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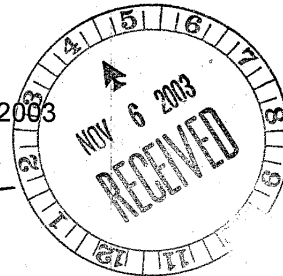
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November 5, 2003



209345

via Federal Express
Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Finance Docket No. 34415, Ohio Department of Transportation -
Petition for Declaratory Order - Status of Track at Findlay, Hancock County, OH
- Norfolk Southern Railway Company's Motion to Hold Proceeding in Abeyance
and Initial Response to Petition for Declaratory Order

Dear Mr. Williams:

Enclosed please find the original and ten copies of Norfolk Southern Railway Company's preliminary response and request to hold this proceeding in abeyance pending the outcome of settlement negotiations between the Ohio Department of Transportation and NSR that could render the controversy that was the subject of ODOT's petition moot. Please verify the filing of this pleading by stamping and returning the copy of this letter in the enclosed self-addressed, stamped envelope. Thank you.

Very truly yours,

James R. Paschall

cc w/encl:

Mr. Michael L. Stokes
Senior Assistant Attorney General
Office of the Attorney General
One Seagate (#2150)
Toledo, OH 43604-1551

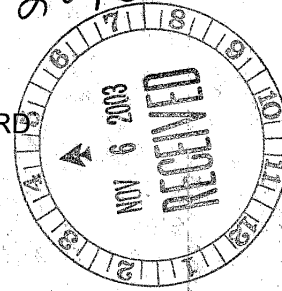
Mr. Fritz R. Kahn
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Findlay, OH 45840

Mr. T. W. Ambler

209345

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34415

OHIO DEPARTMENT OF TRANSPORTATION
- PETITION FOR DECLARATORY ORDER -
STATUS OF TRACK AT FINDLAY, HANCOCK COUNTY, OH

NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION TO HOLD PROCEEDING IN ABEYANCE AND
RESPONSE TO PETITION FOR DECLARATORY ORDER
FILED BY THE OHIO DEPARTMENT OF TRANSPORTATION

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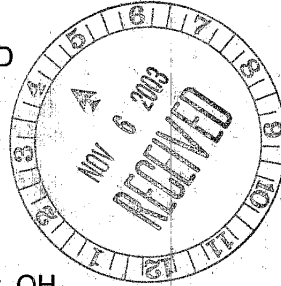
Dated: November 5, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34415

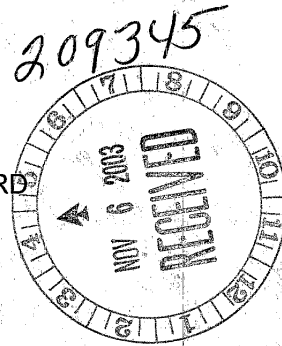
Ohio Department of Transportation
- Petition for Declaratory Order -
Status of Track at Findlay, Hancock County, OH

Norfolk Southern Railway Company's
Motion to Hold Proceeding in Abeyance and
Response to Petition for Declaratory Order
Filed by the Ohio Department of Transportation



Norfolk Southern Railway Company (NSR) hereby moves that the Board hold the subject proceeding in abeyance for 60 days, unless the parties notify the Board that more time is required, to permit possible settlement of the matter in controversy through negotiations proposed to petitioner, the Ohio Department of Transportation (ODOT) on Monday, November 3, 2003 by NSR's local counsel. If ODOT and NSR can settle the matter in controversy between them, this proceeding can be dismissed as moot. Although NSR summarizes its position in response to the petition below, NSR requests that the Board not issue a decision on the merits unless the parties cannot settle the controversy that exists between them. As the attached letter from ODOT's counsel indicates, ODOT will support a two-week postponement of this proceeding in order to explore possible settlement of the controversy. We do not believe that is sufficient time to negotiate a settlement of this matter, but it may be possible. ODOT may wish to see some progress in

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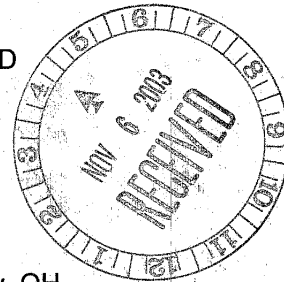
Attorney for
Norfolk Southern Railway Company

Dated: November 5, 2003

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SURFACE TRANSPORTATION BOARD

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Ohio Department of Transportation
- Petition for Declaratory Order -
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order to support a longer postponement. While NSR understands that position, it will likely require the Board to issue a further decision holding the matter in abeyance if the parties can report that progress toward a settlement is being made. Thus, a longer period of abeyance would be more convenient.

