

Adverse Abandonment: Toward Allowing the States to Condemn or Dispose of Unneeded Railroad Land

Michael L. Stokes*

Tall weeds grow over a rusting railroad. Trees have sprung up through the rotting ties, and in places the rails hang in the air, suspended over gullies where rain has washed out the ballast. A quarter-mile away, an old highway bridge, built when the railroad was still active, needs to be replaced. To replace the bridge would cost millions. The state highway department wants to remove it and pave over the old rail line. Can they do it? Surprisingly, the answer may be no. This article will explain why and discuss what can be done about it.

I. SOME ILLUSTRATIONS OF THE PROBLEM

It is a well-known fact that the nation's bridges are wearing out. Highway bridges built in the 1950s and 60s are nearing the end of their useful life. According to the Federal Highway Administration, as of 1998, nearly thirty percent of the nation's 582,976 rural and urban bridges were classified as deficient.¹ Of those, sixteen percent (93,072 bridges) were

* J.D., Ohio State University (1995); M.A., Industrial Relations, Wayne State University (1983); B.A., Economics and Political Science, University of Michigan - Dearborn (1981). Mr. Stokes is an attorney practicing in Toledo, Ohio.

1. Tom Ichniowski, *DOT Says Funding Hikes Raised Quality of Roads and Bridges*, ENGINEERING NEWS-REC., June 12, 2000, at 16.

considered to be structurally deficient.²

The decline in America's railroad mileage is also well-known. In 1960, large railroads owned over 207,000 miles of trackage in the United States.³ By 2000, however, system mileage decreased to less than half that amount, meaning that over 100,000 miles of Class I railroad had been abandoned.⁴ And this figure does not include local spur or industrial track mileage.

Considered together, these two well-documented trends indicate a third: a significant number of the bridges that need replacement pass over unused rail lines. News reports suggest this scenario is not uncommon.⁵ In some cases, highway officials remove the bridge, fill the old railroad right-of-way, and rebuild the road at grade.⁶ In others, they replace the bridge – to the consternation of local residents, who ask questions like “why spend almost \$4 million for a bridge over a railroad that has not been used in years?”⁷

Why, indeed? Two road projects, one in Wisconsin and the other in Missouri, illustrate the issues involved.

A. THE WISCONSIN TWO-STEP

The Wisconsin project, a ten mile, \$66-million-dollar major arterial highway called the Tri-County Freeway, had been planned for twenty-five

2. FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, 1999 STATUS OF THE NATION'S HIGHWAYS, BRIDGES, AND TRANSIT: CONDITIONS & PERFORMANCE REPORT, Exhibit 3-25: Rural and Urban Bridge Deficiencies 1992-1998, available at http://www.fhwa.dot.gov/policy/1999cpr/ch_03/cpg03_25.htm (last visited Oct. 19, 2004).

3. BUREAU OF TRANSPORTATION STATISTICS, U.S. DEP'T OF TRANSPORTATION, NATIONAL TRANSPORTATION STATISTICS (2002) 3, available at http://www.bts.gov/publications/national_transportation_statistics/2002/pdf/entire.pdf.

4. *Id.*

5. See, e.g., *Bridge Project To Be Discussed*, SOUTH BEND TRIB., July 22, 1999, at E3 (proposed removal of U.S. 31 bridge over abandoned railroad); *Road Projects To Total \$248 Million Carbon To Receive \$16.1 Million; Schuylkill Will Get \$54.7 Million*, THE ALLENTOWN MORNING CALL, Nov. 29, 1996, at B3 (bridge over abandoned railroad to be removed for \$295,000); Bill Moss, *State Bridges Crumble As Budget Levels Tumble*, ST. PETERSBURG TIMES, Oct. 29, 1989, at 1B (U.S. Highway 301 bridge over abandoned railroad tracks structurally deficient).

6. See, e.g., Press Release, Danny Morgan, Oklahoma State Representative, State Contract Awarded to Remove Highway Bridge Over Abandoned Railroad in Lincoln County (April 7, 2003), at <http://www.lsb.state.ok.us/house/news6201.htm> (describing removal of bridge and regrading to highway level); George W. Davis, *Stark Bids for Improvement Funds*, AKRON BEACON J., Nov. 29, 1998, at E1 (\$325,415 needed to remove bridge over abandoned railroad line and fill to reconnect the highway).

7. See Arthur H. Gunther, *The Column Rule*, THE J. NEWS (Westchester County, NY), Jan. 16, 2001, at 4B. Mr. Gunther went on to observe that “no one thought about replacing the Western Highway bridge over the same Piermont branch right of way in the 1980s. The hole was simply filled in.” *Id.*

years.⁸ In the late 1980s, the Wisconsin Department of Transportation (“WisDOT”) was finally ready to build it.⁹

The planned highway intersected a little-used stretch of railroad over which a solitary shipper received twelve to fifteen rail cars a year.¹⁰ Putting a bridge over the tracks would have cost \$2.65 million, and an at-grade crossing would have been unsafe, so WisDOT asked the Interstate Commerce Commission for permission to sever the rail line.¹¹ But, the ICC declined.¹²

The Commission recognized the state’s strong public interest in cutting the rail line, but said “we do not simply weigh the dollars to be expended in building an overpass against the dollars of revenue . . . lost by [the railroad], or the increased costs experienced by shippers who lose rail service.”¹³ Instead, the Commission said, it based its decision on the national rail transportation policy, which would be defeated if the railroad were forced to abandon trackage that was still in use and had some potential for increased future traffic.¹⁴

But that was not the end of the story. Now bargaining from a very strong position, the railroad reached an agreement with WisDOT for removal of the track and petitioned the ICC to abandon the line.¹⁵ Granting the petition over the shipper’s opposition, the Commission explained that: “It is one thing to force an abandonment over the opposition of the carrier providing the service on the line: it is quite another to authorize an abandonment when the carrier which must provide the service and incur the costs supports the action.”¹⁶

B. THE “SHOW-ME STATE” SHOW-STOPPER

The rail line affected by the Wisconsin project was seldom used, but at least it was still in service. Not so in Raytown, Missouri, where an old Union Pacific line laid unused and neglected for more than a decade before the city ripped part of it up in 1994 to realign a street.¹⁷

At first, things seemed to go well for the city. The railroad sued in

8. Wisconsin Dep’t of Transp. – Abandonment Exemption, Finance Docket No. 31303, 1988 WL 225048, at *1 (Apr. 24, 1998).

9. *Id.*

10. *Id.* at *2.

11. *Id.* at *1.

12. *Id.* at *6.

13. *Id.* at *5.

