase and sale agreement dated December 7, 1981, an excerpted copy of which is attached as Exhibit B. MTA's records documenting negotiation of the transfer

EXHIBIT A

do not refer to the Line being abandoned. Instead, the documentation suggests continued operation prior to acquisition.

6. The State has searched its records and has not located any record that abandonment was consummated prior to its acquisition of the Line.
7. As reflected in the 1981 agreement attached as excerpted in Exhibit B, and in MTA's documentation of that transaction, the State acquired the Line with the intent to preserve it for rail service.
8. The State did not remove or salvage the tracks on the Line, but instead worked towards restoring service. In 1996, the State facilitated the restoration of the bridge over the Monocacy River, which had been destroyed by Hurricane Agnes in 1972.
9. MTA also worked to secure a common carrier operator for the Line, which it ultimately did. Since 1993 MTA has leased a segment of the Frederick Secondary Track that includes the Line to the Walkersville Southern Railroad, Inc.

I, John Bentley Thomas, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 13, 2024.



John Bentley Thomas
Assistant Director for Rail and Intermodal Freight
Maryland Department of Transportation

EXHIBIT B

THIS AGREEMENT, made this 7th day of December 1981, by and between THE PENN CENTRAL CORPORATION, a Pennsylvania corporation, and BALTIMORE AND EASTERN RAILROAD COMPANY, a Maryland corporation, both hereinafter sometimes called the "Company" as first parties, and the STATE OF MARYLAND, acting by and through the State Railroad Administration of the Department of Transportation, hereinafter called the "State," as second party.

WITNESSETH:

WHEREAS, the Company is the owner of certain rail lines within and without the State of Maryland; and

WHEREAS, under the Agreement for Use of Rail Properties, dated as of April 1, 1976, as extended by various letter agreements, these lines were leased to the State April 1, 1976, for operation and maintenance by an Operator designated by the State; and

WHEREAS, the State desires to acquire these lines in order to continue rail service.

NOW THEREFORE, the parties hereto mutually agree as follows:

1. The Company agrees to sell and the State agrees to purchase all the right, title and interest in and to the lines of railroad ("the property") which are outlined in yellow on the attached valuation maps and which are described as follows:

<u>Rail Segment</u>	<u>Approximate Length</u>
(1) Townsend-Centreville	34.95 miles
(2) Massey-Chestertown	20.36 miles
(3) Clayton-Easton	44.90 miles
(4) Queen Anne-Denton	8.85 miles
(5) Seaford-Cambridge	30.41 miles
(6) Hurlock-Preston	6.60 miles
(7) Hebron-Salisbury	4.19 miles
(8) Littlestown-Frederick	30.03 miles
(9) Kings Creek-Crisfield	14.57 miles
	194.86 miles