BACKGROUND

ODOT's October 17, 2003 petition for declaratory order, with certificate showing service on NSR by next day air on Friday, October 17, 2003, resulted from a court referral in a case instituted by ODOT's complaint to quiet title and for declaratory judgment in the Court of Common Pleas of Hancock County, Ohio ("State Court"), against Michigan Sugar Company, Jim Hickerson individually and d/b/a Hickerson Excavating, Pierce Hardy Limited Partnership and Northern Ohio Sugar Company.¹ This complaint, however, effectively amounts to an attempt by ODOT to have the State Court find that the subject track has been de facto abandoned by NSR or that NSR should cede its right to continue to operate over the track through what amounts to an adverse abandonment finding, presumably permitting subsequent condemnation of the property interests or of NSR's rights to use the property as a spur track, by ODOT through the State Court proceeding.

ODOT wishes to reconstruct a highway bridge originally placed over the subject property under a 1956 highway easement and agreement with the fee owner. The property under the highway bridge includes an NSR spur track on an easement granted to NSR's

¹In the Court of Common Pleas, Hancock County, Ohio, Case No. 2002-CV-472, *Gordon Proctor, Director, Ohio Department of Transportation v. Michigan Sugar Company, et al.*, filed October 29, 2002, summons dated November 1, 2002.

predecessor by Michigan Sugar's predecessor. The 1956 agreement recognized the existence of the railroad easement and track under the bridge and promised to protect it. To save costs in improving the sight lines approaching the highway bridge, ODOT now wishes to lower the bridge. The proposed change in the bridge's elevation would not allow sufficient clearance for rail traffic on the spur track underneath the bridge. ODOT brought the action to quiet title because one or more defendants, including NSR, may claim the right to resume use of the rail spur, over which no traffic has moved for several years, or may claim a right otherwise inconsistent with the planned project.

ODOT claims that the track is a spur or excepted track that NSR has abandoned - or at least that the State Court should be able to decide that NSR has abandoned as a predicate to deciding the issues presented in ODOT's complaint. If NSR were to have abandoned the track, or can be held by the Court either to have done so or to be required to do so, ODOT could prevent NSR's further use of the track and to the extent necessary could bring a condemnation action against NSR's interest in the property, without federal pre-emption of State Court jurisdiction by the Board's jurisdiction under Subtitle IV of Title 49 of the United States Code (the Interstate Commerce Commission Termination Act or "ICCTA").

NSR asserts that it has not abandoned the spur or the right to resume rail service over it. NSR further asserts that the State Court is without jurisdiction either to require NSR to abandon the track or to determine that NSR has abandoned the track. That jurisdiction lies with the Board, even though the Board's authority to exercise it has been circumscribed by the provisions of 49 U.S.C. 10906. Furthermore, the Board's exclusive

jurisdiction over line and track abandonments cannot be circumvented by a claim that the State Court can decide whether an abandonment of the spur, which both NSR and the property owner deny has occurred, can be found to have occurred as a *de facto* matter through contract interpretation or lack of maintenance or use. Since the Board is precluded from exercising its jurisdiction over the abandonment of excepted tracks, such as spur tracks, the Board must find, as it has previously stated, that Congress clearly has left the decision whether to abandon excepted tracks such as spur tracks to the discretion of the railroad.

MOTION TO HOLD PROCEEDING IN ABEYANCE

Upon consideration of the subject petition, NSR has re-evaluated the extent of its obligations under relevant agreements, its likely future need to provide service over the segment of track in controversy at its current location and whether a settlement might be reached that would allow ODOT to achieve its objective and NSR to protect its interests. Thus, NSR has proposed that ODOT and NSR negotiate to try to settle the matter in controversy. NSR believes that a settlement can be made, or that the existence of an impasse will be obvious, within a reasonable period of time, although perhaps not as quickly as the two-week period that ODOT has agreed to support in the attached letter.