14. *Id.*

15. Wisconsin Cent. Ltd. –Abandonment Exemption, No. AB-303 (Sub-No. 2X), 1990 WL 287427, at *1 (Feb. 22, 1990).

16. *Id.* at *4.

17. St. Louis S.W. Ry. Co. v. City of Raytown, No. 94-055-CV-W-6, 1994 WL 22466, at *1 (W.D. Mo. Jan. 25, 1994).

federal court to enjoin the road project, arguing that the ICC had exclusive jurisdiction over the old line, but the federal court disagreed.¹⁸ Noting that the state transportation department had reserved the right to order construction of an overpass if the railroad became active again, the court allowed the city to proceed with the project, stating:

The possibility of renewed railroad service by the Union Pacific is so speculative that it hardly merits consideration as a factor favoring a preliminary injunction against further work on the new road. Plaintiff makes no claim that it might assume the cost of refurbishing and reactivating the railroad line, and that possibility may be treated as nonexistent.¹⁹

Significantly, however, even though the line had not been used since 1979, the ICC had never authorized its abandonment.²⁰ So when a rail carrier sought to reactivate the line in 1997 it needed no regulatory approval to do so, despite strong opposition from communities affected by the resumption of train traffic over a line that had been dormant for nearly twenty years.²¹

The line's unforeseen reactivation also meant that Missouri, at considerable expense, had to replace the bridges that it had removed for its highway projects.²²

C. CALL BEFORE YOU DIG

These two examples seem to say that if a line of rail is in the way of a highway project, local transportation officials had better be prepared to build a costly overpass, settle for an undesirable at-grade crossing, or negotiate with a railroad that holds all the trump cards. Up to a point that is true, because national rail transportation policy is tilted in favor of maintaining economically viable rail service, and federal law generally preempts state condemnation of a rail line.²³

But if a line is not viable, the ICC and its successor, the Surface Transportation Board ("STB"), will not allow the railroad to use exclu-

18. *Id.* at *1, *3.

19. *Id.* at *2.

20. *See Lee's Summit v. Surface Transp. Bd.*, 231 F.3d 39, 42 (D.C. Cir. 2000).

21. *Id.*

22. *See Missouri Cent. R.R. Co. – Acquisition & Operation Exemption*, Finance Docket No. 33508, 1998 WL 211757, at *8 (Apr. 28, 1998); Russ Pulley, *Task Force Calls For Appeal On Rail Line*, KAN. CITY STAR, Dec. 6, 2000, at 6. Four years earlier, when denying to enjoin the road project, the federal court noted that "the remotely possible cost of bridging the new road is troubling [so if] . . . reinstatement of railroad service is contemplated . . . a deepening of the planned roadway may ultimately save a lot of money." *St. Louis S.W. Ry. Co.*, 1994 WL 22466, at *2 n.4.

23. *See, e.g., Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1015 (W.D. Wis. 2000); *cf. City of Lincoln –Petition for Declaratory Order*, Finance Docket No. 34425, 2004 WL 1802302, at *2-*3 (Aug. 11, 2004).

sive federal jurisdiction as leverage to block condemnation and extract unfair concessions from local officials. As the Commission explained in its 1981 decision in *Modern Handcraft*:

The function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance . . . of available rail service. We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce. [When] . . . there have been no rail operations for over 12 years and no attempt to provide rail service, we can find no public benefit in preventing a State condemnation proceeding.²⁴

Modern Handcraft established the principle that, under appropriate circumstances, the ICC (and STB) may withdraw federal jurisdiction and clear the way for a state law condemnation or quiet title action to dispose of a rail line.²⁵ This article will consider the legal principles underlying *Modern Handcraft*; review recent STB decisions showing what circumstances justify abandonment; and discuss an apparent gap in the Board's authority to withdraw its jurisdiction over intrastate spur or industrial tracks. Finally, the article will suggest some ways to streamline the process for letting state courts determine how to dispose of railroad right-of-way that is no longer needed in the national rail transportation system.²⁶

II. MODERN HANDCRAFT AND THE PRINCIPLE OF "ADVERSE ABANDONMENT"

A railroad, as a common carrier, has an obligation under federal law to provide service on a rail line it is authorized to operate.²⁷ At the same time, however, the railroad has a federal right to remain on that line, a right that only the STB can terminate.²⁸ And if the carrier wants to be relieved of its obligation to provide service, for example, over an unprofitable line, it must first get abandonment authorization from the STB.²⁹

24. *Modern Handcraft, Inc. – Abandonment*, 363 I.C.C. 969, 972 (1981).

25. See, e.g., *Maine Central R.R. Co. – Abandonment Exemption*, No. AB-83 (Sub-No. 16X), 2000 STB LEXIS 532, at *15 (Sept. 14, 2000).

26. The article's focus is on making unused railroad property available for public projects. But many of the issues discussed are also relevant to private landowners seeking to have a state court quiet title to an apparently abandoned railroad easement.

27. See, e.g., *CSX Transp. Inc. – Discontinuance*, Finance Docket No. 34236, 2003 WL 21108203, at *1-*2 (May 9, 2003).

28. See *id.* at *5.

29. See *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 313 (1981). An "abandonment" is a permanent or indefinite cessation of service on the line. An "embargo," by contrast, is a temporary, emergency suspension of service. *Id.* at 314 n.2. For a good general review of the subject, see Stephen R. Wild, *A History of Railroad Abandonments*, 23 TRANSP. L.J. 1 (1995).

If there are shippers on the line, they can object to the abandonment, subsidize the line to allow its continued operation, or buy it outright.³⁰ However, if there is no affected shipper to complain about lack of service, the railroad might not apply for abandonment authority. Instead, it might just let the line lay fallow, use the land for other purposes, and meanwhile enjoy the benefit of its federally-protected legal occupancy.³¹

A similar situation gave rise to the ICC's *Modern Handcraft* decision. Before 1957, the Kansas City & Westport Belt Railway Co. operated a rail line running about eight miles from central Kansas City to the southwestern part of the county.³² The railway contracted the line's operation to a local company in 1957, and in 1962 it sold the line to that company, which became known as the Kansas City Public Service Freight Operation.³³ The demand for freight service, however, was "in a steady decline, and, in September 1968, the trains ceased to run."³⁴ Afterward, the railroad quit maintaining the track, made no serious effort to solicit rail customers, and began to use the land "for parking lot and billboard purposes . . . totally unrelated to [its] obligation to perform rail service."³⁵

A few years later, the Kansas City Area Transportation District tried to condemn the defunct line for part of its mass transit system.³⁶ The Missouri Supreme Court agreed that there had

been a de facto abandonment of all railroad service . . . and that no resumption . . . is anticipated in the foreseeable future."³⁷ But it dismissed the condemnation suit, holding that the track remained under the ICC's jurisdiction and that "the legal abandonment of [the] line of track . . . can only be accomplished by order of the ICC."³⁸

The transportation authority, and a competing private landowner seeking to enforce its reversionary rights in the land, then asked the ICC

30. See *Chicago & N.W. Transp. Co.*, 450 U.S. at 322-23; see also *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 622 (1984).