In order to render the controversy set forth in the petition moot, to relieve the Board to review the somewhat complicated facts and to decide the issues presented by the petition, to relieve the parties of the continued delays and costs of litigation and to relieve NSR of having to further investigate or to file further responses that may not be required, NSR moves that the Board hold the proceeding in abeyance for 60 days to allow the

parties to attempt to negotiate a settlement of the matters in controversy. If the Board determines that a shorter postponement should be ordered, NSR requests that the Board hold out the possibility of a further period of abeyance if the parties report that progress toward a settlement is being made. If no settlement has been reached within 60 days or a reasonable time, the parties can report whether further negotiations appear to be worthwhile and a further postponement of the consideration of this matter should be required, or whether the Board should proceed to decide the issues presented in the petition. Otherwise, the Board's consideration of the merits of a petition that may become moot would be an unproductive use of the Board's time and effort.

RESPONSE TO ODOT'S PETITION

Most of ODOT's filing addresses issues or cites precedent not germane or relevant to answering the questions presented by this case. ODOT's pleading might be appropriate or relevant in an adverse abandonment case or if the theory that a rail line, or any track under Board jurisdiction, could be abandoned *de facto* through non-use, lack of maintenance or some other factor, were valid. However, neither the Board nor the State Court has the authority or jurisdiction, respectively, to conduct an adverse abandonment proceeding concerning this track nor to determine that a *de facto* abandonment of the track either has occurred or is legally permissible. The relevant law and precedent is to the contrary. Indeed, the Board's exclusive and plenary jurisdiction over railroad line or track abandonments under ICCTA pre-empts any State Court jurisdiction that would result in the forced abandonment of the track at issue or the condemnation of the railroad's interest in that track or its use and operation.

The relevant legal precedent does not support ODOT's argument that the track segment at issue has been, or even legally can be, subject to *de facto* abandonment. See, STB Docket No. AB-33 (Sub-No. 132X), *Union Pacific Railroad Company -- Abandonment Exemption -- In Rio Grande and Mineral Counties, CO*, served May 24, 2000; STB Docket No. AB-547X, *Roaring Fork Railroad Holding Authority -- Abandonment Exemption -- in Garfield, Eagle, and Pitkin Counties, CO*, served May 21, 1999. Moreover, no period of non-use of a rail line can be considered either a discontinuance of service or an abandonment of that rail line or support a finding of *de facto* abandonment. *Phillips Co. v. Southern Pac. Rail Corp.*, 902 F.Supp. 1310 (D. Colo 1995), aff'd sub nom. *Phillips Co. v. Denver and Rio Grande Western R.R. Co.*, 97 F.3d 1375 (10th Cir. 1996). The Board cannot authorize, or advise the State Court that it could make a finding or determination, contrary to these abandonment principles and precedents concerning a track that is now within the Board's jurisdiction, even if the Board does not have authority to exercise its jurisdiction with respect to excepted tracks under 49 U.S.C. 10901 et seq. because of the provisions of 49 U.S.C. 10906. That would undermine the very uniformity in the pre-emption of local regulation of railroads that these sections of the ICCTA were designed to achieve.

ODOT argues that the Board is "without jurisdiction" to pass on the proposed acquisition or abandonment of this track because of the provisions of 49 U.S.C. 10906. However, that section of the law merely removes the Board's authority to exercise its jurisdiction under Chapter 109 of Subtitle IV of Title 49 of the U.S. Code, it does not take

away the exclusive jurisdiction over the regulation of such tracks clearly granted to the Board in 49 U.S.C. 10501 nor does it leave the States free to exercise jurisdiction over such tracks either directly or indirectly through findings or decisions that result in the interference with or preclusion of railroad business or operations or the condemnation of their property or operating rights. In STB Finance Docket No. 34090, *Union Pacific Railroad Company - Petition for Declaratory Order*, served November 9, 2001, the Board stated:

In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), Congress broadened the express preemption provision at 49 U.S.C. 10501(b), so that both the jurisdiction of the Board over transportation by rail carriers and the remedies provided under 49 U.S.C. 10101-11908 are exclusive and preempt the remedies provided under Federal or state law. 49 U.S.C. 10501(b). See *City of Auburn v. STB*, 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (*City of Auburn*). [*12]

See also Civil Action No. 1:97-CV-1018-RLV, *Norfolk Southern Railway Company, et al. v. City of Austell, Georgia, et al.*, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga., Aug. 19, 1997), quoted *infra*.²

²And see also STB Finance Docket No. 33740, *The Burlington Northern and Santa Fe Railway Company -- Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights*, served May 13, 2003, where the Board stated at pages 25-27 of the slip opinion:

"Even assuming, for purposes of argument, that the KJRY track is excepted track under section 10906, we do not lack "jurisdiction" over the track, as KJRY claims. Section 10906 simply provides that a Board license is not needed to construct, operate over, or abandon excepted track. It therefore addresses the "authority" of the Board only as to particular types of licensing actions, not the agency's general jurisdiction over such track. See *UTU/Effingham*, 183 F.3d at 612. n32 This is confirmed by 49 U.S.C. 10501(b)(2), which expressly provides that our jurisdiction over excepted track is exclusive. n33

n32 Sometimes, the courts and the agency have used the term "jurisdiction" loosely to

The Board has already answered the question presented by this petition in STB Finance Docket No. 33200, *Auburn and Kent, WA- Petition for Declaratory Order - Burlington N.R.R. - Stampede Pass Line*, 2 S.T.B. 330 (1997), *aff'd*, *City of Auburn v. STB et al.*, 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) .

At sheets 11-12 of the slip opinion in the Board's 1997 decision, the Board stated:

Under section 10501(b)(2) of ICCTA, however, we have "exclusive" jurisdiction over spur or switching tracks located entirely in one state. When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove our authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of auxiliary tracks entirely to railroad management. See Conference Report on ICCTA, explaining that section 10501(b)(2) was added "[i]n light of the exclusive Federal authority over

refer to the Board's authority under a particular provision of the statute. But disputes involving excepted track under section 10906 are "not about whether the Board has jurisdiction, but about under which provision of the statutes administered by the Board it exercised jurisdiction." *UTU/Effingham*, 183 F.3d at 612. As that court recently observed "the section 10906 no-authority language means no authority, not no jurisdiction." *Id.* (emphasis in original). [*26]

"n33 In ICCTA, Congress specifically committed jurisdiction over spur, industrial, team, side, and switching track (even if located entirely in one state) exclusively to the Board, carrying out its policy of federally "occupying the entire field of economic regulation" of the Nation's rail transportation system. See H.R. Rep. No. 311, 104th Cong. 1st Sess. 95-96 (1995). In so doing, Congress preempted other Federal or state "statutory, common law, and administrative remedies that may have been previously available and placed exclusive remedial authority concerning such track solely with the Board." *Id.* at 95.

"The section 10906 exception to our licensing authority allows carriers regulatory flexibility for track incidental to their interstate common carrier service. But as we stated in our prior decision, although there may be no Federal interest in whether a spur is constructed or abandoned, there is a Federal interest in the actions of the owner of a spur that block a regulated carrier from conducting interstate operations to meet its common carrier obligations. 2001 Decision at 8. We thus concluded there, and reiterate here, that this Federal interest allows us to make [*27] section 10901(d) relief available to BNSF, regardless of the status of KJRY's track."

auxiliary tracks and facilities * * *." H.R. Rep. No. 104-422, 104th Cong., 1st. Sess. 167 (1995). Thus, although we may not regulate the construction and disposition of spur and switching tracks, it is equally clear that state and local authorities may not regulate those activities either. [Footnotes omitted.]