31. Whether an unused rail corridor should remain as a unitary right-of-way, or whether the rail easement should be extinguished and the property revert to the adjacent landowners, has been the subject of much lawmaking and litigation. See, e.g., *Nat'l Assoc. of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135, 136 (D.C. Cir. 1998); *Preseault v. United States*, 100 F.3d 1525, 1525 (Fed. Cir. 1996).

32. See *Kansas City Area Transp. Authority v. Ashley*, 555 S.W.2d 9, 10 (Mo. 1977).

33. *Id.*, see also *Kansas City Public Service Freight Operation – Exemption*, 7 I.C.C.2d 216, 218 (1990).

34. *Kansas City Public Service Freight Operation – Exemption*, 7 I.C.C.2d at 218.

35. *Modern Handcraft, Inc. – Abandonment*, 363 I.C.C. at 971.

36. *Kansas City Area Transp. Authority*, 555 S.W.2d at 9.

37. *Id.* at 10.

38. *Id.* at 10-11. In parting, the court expressed its confidence that the ICC would not "allow this . . . railroad to persist in a non-service (embargoed) status and continue to exist under the facade of an operating railroad merely to keep a right-of-way easement in a metropolitan area out of public use . . ." *Id.* at 11.

for a ruling on the status of the rail line.³⁹ Noting that “a rail line abandonment . . . sought by noncarrier applicants and opposed by the rail carrier” was “uncommon [but] not unique,” the Commission found that both parties had a sufficient interest in the line’s disposition to seek a ruling that the public convenience and necessity authorized abandonment of the rail line.⁴⁰

Turning to the merits, the ICC agreed that a *de facto* abandonment of the line had taken place, noting that “[n]o rail service or recognizable rail track maintenance has taken place since September of 1968. Nor has there been any serious effort on the part of [the railroad] to solicit traffic or reinstitute rail service.”⁴¹ Significantly, too, no shipper objected to the abandonment.⁴² Under the circumstances, the ICC concluded there was no need for the rail service that the railroad had been authorized to perform and granted the petition.⁴³

Abandonments, however, are permissive. Even after the abandonment application was granted, the railroad still could have chosen not to surrender its common carrier status and obligations.⁴⁴ To close that loophole, the ICC explained that the “certificate of abandonment is evidence in any court proceeding that the line is not required by the public for rail operations.”⁴⁵ Therefore, even if the railroad did not exercise the abandonment authority granted, the Commission emphasized that “our jurisdiction should not be seen as an impediment to the disposition of the property” by a Missouri court.⁴⁶

Ironically, further litigation in the Missouri courts proved to be disastrous for the transportation authority. A state appeals court concluded that much of the railroad right-of-way had been abandoned and had reverted to the adjoining landowners, so the authority was unable to buy the intact rail corridor from the railroad.⁴⁷ And, when the authority (and the railroad) went back to the ICC to try to preserve the corridor by having a trail use condition imposed on it, the Commission held that its jurisdiction “could not have survived” the state court quiet-title case.⁴⁸

39. *Modern Handcraft, Inc. – Abandonment*, 363 I.C.C. at 969-70.

40. *Id.* at 971.

41. *Id.*

42. *Id.*

43. *Id.* at 972-74.

44. *Modern Handcraft, Inc. – Abandonment*, 363 I.C.C. at 972.

45. *Id.*

46. *Id.*

47. *Kansas City Area Transp. Auth. v. 4550 Main Assocs., Inc.*, 742 S.W.2d 182, 191 (Mo. Ct. App. 1986).

48. *Kansas City Public Service Freight Operation – Exemption*, 7 I.C.C.2d at 225. The Authority and the railroad argued that the procedural steps they took before the ICC’s abandonment authority became effective prevented the right-of-way from reverting to the landowners. The ICC decided this argument was moot because “(1) since *Modern Handcraft* we have in-

Nonetheless, the *Modern Handcraft* decision firmly established that the ICC would not allow a railroad to use its exclusive jurisdiction to maintain control over an unused rail line if the railroad was not making serious efforts to put the line back in service.⁴⁹ Instead, the Commission showed that it would consider an “adverse abandonment” application from an interested party and, if warranted, step back to allow “the legitimate processes of State law” to dispose of the property.⁵⁰ For as the Supreme Court explained soon afterward, once the ICC withdraws its jurisdiction, a rail line becomes “ordinary real property” subject to state law.⁵¹

III. HAYFIELD NORTHERN AND STATE AUTHORITY OVER ABANDONED RAIL PROPERTY

To address public concern with abandonment-related rail service interruptions, in 1980 Congress amended the Interstate Commerce Act to provide a procedure for shippers to buy rail lines or subsidize their operation.⁵²

If the ICC found that abandonment was appropriate it would publish notice in the Federal Register.⁵³ Thereafter, a shipper, or other person, could offer to buy or subsidize the line, and if the parties could not agree on terms, the ICC would set the price.⁵⁴ If the offeror was willing to pay that amount, the line would remain in service; if not, it could withdraw its offer and the abandonment would go forward.⁵⁵

In 1981, the Chicago & North Western Transportation Co. applied to abandon forty-four miles of trackage, including a nineteen mile segment that went through Hayfield, Minnesota.⁵⁶ Several shippers objected to the abandonment of the Hayfield segment, but they could not agree with the railroad on a subsidy amount.⁵⁷ The ICC established an appropriate subsidy, but the shippers disagreed with it and withdrew their offer.⁵⁸ Soon afterward, the ICC granted a certificate of abandonment to the railroad, “thereby relieving [it] of its federal obligation to supply rail service”

tended that ICC jurisdiction no longer preclude state action on the ROW, and (2) . . . the state court resolved the title issues before it in accordance with state law.” *Id.* (citations omitted).

49. *Modern Handcraft, Inc. – Abandonment*, 363 I.C.C. at 972.

50. *Id.* at 971-72.

51. *Hayfield N. R.R. Co.*, 467 U.S. at 633-39.

52. *Id.* at 629.

53. *Id.*

54. *Id.* at 630.

55. *Hayfield N. R.R. Co.*, 467 U.S. at 630.

56. *Id.* at 625.

57. *Id.* at 625-26.

58. *Id.* at 626.

along the 44 miles of track.⁵⁹

In response, some of the shippers formed their own railroad, the Hayfield Northern, and sued in state court, using Minnesota eminent domain law to condemn the abandoned Hayfield segment so they could put it back into service.⁶⁰ The railroad asked a federal court to intervene saying that it had plans to salvage the abandoned track to rehabilitate other active lines and arguing that the federal procedure for subsidizing and abandoning rail lines preempted state law.⁶¹

The federal trial and appeals courts agreed with the railroad.⁶² Focusing on the detailed, comprehensive nature of the federal scheme regulating abandonments, the appeals court decided that federal law would be frustrated if Hayfield Northern could use state condemnation law to acquire the line.⁶³ As the appeals court saw it, allowing the condemnation would burden the railroad with drawn-out legal proceedings and allow Hayfield Northern to circumvent the ICC's determination of value.⁶⁴ Distinguishing *Modern Handcraft*, the court noted that it involved state condemnation of an abandoned rail line for "non-rail 'public purposes'" rather than continued rail service.⁶⁵

The Supreme Court unanimously reversed the appeals court's decision.⁶⁶ First, the Court noted, there was nothing in the statute to indicate that "Congress intended to pre-empt state authority over rail property after the Commission has authorized its abandonment."⁶⁷

Second, federal law on the subject did not occupy the field so fully as to leave no room for state condemnation of an abandoned rail line.⁶⁸ Applying its test for field preemption, the Court said:

In this case, Congress has not "unmistakably ordained" that the States may not exercise their traditional power of eminent domain over railroad property that has been abandoned; nothing in the Act expressly refers to federal pre-emption with respect to the disposition of abandoned railroad property. Nor is there any indication that the subject matter at issue here – abandoned railroad property – is of the sort that "permits no other conclusion" but that it is governed by federal and not state regulation. After all, state law normally governs the condemnation of ordinary real property.⁶⁹

59. *Id.*

60. *Hayfield N. R.R. Co.*, 467 U.S. at 626.

61. *Id.*

62. *Id.* at 627.

63. *Id.*

64. *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 693 F.2d 819, 823 (8th Cir. 1982).

65. *Id.*

66. *Hayfield N. R.R. Co.*, 467 U.S. at 624-25.

67. *Id.* at 628.

68. *Id.* at 632.

69. *Id.*

The railroad maintained that the line did not become “ordinary real property” after abandonment, arguing that even then the line remained under the ICC’s jurisdiction.⁷⁰ However, the Supreme Court disagreed, holding that “unless the Commission attaches postabandonment conditions to a certificate of abandonment, the Commission’s authorization of an abandonment brings its regulatory mission to an end.”⁷¹ Citing several decisions, including *Modern Handcraft*, the Court held that the ICC could withdraw its jurisdiction and allow state law to operate:

According to the Commission, “the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission’s jurisdiction, and within a State’s reserved jurisdiction. Questions of title to, and disposition of, the property are matters subject to State law.”⁷²

Finally, the Court found there was no conflict preemption, either.⁷³ The expedited process for handling an offer to buy or subsidize a rail line, according to the Court,

was intended to abbreviate the period during which a carrier is obligated to furnish financially burdensome service it seeks to escape through abandonment. State condemnation proceedings do not interfere with that purpose insofar as such proceedings *follow* abandonment. After the Commission has authorized a carrier to abandon its lines, that carrier is relieved of its obligation to furnish rail service. Nothing in [the federal law] indicates a federal interest in affording special protection to a carrier after that point at which the carrier’s federal obligation ends.⁷⁴

In its *Hayfield Northern* decision, the Supreme Court fully supported the principle that, once the ICC has decided a line can be abandoned, state law can govern its disposition.⁷⁵ In so doing it avoided a problem highlighted by the Solicitor General, namely, the creation of “a no-man’s land in which abandoned rail lines may not be regulated by the ICC or condemned by the state.”⁷⁶ And, as the following years would show, the

70. *Id.*

71. *Id.* at 633.

72. *Id.* at 634 (quoting *Abandonment of R.R. Lines & Discontinuance of Service*, 365 I.C.C. 249, 261 (1981)).

73. *Hayfield N. R.R. Co.*, 467 U.S. at 635.

74. *Id.*

75. *Id.* at 632-34.

76. Brief of Amicus Curiae United States at 9, *Hayfield N. R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984) (No. 82-1579), *reprinted at* <http://www.usdoj.gov/osg/briefs/1983/sg830148.txt> (last visited Oct. 14, 2004). The brief went on to note that the appeals court’s opinion gave “no guidance on . . . the length of time following abandonment that state condemnation is preempted or whether . . . a change of circumstances would enable the state to exercise its condemnation power.” *Id.* at 17. In the Solicitor General’s view, “To create a special class of property thus exempt from normal processes of government regulation [would be] unwise and unwarranted.” *Id.* at 9.

states would regularly need to use their eminent domain powers to oust railroads from unused rail lines.

IV. THE DEVELOPING LAW OF ADVERSE ABANDONMENT

Throughout the past two decades, government agencies and private landowners continued to file “*Modern Handcraft* adverse abandonment applications” with the ICC and its successor agency, the Surface Transportation Board.⁷⁷ Once considered “an unusual practice,”⁷⁸ the Board now hears several applications each year.⁷⁹ While its decisions are grounded in the facts and circumstances of each case, some general observations can be made.

First, the standard for a third-party “adverse abandonment” is the same as for an abandonment application filed by a railroad: namely, the moving party has the burden of showing “that the public convenience and necessity require or permit abandonment.”⁸⁰ In essence, the STB will decide whether it is in the public interest to remove the line from the national rail transportation network and terminate the incumbent railroad’s common-carrier obligation to serve existing or future shippers along the line.

If the rail line has been out of use for many years and fallen into disrepair, that evidence would support a Board decision to allow abandonment. But again, the question is one of federal rail transportation policy, not state property law.⁸¹ So even if the facts indicate that a given rail easement was “abandoned” under state law, the property cannot be condemned or sold for other uses unless and until the Board decides that abandonment is appropriate.⁸²

The “public convenience and necessity” standard, moreover, is one that is weighted in favor of rail transportation. So even though condemnation of a rickety, seldom-used rail line might save millions of dollars in highway construction costs, the STB will decide the issue in accordance

77. Los Angeles County Transp. Commission – Abandonment, No. AB-12 (Sub-No. 129-133), 1990 WL 288460, at *1 (Oct. 26, 1990); *see also* Massachusetts Bay Transp. Authority – Exemption, Finance Docket No. 31269, 1990 MCC LEXIS 131, at *4 (Aug. 22, 1990) (“MBTA may file a formal application for abandonment by Boston & Maine under section 10903 pursuant to this agency’s *Modern Handcraft* precedent for the filing of adverse abandonments and discontinuances.”).