The principles of federal pre-emption of State jurisdiction over the construction, operation and abandonment of excepted track under the ICCTA have been recognized by the United States Court of Appeals for the Sixth Circuit, interpreting Ohio law, as well as by the Board and other courts generally. In the Sixth Circuit case, *Railroad Ventures, Inc. et al.*, v. STB, 299 F.3d 523; 2002 U.S. App. LEXIS 15405; 2002 Fed. App. 0259P (6th Cir. 2002), the Court of Appeals stated at 299 F.3d 562-563:

"Finally, we note that the ICCTA preempts the Ohio state statutes in question to the extent that they intrude upon the jurisdiction of the STB with regard to the regulation of rail transportation under § 10501(b). [HN34] Under the Supremacy Clause, U.S. Const. art. 6, cl. 2, federal law preempts state or local law in various ways: (1) express preemption where the intent of Congress to preempt state law is clear and explicit; (2) field preemption where Congress' regulation of a field is so pervasive or the federal interest is so dominant that an intent can be inferred for federal law to occupy the field exclusively; and (3) conflict preemption, where federal and [***64] state law so conflict that it is impossible for a party to comply with both simultaneously, or where enforcement of state law [**106] prevents the accomplishment of the full purposes and objectives of federal law. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 [*562] (1992); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001). "If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664, 123 L. Ed. 2d 387, 113 S. Ct. 1732 (1993). Although there is a presumption under the Supremacy Clause that Congress did not intend to preempt state law, "an assumption of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108, 146 L. Ed. 2d 69, 120 S. Ct. 1135 (2000).

"As set forth in 49 U.S.C. § 10501(b):
[HN35] (b) The jurisdiction of the Board over--

"(1) transportation by rail carriers, and the remedies provided in this part with respect [**107] 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. [***65]

"49 U.S.C. § 10501(b). As explained by the Ninth Circuit in *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998):

"[HN36] Section 10501 of the ICCTA, which governs the STB's jurisdiction, states the Board will have exclusive jurisdiction over "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)(2) (1997). [**108] The same section states that "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) (1997). . . . The section unambiguously states: "The authority of the Board under this subchapter is exclusive." *Id.*

"154 F.3d at 1030 (emphasis in original).

"In *City of Auburn*, the Ninth Circuit, endorsing a "broad reading of Congress' preemption intent, not a narrow one," rejected the City's argument that Congress, through the ICCTA, only intended preemption of economic regulation of the railroads. Finding that Congressional intent was clear and that preemption of rail activity is a valid exercise of Congressional power under the Commerce Clause, the Ninth Circuit affirmed the STB's finding that state and local environmental review laws were preempted pursuant to § 10501(b)(2).

"The Fifth Circuit has also found preemption under 49 U.S.C. § 10501(b). In *Friberg*, 267 F.3d at 439, the Fifth Circuit ruled that suits against the railroad (KCS) for negligence [**109] were preempted by federal law under 49 U.S.C. § 10501(b). In that case, the plaintiffs, who operated a landscape nursery, alleged that they lost business and eventually were forced to close their business because their [***66] customers were required to endure long delays in getting to their nursery when the primary access road was blocked by waiting trains. Finding that "the language of

the statute could not be more precise, and it is beyond [*563] peradventure that regulation of KCS trains operations, as well as the construction and operation of the KCS side tracks, is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides otherwise," the Fifth Circuit in *Friberg* held that the plaintiffs' common claims of negligence were preempted by the ICCTA. 267 F.3d at 443-44.

"In the present case, it is manifestly clear that Congress intended to preempt the Ohio state statutes, and any claims arising therefrom, to the extent that they intrude upon the STB's exclusive jurisdiction over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, [*110] 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). Although Boardman Township claims that the purpose of the GSCSA was to comply with the requirements of the Ohio HN37 statutes, § 10501(b) has preemptive effect to the extent that these state statutes conflict with federal law. *Cipollone*, 505 U.S. at 516 (citing *Maryland v. Louisiana*, 451 U.S. 725, 746, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981)). n15

.....

Several courts have recognized the broad scope of the pre-emption of State jurisdiction over railroad facilities and operations due to the Board's jurisdiction under ICCTA. In Civil Action No. 1:97-CV-1018-RLV, *Norfolk Southern Railway Company, et al. v. City of Austell, Georgia, et al.*, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga., Aug. 19, 1997),³ the Court stated at sheets 16-17 of the slip opinion.

The local regulation, via a zoning ordinance and a land-use permitting

³See *CSX Transp., Inc. v. Georgia Public Service Com'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (Georgia) ["It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than Congress provided in 49 U.S.C. 10501(b)]; *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1294-95 (D. Mont. 1997) (the preemption provisions in ICCTA show an intent to occupy the entire field of regulation). n10

n10 See also *Georgia Pub. Serv. Comm'n v. CSX Transp. Inc.*, 481 S.E.2d 799, 801 (Ga. Ct. App. 1997); *In re Burlington N.R.R.*, 545 N.W.2d 749, 751 (Neb. 1996).

requirement, of the construction, development, and operation of an intermodal facility, a facility which is operated in order to transfer containers or trailers of cargo between trains and tractor-trailers so that the cargo may be shipped in interstate commerce, certainly appears to come within "regulation of rail transportation," which is explicitly preempted by section 10501(b)(2). [*17] n6 The plain meaning of this statutory preemption provision, and the language of the entire Act, support such a conclusion. Cf. CSX, 944 F. Supp. at 1581. "The most natural reading of section 10501(b)(2) is that the federal remedies provided by the [ICCTA] are the only remedies available as to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the [ICCTA] has expressly provided otherwise." *Id.*

The Board need not review the facts and interpret the contracts in this matter in any detail because neither the Board nor the State Court have the jurisdiction to use those facts as a basis for determining either that adverse abandonment of the subject track should be permitted or that a *de facto* abandonment has occurred. Nonetheless, NSR shall briefly point out key errors in the ODOT factual presentation, argument and conclusions to show that ODOT draws either erroneous conclusions such as that the State Court has jurisdiction to declare a railroad spur track abandoned from the facts or draws conclusions not supported by the facts presented, even though it is also clear that those conclusions are not determinative of the outcome of this matter under the applicable law.

ODOT's presentation concerning the apparent sale of a portion of the track to 84 Lumber is neither relevant to the jurisdictional question presented nor does it support ODOT's conclusion that NSR gave up its right to serve the remainder of the track because of any such sale or lease. In fact, the actual, final transaction, much less all of its terms, is not described or shown by any document in the record. A close reading of 84 Lumber's statement reveals that 84 Lumber makes no claim that NSR is precluded from serving the Michigan Sugars' facility over that portion of the track that NSR offered to sell to it and that

it rehabilitated to the extent required to receive rail service to its facility. Neither 84 Lumber's statement and attachments nor ODOT's presentation as a whole provide any deed, contract or agreement, or direct quotations from any such document, that show that NSR is precluded from using the 84 Lumber segment of the track to serve any customer located beyond that segment. Despite this lack of support in the record, ODOT comes to the erroneous conclusion that NSR is precluded from using the track to serve any shipper beyond 84 Lumber because NSR has supposedly surrendered its ability to access the track beyond 84 Lumber simply by selling the initial segment to 84 Lumber. However, there is no factual support for that conclusion, or even that the sale was concluded, in the record. Moreover, ODOT cites no applicable statute or legal precedent that supports the conclusion that a railroad could not serve another party over a track owned or leased by a third party as a matter of law because there is none to be cited. Thus, there is neither an inconsistency in, nor a legal barrier to, NSR selling or leasing a portion of the track to 84 Lumber and reserving or claiming a right to operate over that segment to reach a second shipper. Nothing in the record shows that NSR has surrendered the right to use the track for service to anyone other than 84 Lumber. That is the only point even arguably relevant for the purpose of this determination with respect to 84 Lumber's statement and attachments.

It is well known that railroads do not own in fee simple the real estate under all of their tracks. Sale of the underlying real estate, and even the track material, does not automatically result in the right to operate over the track being either abandoned or restricted, since the operating rights may be separated from the ownership of the real

estate and track material.⁴ Thus, NSR's operation over the track to serve any shipper that might begin operations at the Michigan Sugars facility beyond 84 Lumber cannot be precluded by the mere transfer of ownership of either the real estate under the tracks or the track material.