78. *Consol. Rail Corp. v. I.C.C.*, 29 F.3d 706, 708 (D.C. Cir. 1994).

79. From 2001 to 2004, the Board normally had four to five adverse abandonment cases on its docket at any given time.

80. *Chelsea Property Owners – Abandonment*, 8 I.C.C.2d 773, 1992 ICC LEXIS 192, at *10 (Aug. 28, 1992).

81. *See, e.g., Phillips Co. v. Denver & Rio Grande W. R.R. Co.*, 97 F.3d 1375, 1377 (10th Cir. 1996).

82. *Id.*

with its view of what will best serve the national *rail* transportation policy.⁸³

Second, if the rail line is used *at all*, odds are the STB will deny an adverse abandonment petition.⁸⁴ In the one instance, which was later reversed on appeal, where the Board did allow adverse abandonment, the moving party was a government that already owned the property in question and wanted to devote it to other public uses.⁸⁵ Even if the local authority seeks only to narrow the right-of-way, it must convince the Board that the taking will not interfere with the railroad's operations.⁸⁶ And, even though sparse rail traffic may mean the carrier is operating the line at a loss, if it wants to continue operating, the Board will allow it to do so.⁸⁷

Third, if the line is not in service, the Board will look at its potential for future rail traffic. If the rail carrier is making efforts to solicit traffic, and there appears to be "a real potential for reactivation of service," an adverse abandonment petition will probably be denied.⁸⁸ Conversely, if

83. See Wisconsin Dep't of Transp. – Abandonment Exemption, 1988 WL 225048, at *11-13. See also *New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1183-84 (D.C. Cir. 2004) (noting that the public agency's intended use for the rail property is only one of the factors to be weighed in deciding an adverse abandonment application).

84. See, e.g., *Salt Lake City Corp. – Adverse Abandonment*, No. AB-33 (Sub-No. 183), 2002 STB LEXIS 150, at *17, *20-21 (Mar. 6, 2002).

85. See *New York City Econ. Dev. Corp. – Adverse Abandonment*, No. AB-596, 2003 STB LEXIS 240, *14-17 (May 9, 2003). In July 2004 the appeals court reversed and remanded this decision for several reasons, including the Board's failure to distinguish its "earlier – and uniform – adverse abandonment precedent" denying abandonment whenever the railroad was operating the line. See *New York Cross Harbor R.R.*, 374 F.3d at 1183. The railroad occupies several acres of city-owned waterfront property in Brooklyn and handles about five carloads of traffic a day. A virtual tour of its antiquated facilities is available on the internet. See *N.Y. Cross Harbor Railroad Virtual Tour*, at <http://www.oldnyc.com> (last visited Oct. 18, 2004).

86. In a recent example, the STB denied a city's petition for a declaratory order allowing it to condemn a twenty foot-wide strip of railroad right-of-way over five city blocks for a bicycle trail. See *City of Lincoln – Petition for Declaratory Order*, 2004 STB LEXIS 508, *12-13, *appeal docketed*, No. 04-3453 (8th Cir. Oct. 8, 2004). The Board reasoned that the partial-width taking would be preempted unless the city could prove that it would not "unduly interfere with railroad operations." *Id.* at *7. "Undue interference" sounds like an easy standard to meet, but it is not. The railroad's photos of freight operations in the proposed bike-path area (which the city said were staged) and its articulated safety concerns and inchoate plans to build new facilities there easily trumped the city's "extraordinary request to allow a taking of actively used railroad property." *Id.* at *12-13. The *City of Lincoln* decision suggests that, unless the public agency can show that the railroad can avoid the interference easily and at no cost, it will be considered "undue." *Id.*

87. See, e.g., *Western Stock Show Association – Abandonment Exemption*, 1 S.T.B. 113, 134 (1996).

88. See, e.g., *City of Colorado Springs & Metex Metro. Dist. – Petition for Declaratory Order*, Finance Docket No. 31271, 1989 ICC LEXIS 78, at *14-15 (Mar. 22, 1989). See also *Yakima Interurban Lines Association – Adverse Abandonment*, No. AB-600, 2004 STB LEXIS 741, at *2, *11-13 (Nov. 18, 2004) (line was out of service for seven years due to poor track

the evidence indicates that future rail use is not realistic or economically viable, the Board may grant the petition to allow condemnation for other public purposes.⁸⁹ The presence or absence of potential shippers, the railroad's efforts to try to attract them, and cost of rehabilitating the line to make it usable all are factors that bear on this decision.

However, while the table is tilted in favor of rail service, that does not mean that the railroad can act arbitrarily. For example, if parts of an operating rail line need to be condemned for some other public project and the public authority has a realistic plan for relocating it without interrupting rail service, the Board will allow the authority to proceed.⁹⁰ Similarly, if a local public authority seeks to condemn part of a line to build an at-grade road crossing, the Board will not allow the railroad to use federal jurisdiction to bar the action.⁹¹

V. ADVERSE ABANDONMENT OF RAIL SPURS

As we have seen, the STB will not allow abandonment and subsequent condemnation of a rail line that has a reasonable chance of becoming economically viable.⁹² It will also not allow a railroad to use its exclusive jurisdiction as leverage in disposing of a line that is unlikely to see sustainable rail traffic.⁹³ For interstate rail lines, this principle was unaffected by the 1995 enactment of the Interstate Commerce Commission Termination Act ("ICCTA").⁹⁴ For some intrastate tracks, however,

conditions, but adverse abandonment denied because shippers wanted resumed service and local government would help pay to restore the line).

89. See, e.g., *Chelsea Property Owners – Abandonment*, 8 I.C.C.2d 773, 1992 ICC LEXIS 192, at *36-*37 (Aug. 28, 1992). When appropriate, the Board has adopted a wait-and-see position, allowing rail redevelopment to proceed but signaling it may reopen proceedings (and perhaps allow local government condemnation) if rail operations do not resume. See *City of Riverview v. Surface Transp. Bd.*, 2005 U.S. App. LEXIS 2159, at *9 (6th Cir. Feb. 10, 2005).

90. See, e.g., *Napa Valley Wine Train, Inc. – Adverse Abandonment*, No. AB-582, 2001 STB LEXIS 609, at *1 (July 9, 2001); *State of Texas, Dep't of Transp. – Petition for Declaratory Order*, Finance Docket No. 32589, 1995 ICC LEXIS 14, at *5-*6 (Feb. 1, 1995).