Moreover, the existence of a sign across the right-of-way that could be moved (if the track could not be) beyond the 84 Lumber facility, the paving over of a crossing or the need to rehabilitate about 800 feet of track which has no significant obstacles or structures to be taken into account or rehabilitated in order resume service to Michigan Sugar's industrial facility do not present insurmountable burdens or costs to resuming operations over the track if a rail customer with significant business were to require service over it. Certainly, as the precedent cited above indicates, even if a finding of *de facto* abandonment of the track could be made, the non-use of the track for some years and its need for repair do not constitute or result in a *de facto* abandonment of that track.⁵

⁴The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901, if the acquiring entity is a noncarrier, but the Board's authorization is not required, however, when the common carrier rights and obligations that attach to the line will not be transferred. See STB Finance Docket No. 33838, *Metro Regional Transit Authority -- Acquisition Exemption -- CSX Transportation, Inc.*, served October 10, 2003; STB Finance Docket No. 34258, *North Carolina State Ports Authority - Acquisition Exemption - North Carolina Ports Railway Commission*, served October 31, 2002; *Maine, DOT--ACQ. Exemption, ME Central R. Co.*, 8 I.C.C.2d 835 (1991).

⁵One of ODOT's principal arguments in the State Court case is that it has the right under a State law technicality to renege on its 1956 contract and highway easement that in fact recognizes the very railroad track easement that it argues has been abandoned or surrendered. This is hardly a basis for supporting a finding either permitting adverse abandonment or recognizing *de facto* abandonment, if there were a forum in which either

At the time this response is written, both NSR and Michigan Sugars believe and assert that the right to maintain and operate over this track still exists based on prior easements and contracts as well as the longstanding use of the track as well as its continued existence, regardless of its admittedly deteriorated condition. Michigan Sugars has been attempting to sell the industrial facility. It would be a rational business decision for NSR to maintain its ability to serve this facility until it is clear that it will not be sold to a business that might become a railroad customer, or until some agreement or arrangement is worked out with ODOT and Michigan Sugars that satisfies the parties' interests.

Since spur tracks and other excepted tracks are under the Board's jurisdiction, and the scheme established by the ICCTA is to permit the railroad to construct, operate or abandon such tracks within its managerial discretion, ODOT's attempt to distinguish cases that do not permit *de facto* abandonments by arguing that they were decided with respect to lines or railroad rather than spur tracks is unavailing. To the extent spur tracks can be subject to any type of licensing or regulatory proceeding, including indirect regulation that would prevent their use, there is no reason why legal principles or precedent applicable to regulation of lines of railroad would not apply to excepted track in cases where court or Board determinations are required.

ODOT's further effort to mix arguments and precedent applicable to adverse

such finding could be made. The more important point is that the 1956 agreement recognized the railroad easement that ODOT claims has been extinguished, in part based on acts or documents that occurred or were entered into prior to the 1956 agreement. Moreover, lack of reservation of a railroad easement in conveyances of property over which that easement has not been shown to run lends no support to ODOT's argument. Both of these points pad ODOT's argument, but provide no relevant factual basis or applicable legal basis for accepting its conclusions.

abandonment cases to support its argument that a *de facto* abandonment of this track has occurred, and the necessary corollary that the State Court is free to treat the property as if it were abandoned even though the railroad denies the track has been abandoned and no findings supporting adverse abandonment can be made by either the State Court or the Board, is similarly off point. The railroad is not attempting to use the Board processes to shield itself from the application of state law, it is attempting to protect its business interests in reaching customers, even prospective customers, through assertion of its right to make certain managerial decisions under the relevant provisions of the ICCTA. Whether the Board would reach a different decision if it could hear an adverse abandonment application with respect to this track does not change the application or interpretation of the statutory scheme that actually exists with respect to this type of track.

ODOT uses obsolete cases in which the Interstate Commerce Commission found that it would not exercise jurisdiction over lines that had been unlawfully abandoned rather than *de facto* abandoned, as well as more recent cases dealing with affirmative findings and decisions in contested adverse abandonment cases before the Board, to support its argument that the STB should recognize a *de facto* abandonment in this case and leave the parties "where they are." Neither type of case supports ODOT's conclusions. ODOT's theory of where the parties are, or would be, is that the Board would recognize a *de facto* abandonment of this track despite the railroad's assertion that it has not abandoned the track, or in the alternative that the Board would cede its abandonment jurisdiction to the State Court in order that the Court could do so. The Board cannot make such a finding, nor can the Board cede its plenary or exclusive jurisdiction over rail line abandonments,

which now encompasses excepted tracks, under more relevant and recent precedent, including the U. S. Supreme Court's decisions in *Preseault v. ICC*, 494 U.S. 1 (1990) and *C & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) and the changes in the Board's jurisdiction under ICCTA. The correct precedent and statement of the law can be found in recent cases such as STB Docket No. AB-433X, *Idaho Northern & Pacific Railroad Company -- Abandonment Exemption -- in Wallowa and Union Counties, OR*, served December 13, 2001, where the Board stated at pages 15-16 of the slip opinion:

However, Congress gave the Board exclusive and plenary authority over rail line abandonments, n14 and we have already approved the abandonment and salvage of this line subject to satisfaction of the four environmental conditions, the purposes of which have been met. n15 Moreover, court and agency precedent [*16] addressing the scope of 49 U.S.C. 10501(b) n16 have made it clear that, while not all state and local regulations that affect railroads are prohibited under this broad preemption regime, n17 zoning ordinances and local regulations cannot be used to veto or unreasonably restrict the railroad from conducting its operations or unreasonably burden interstate commerce. E.g., *Norfolk S. Ry. v. City of Austell*, No. 1:97-CV-1018-RLV, 1997 U.S. Dist. LEXIS 17236 at *17 n. 6 (N.D. Ga. Aug. 18, 1997); *Friends of the Aquifer et al. - Declaratory Order*, STB Finance Docket No. 33966, slip op. at 4-5 (STB served Aug. 15, 2001). n14 E.g., *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-21 (1981).

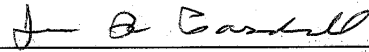
The statutory scheme may inconvenience or frustrate ODOT in this case. However, it is clear that the abandonment of excepted tracks is a matter that Congress has left to the managerial discretion of the railroads. This is a sensible way to reduce regulatory burdens on the railroads while allowing them to protect their franchises and ability to serve their customers (a public use), on the one hand, and permitting them to exit from situations in which their assets are not being used and to redeploy them to more productive uses, on the other. ODOT's efforts to squeeze this case into theories that do not apply and to persuade the Board to permit the State Court directly or indirectly to force the railroad to

abandon its right to serve the Michigan Sugars facility, are clearly contrary to the statute and previous applicable precedent, and should be rejected by the Board.

The Board should declare that the State Court jurisdiction to determine directly or indirectly that the railroad has, or must, abandon the subject track is pre-empted by the exclusive jurisdiction of the Board under the ICCTA. Moreover, the remedies prescribed in the ICCTA are also exclusive. If ODOT has no effective remedy under the ICCTA in the absence of a negotiated settlement in this case, it is because that is the correct interpretation of the statutory scheme established by Congress as already interpreted by several court and Board decisions.

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY

By 
James R. Paschall
General Attorney
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3 Commercial Place
Norfolk, VA 23510

Dated: November 5, 2003

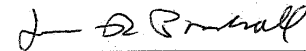
CERTIFICATE OF SERVICE

I hereby certify that I this day have served a copy of the foregoing Motion to Hold Proceeding in Abeyance and Response to Petition for Declaratory Order Filed by the Ohio Department of Transportation of Norfolk Southern Railway Company upon counsel for the Ohio Department of Transportation by mailing a copy by Federal Express delivery to:

Michael Stokes
Senior Assistant Attorney General
Office of the Attorney General
One SeaGate (#2150)
Toledo, OH 43604-1551

Fritz R. Kahn
Fritz R. Kahn P.C.
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Washington, D. C. 20036-4152

Dated at Norfolk, Virginia, November 5, 2003.


James R. Paschall



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November 5, 2003

Roger L. Miller, Esq.
Betts, Miller & Russo
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Findlay, Ohio 45840

Re: *Proctor v. Michigan Sugar Company, et al.*, Hancock County
Common Pleas Case No. 2002-CV-472 and ODOT Petition for Declaratory Order,
STB Finance Docket No. 34415

Dear Roger:

Further to your letter this morning, ODOT agrees to a two-week extension of the time in which Norfolk Southern may reply to ODOT's Petition for Declaratory Order.

I look forward to receiving Norfolk Southern's settlement proposal soon.

If you have any questions, please call me at (419) 245-2550.

Sincerely,

Michael L. Stokes
Senior Assistant Attorney General
Toledo Regional Office

cc: Fritz R. Kahn, Esq.

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