91. See *Maumee & W. R.R. Corp. & RMW Ventures, LLC – Petition for Declaratory Order*, Finance Docket No. 34354, 2004 STB LEXIS 140, at *3 (Mar. 2, 2004). The STB decided that "routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as they would not impede rail operations or pose undue safety risks." *Id.* at *5. The Board also felt that a state or federal court could decide what effect the crossing would have on rail operations. *Id.*

92. See *City of Colorado Springs & Metex Metro. Dist. – Petition for Declaratory Order*, 1989 ICC LEXIS 78, at *5 (holding that there was some potential for future rail traffic, even though the city argued that the railroad was merely "attempting to thwart necessary governmental efforts to exercise eminent domain powers merely to obtain a higher price for this property.").

93. See *Modern Handcraft, Inc. – Abandonment*, 363 I.C.C. at 971 ("The only objection to abandonment comes from the carrier itself, whose principal interest appears to be the price and terms for the sale of the right-of-way.").

94. See, e.g., *Maine Central R.R. Co. – Abandonment Exemption*, 2000 STB LEXIS 532, at

the answer might be different.

For the first time, ICCTA brought all rail trackage, including spurs, industrial tracks, and other types of ancillary track⁹⁵ formerly regulated by the states,⁹⁶ within the exclusive jurisdiction of the Surface Transportation Board.⁹⁷ But ICCTA specifically excluded the construction and abandonment of spur track from the Board's regulatory authority.⁹⁸

This dichotomy poses a significant question: if the Board cannot regulate abandonment of a spur, can it grant an adverse abandonment petition to withdraw its jurisdiction and allow a state to condemn the track? Or, as the railroads argue, is the abandonment of spur track a matter for their discretion alone? The answer is important, because highway bridges that need replacement sometimes cross over long-disused spur tracks.⁹⁹ If the STB cannot withdraw its jurisdiction over the spur, then the state cannot condemn it, giving the owner of the rusting tracks unfettered power to block public projects or accommodate them for a price.

Several reasons suggest that Congress did not intend that result. First, the fundamental concept of abandonment is jurisdictional, not regulatory. When granting an abandonment petition filed by a railroad or a third party, the STB withdraws its "primary jurisdiction over the line, thereby clearing the way for the operation of state law."¹⁰⁰ As the Supreme Court made clear in *Hayfield Northern*, "unless the Commission

*12 ("As the ICC explained in *Modern Handcraft*, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of state law while there is no overriding Federal interest to protect." *Id.* (citations omitted)).

95. "Lines of railroad" have long been a subject of federal regulation, while local rail facilities such as spur, industrial, switching, team, or side tracks were not. To determine which is which, the Board looks at factors such as the track's length, what it is used for, whether it is stub-ended, whether it was built with light-weight rail, and whether the shipper is located at the end of the track. *See, e.g., Grand Trunk Western R.R. – Petition for Declaratory Order*, Finance Docket No. 33601, 1998 STB LEXIS 194, at *2-*3 (July 26, 1998).

96. *See United States v. Idaho*, 298 U.S. 105, 107-09 (1936) (ICC lacked jurisdiction to authorize abandonment of rail spur; the subject was up to state regulation). Before ICCTA, petitioners for adverse abandonment commonly argued that the trackage in question was spur track that could be taken by eminent domain without the ICC's permission. *See, e.g., City of Colorado Springs & Metex Metro. Dist. – Petition for Declaratory Order*, 1989 ICC LEXIS 78, at *8-*9.

97. 49 U.S.C. § 10501(b)(2) (2004).

98. 49 U.S.C. § 10906 (2004).

99. *See, e.g., Ron Clayton, Bridge Project Completed a Week Early*, CHATTANOOGA TIMES FREE PRESS, Sept. 2, 1999, at B5 (describing recent road widening over "a former CSX Railroad spur line that was no longer used, so the tracks were removed, dirt was hauled in and compacted, and the road widened."); Laura Shireman, *UP Asked to Give Up Spur Line*, SPOKANE SPOKESMAN-REVIEW, Oct. 10, 1998, at A1 ("Bridges in need of repairs take I-90 and Seltice Way over the spur. . . if [it] were abandoned, the two agencies could fix the roads there more cheaply."); Don Porter, *U.S. 33 Toll Road Entrance to be Closed for Renovation*, SOUTH BEND TRIB., Mar. 9, 1995, at C4 ("The work will involve removing three bridges. . . Two of the bridges cross an abandoned railroad spur line. . .").

100. *Maine Central R.R. Co. – Abandonment Exemption*, 2000 STB LEXIS 532, at *12.

attaches postabandonment conditions to a certificate of abandonment, the Commission's authorization of an abandonment brings its regulatory mission to an end."¹⁰¹ ICCTA would preclude the Board from *regulating* the adverse abandonment of a rail spur by imposing conditions on it. But, since the abandonment itself is jurisdictional, ICCTA should not be understood to preclude it.¹⁰²

Second, as the Solicitor General observed in the United States' *amicus curiae* brief in *Hayfield Northern*, interpreting a statute to create a "no-man's land" of property that cannot be regulated by the federal government or condemned by a state "is unwise and unwarranted."¹⁰³

The Supreme Court agreed, holding that if the ICC withdraws its jurisdiction a rail line becomes "ordinary real property" governed by state law.¹⁰⁴ This principle indicates that if the STB were to withdraw its jurisdiction over a rail spur, it too would become ordinary real property subject to a condemnation or quiet title action in state court.¹⁰⁵

Third, the ICCTA did not alter the STB's authority to authorize the

101. *Hayfield N. R.R. Co.*, 467 U.S. at 633.

102. The STB expressed this view in its *Jefferson Terminal* decision dealing with some old industrial property in Detroit. Since the facts suggested that Jefferson was using the tracks on the property to portray itself as a common carrier in order to block a state condemnation proceeding, the Board decided to make Jefferson to go through the full regulatory process to become a rail carrier, noting:

Here, there is ample basis to question whether what Jefferson acquired was a rail line. The City states, and Jefferson does not deny, that rail service has not been provided over this track for 13 years. It may be, as Jefferson claims, that this track was a rail line that could not be removed without regulatory permission, and that a common carrier obligation thus remains attached to the property and would devolve upon Jefferson if it were allowed to become a rail carrier. But it may well be instead that this was ancillary trackage that was properly taken out of service without any need for regulatory permission, as to which the common carrier obligation was this extinguished long ago.

Jefferson Terminal R.R. Co. – Acquisition and Operation Exemption, Finance Docket No. 33950, 2001 STB LEXIS 267, at *9-*10 (Mar. 15, 2001). This reasoning suggests that, if the owner has taken a spur or industrial track out of service, the Board can recognize that a *de facto* abandonment has occurred and remove its jurisdiction from the property, allowing it to be condemned.

103. Brief of Amicus Curiae United States at 7, *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984) (No. 82-1579), available at <http://www.usdoj.gov/osg/briefs/1983/sg830148.txt> (last visited Oct. 14, 2004).

104. *Hayfield N. R.R. Co.*, 467 U.S. at 632.

105. Whether a state could *regulate* a rail spur from which the STB had withdrawn its jurisdiction is another question entirely. Since Congress clearly prohibited the STB from regulating a rail spur within its jurisdiction, it seems logical that state regulation of a spur from which that jurisdiction had been withdrawn would also be barred. But the physical *taking* of property for public use is conceptually distinct from regulation. See *Brown v. Legal Found. of Washington*, 538 U.S. 216, 233 (2001); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982); but see *Wisconsin Central Ltd.*, 160 F. Supp. 2d at 1013 (equating condemnation with regulation).

“adverse abandonment” of an interstate rail line.¹⁰⁶ Because the STB has that power over primary rail trackage that once served hundreds of shippers, it seems absurd that it could not withdraw its jurisdiction over an ancillary spur track built to serve a single shipper. There is no apparent reason for this odd result and neither the text nor the legislative history of ICCTA provide one.¹⁰⁷ But if the distinction between abandonment, as a withdrawal of jurisdiction and putting conditions on abandonment regulation is maintained, the act can be read to avoid this absurd result. Accordingly, the principles of legislative construction indicate that reading is most appropriate.¹⁰⁸

Fourth, when reviewing conflicts between federal and state powers, the Supreme Court “‘start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.’”¹⁰⁹ And as the Solicitor General noted in his *Hayfield Northern* brief:

These principles are especially apt in a case involving a state’s condemnation authority, which is “part of its sovereign power” and “an attribute of sovereignty . . . (that) inheres in every independent State . . . (and is) necessary for the proper performance of governmental functions.”¹¹⁰

Accordingly, if Congress had intended to preclude the States from

106. See, e.g., *Grand Trunk W. R.R. – Adverse Discontinuance of Trackage Rights Application*, No. AB-31, Sub-No. 30, at 5 (May 13, 1998)

Section 10904 requires us to give preference to arrangements for continued rail service over other alternatives. But, under the statutory standard governing abandonment cases, we cannot view that interest as absolute. *Modern Handcraft* would be rendered a nullity if GTW or IORY could invoke Section 10904 to perpetuate our jurisdiction over property that we just found under section 10903 should be subject to the operation of the laws of the City of Cincinnati or those of the State of Ohio.

Id.

107. Discussing the original House version of 49 U.S.C. 10906, the committee report expressed the hope that the agency would “minimize regulatory burdens by utilizing its exemption power wherever possible with respect to these tracks formerly excluded from its jurisdiction.” H.R. REP. NO. 104-311, *reprinted in* 1995 U.S.C.C.A.N. 793, 815. The conference committee report on the adopted section, which removed the agency’s regulatory jurisdiction over such tracks altogether, simply notes that “such auxiliary tracks are not subject to the regulatory approval processes under chapter 109.” H.R. CONF. REP. NO. 104-422, *reprinted in* 1995 U.S.C.C.A.N. 850, 867.

108. See, e.g., *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) (“[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where . . . the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intent of the law.”).

109. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

110. Brief of Amicus Curiae United States at 17, *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984) (No. 82-1579) (citations omitted), available at <http://www.usdoj.gov/osg-/briefs/1983/sg830148.txt> (last visited Oct. 14, 2004).

condemning abandoned rail spurs – and to legislatively overrule *Hayfield Northern* in the process – one would expect to see a clear statement of that intention.¹¹¹

In summary, while Congress did not want any government – federal, state, or local – to regulate the construction and abandonment of rail spurs, there is no reason to believe it intended to put those spurs beyond the reach of any governmental authority. When a spur is no longer in use, when its operator has *de facto* abandoned it, the STB must have the power to recognize that fact and withdraw its jurisdiction. Furthermore, the Supreme Court has long held that the actual *taking* of property for public use is conceptually distinct from the *regulation* of property,¹¹² and the power to take emanates from a different source than the power to regulate.¹¹³ Therefore, even if a rail spur is still in use, the STB should still have discretion to withdraw its jurisdiction to allow the spur to be condemned.¹¹⁴

VI. SOME SUGGESTIONS FOR STREAMLINING THE PROCESS

In adjudicating the Wisconsin rail-highway conflict discussed at the beginning of this article, the ICC recognized the public interest in cutting a seldom-used rail line to save millions of road construction dollars.¹¹⁵ But the line was still in use, and there was reason to believe it might handle more traffic in the future.¹¹⁶ Accordingly, the Commission decided that national rail transportation policy required preservation of the line even while recognizing that its decision might not seem economically justifiable.¹¹⁷

Balancing the competing considerations is difficult. If a rail line that

111. *Compare* *Palmer v. Massachusetts*, 308 U.S. 79, 85 (1939) (“If this old and familiar power of the states was withdrawn [by] Congress . . . we ought to find language fitting for so drastic a change.”).

112. *See* *Brown*, 538 U.S. at 233; *Loretto*, 458 U.S. at 440.

113. *See, e.g.*, 1 PHILLIP NICOLS, NICHOLS ON EMINENT DOMAIN § 1.42 (Julius Sackman et al eds., 3d ed. 1998) (“What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest.”).

114. Whether abandonment of a spur track would serve the public convenience and necessity involves different issues than abandonment of a main line of rail. As noted above, a spur often runs across a single shipper’s land to reach that shipper’s facility at the end of the track. If condemning the track diminishes the value of the shipper’s remaining property, the state court condemnation award would compensate the shipper for that loss. *See, e.g.*, *State of Louisiana v. Rach*, 136 So.2d 105, 107 (La. Ct. App. 1961) (condemnation award included payment for loss of rail access).

115. *See* Wisconsin Dep’t of Transp. – Abandonment Exemption, 1988 WL 225048, at *5.

116. *Id.* at *4.

117. *Id.* at *5.

shows potential for economically viable use is severed by a highway, that potential is permanently destroyed, because the highway would prohibitively increase the cost of future rail service. The cumulative effect of many decisions to cut off small feeder lines could degrade the nation's rail network as a whole. On the other hand, if a railroad's insubstantial claims about restoring profitable service on a long-unused rail line can block a public project, the railroad has a strong incentive to manipulate the STB's jurisdiction to better its bargaining position with the local public authority. Even though there is a national policy favoring rail transportation, if resumed service is not realistic, federal jurisdiction over a dead line of rail should not obstruct needed public projects or tie up real estate that could be put to productive use.

The abandonment procedure, too, can encourage strategic behavior, because the issuance of a certificate of abandonment does not necessarily mean that a line has been abandoned. If the STB attached conditions to the abandonment, it retains jurisdiction to ensure compliance with those conditions. But, even if no conditions are attached, the railroad might not exercise its abandonment authority leaving the abandonment "unconsummated."¹¹⁸ In addition, if the abandonment is not consummated within a year, the certificate expires and the carrier's obligation to provide service over the line is revived.¹¹⁹

In theory, this penalty, reinstatement of the duty to resume unprofitable rail service if demanded by a shipper, should encourage carriers to be diligent about consummating abandonments. But, in practice, if there is no shipper on the line to demand service, the carrier can maintain control of the real estate without having to actually operate a railroad over it, a situation that rewards gamesmanship by the incumbent railroad. However, there are some ways to streamline this process and to eliminate uncertainty about the legal status of unused rail property.

First, as the ICC emphasized in *Modern Handcraft*, even if a railroad does not exercise abandonment authority, the "certificate of abandonment is evidence in any court proceeding that the line is not required by the public for rail operations."¹²⁰ Accordingly, if an abandonment is unconditional, its consummation or completion has no bearing on whether a state court now has jurisdiction to dispose of the property.¹²¹

118. 49 C.F.R. §§ 1152.29(c)(2), (d)(2), (e)(1) (2004).

119. 49 C.F.R. § 1152.29(e)(2) (2004).

120. *Modern Handcraft, Inc. – Abandonment*, 363 I.C.C. at 972.

121. The ICC and some courts have hedged on this issue, requiring proof that an abandonment was consummated before allowing a state court to dispose of the property. *See, e.g., Grantwood Village v. Missouri Pac. R.R. Co.*, 95 F.3d 654, 659 (8th Cir. 1996) ("State law claims can only be brought *after* the ICC has authorized an abandonment and after the railroad has consummated that abandonment authorization."); *Abandonment of Railroad Lines & Discontinuance of Service*, 365 I.C.C. 249, 261 (1981) ("[T]he disposition of rail property after an effective

Second, even if the STB imposes post-abandonment conditions, they may not conflict with condemnation of the property or disposition of the land in a quiet title action. Or, the conditions may contain time limits, the passage of which a court could easily determine. These factors suggest the Board should use its rule-making powers to identify which conditions might conflict with state-law action. This regulatory guidance would allow a state court to adjudicate the entire matter rather than having to wait for the Board to determine whether a conflict existed. Moreover, for future conditional abandonments, the STB should explicitly state which conditions, if any, foreclose state law action, and if so, for how long.

Third, the Board should give considerable weight to a railroad's *de facto* abandonment of a line. Mere cessation of operations does not and should not terminate the railroad's duty to provide service or the STB's power to require it to do so.¹²² But, if a rail line has not been used for a long time, that fact is compelling evidence that there is no need for rail service on it. To facilitate the disposition of such property the Board could adopt a rebuttable presumption¹²³ favoring adverse abandonment if the line has not been used or maintained for a significant time.¹²⁴

Fourth, when looking at a railroad's claim that it will restore a line to economically viable service, the Board should recall the maxim that "actions speak louder than words." What efforts has the carrier made to attract business or sell the line to someone who wants to operate it? Have any potential shippers expressed a concrete interest in using the line?¹²⁵

certificate of abandonment has been exercised is a matter . . . within a State's reserved jurisdiction.") A careful reading of the Supreme Court's *Hayfield Northern* opinion, however, shows that unless conditions are imposed, "the Commission's authorization of an abandonment brings its regulatory mission to an end" and "issuing a certificate of abandonment terminates the Commission's jurisdiction. . . ." *Hayfield N. R.R. Co.*, 467 U.S. at 633-34 (emphasis added).

122. See, e.g., *Phillips Co.*, 97 F.3d at 1377 ("[I]f *de facto* abandonment were sufficient to establish abandonment under [the federal quiet title statute], a railroad could easily circumvent the ICC's oversight and regulation by simply terminating its use of a railroad line.")

123. The ICC has employed rebuttable presumptions in past abandonment cases. See, e.g., *Chicago & N.W. Transp. Co.*, 354 I.C.C. 114, 1972 ICC LEXIS 72, at *10 (July 28, 1977) (rebuttable presumption that past level of operations will be repeated in the future); *Marianna & Blountstown R.R. - Abandonment*, 348 I.C.C. 507, 1976 ICC LEXIS 52, at *7 (July 21, 1976) ("[E]vidence of fewer than 34 carloads of traffic per mile [per year] creates a rebuttable presumption in favor of abandonment.")

124. In *Modern Handcraft*, the ICC had "no doubt" that *de facto* abandonment had occurred on a line that had not been used or maintained for about nine years when the underlying state court litigation began. See *Modern Handcraft, Inc. - Abandonment*, 363 I.C.C. at 971. Nine years and "no doubt" sets the bar somewhat high for a rebuttable presumption. Conversely, although railroads are required to inspect all their tracks weekly or before each use and to keep records of those inspections for two years, see 49 C.F.R. § 213.233(b)(3) (2004); 49 C.F.R. § 213.241(c) (2004), two years seems somewhat soon for presuming abandonment is proper. Five or six years might be an appropriate threshold. An adverse abandonment application could be filed earlier, but the applicant would not have the benefit of any presumption.

125. See, e.g., *Consolidated Rail Corp.*, 29 F.3d at 711 (upholding adverse abandonment

Does the carrier have a realistic plan for restoring service to the line?¹²⁶ What investments, if any, has the carrier made in the trackage or in planning for future use? Demonstrable efforts by the railroad would back up its professed belief in the line's potential. Conversely, if the railroad is not devoting resources to develop what it says would be a profitable investment, its words will ring hollow.

VII. CONCLUSION

The continuation of rail service and the "banking" of railroad rights-of-way for future rehabilitation are important public policies.¹²⁷ Under appropriate circumstances, these policies mean that other public uses of the right-of-way or the adjudication of private claims to the property in state court must take second place. But, under other circumstances, as the STB has recognized, rail carriers do try to use the agency's exclusive jurisdiction to "shield" unused rail property "from the legitimate processes of state law."¹²⁸ Such strategic behavior is economically inefficient at best and, at worst, fundamentally unfair to private landowners and the public. It is hoped that this discussion of the problem proves to be helpful in correcting it.

where railroad's plan for resumed service was not feasible; potential shipper's mild expression of support for the plan "merely expressed BFI's desire to keep options open").

126. *Id.* at 710-12.

127. *See, e.g., Consolidated Rail Corp.*, 29 F.3d at 712-13.

128. *See, e.g., Maine Central R.R. Co. – Abandonment Exemption*, 2000 STB LEXIS 532, at *12 (citing *Modern Handcraft, Inc. – Abandonment*, 363 I.C.C. at 972).