Articles

A History of Railroad Abandonments

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I. INTRODUCTION

Railroading is a speculative business and from the earliest days of construction, some routes have proven profitable, others unprofitable.

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Accordingly, railroads sought to cut their losses by abandoning unprofitable routes. By discontinuing service, eliminating maintenance, avoiding local property taxes, and recovering the salvage value of the rail, ties, and sidings, a company may save between $18,000 and $24,000 per mile per year.[1] Yet historically, railroads rarely had a free hand in abandoning routes. Over the years, shippers, local governments, and interested citizen groups challenged the route abandonments under a variety of state and federal laws. Those challenges were aimed at the disastrous effects abandonments often had on local businesses and on proposed alternate uses of the valuable corridors of railroad land. This article examines the economically important, but sparsely chronicled challenges to abandonments railroads have faced from the mid-nineteenth century to the present.

II. Early Common Law

If the ancient common law been the only way to challenge abandonments, the railroads could have abandoned lines freely. The common law of railroads derived from the law of older modes of transport, such as maritime law and carriage transport law. As common carriers of goods and people railroads had a common law duty to serve all comers.[2] However, no duty existed at common law to serve all *localities* on or off of the route map. Therefore, at common law, no action existed for the incidental damages suffered by private parties from loss of service.[3] Barring restrictions by contract, statute, or charter, railroads would be free to abandon or change routes at will.[4]

III. Restrictions by Contract

In many abandonment cases, state courts held railroads liable for breach of contract by focusing on the benefits which railroads derived from local interests when the rail was laid. To lure railroads to build near their towns, local interests frequently granted rights of way, made cash donations, purchased bonds and stocks, or extended public credit.[5] Communities voted to sell government bonds, and farmers mortgaged land to

1. Henry B. McFarland, *Railroad Abandonment Policy in the 1990's*, 58 Transp. Prac. J. 331, 336 (1991) (Figures in 1989 dollars).

2. Gisbourn v. Hurst, 1 Salk. 250, 91 Eng. Rep. 220 (1710).

3. Baltimore & Susquehanna R.R. Co. v. Compton, 2 Gill 20, 36-37 (Md. 1844); Kinealy v. St. Louis, Kansas City & N. Ry. Co., 69 Mo. 658, 666-67 (1879).

4. David Rorer, The Law of Railways 274-75 (1884) (citing Gear v. Dubuque & Sioux City R.R. Co., 20 Iowa 523, 529 (1866), and Mississippi & Tenn. R.R. Co. v. Devaney, 42 Miss. 555, 593-98 (1869)).

5. Balthasar H. Meyer, *Railway Legislation in the United States, in* The Citizen's Library of Economics, Politics, and Sociology 102 (R.T. Ely, ed., 1903).

pay for them.[6] The outlays were substantial. While state and federal governments pledged about one-fifth of the cost of all railroad construction through 1870, local and municipal sources contributed at least another one-fifth.[7]

In light of these substantial expenditures, some courts overlooked the prevailing formalities of contract law and found that promises to build roads and serve communities were binding in law or equity.[8] Therefore, in some states, a railroad contemplating abandonment of an unprofitable line faced the prospect of lawsuits from local investors based on the new flexibility in the law of contract.

IV. Terms of the Railroad Charter

In many other cases, a railroad's own charter limited its ability to abandon routes. Violating a charter provision was actionable in a state court. The terms of a railroad's charter or articles of incorporation often included a description of the terminuses or bound the railroads to described routes. Most of the charters granted in the early 1800's describe only the terminuses and a few intermediate points, while others defined only the terminuses, or vague "eligible points."[9] Therefore, in the early nineteenth century, railroads enjoyed wide discretion to locate or relocate their roads within the ambiguous terms of these charters.[10] However, the terms of subsequent charters required more detailed route descriptions and frequently restricted abandonments.[11] Thus, the charter restrictions, though sparse in early versions, later became a serious barrier to railroad abandonments.[12]

V. Acts of State Legislatures

General legislation was another impediment to railroad abandonment. By the early 1900's, over half of the states had enacted legislation governing route relocation.[13] Many jurisdictions established their own

6. William Z. Ripley, Railroads, Rates and Regulation 38 (1912).

7. *Id.* at 39.

8. Rorer, *supra* note 4, at 280. Compare the early case of The Utica & Schenectady R.R. Co. v. Brinckerhoff, 21 Wend. 139, 140 (N.Y. Sup. Ct. 1839), finding no binding contract due to a lack of mutuality and binding consideration, with the later Burlington, Cedar Rapids & Minn. Ry. Co. v. Palmer, 42 Iowa 222, 226-29 (1875), interpreting a written promissory note as a contract for service.

9. Meyer, *supra* note 5, at 75.

10. Rorer, *supra* note 4, at 278 (citing Southern Minn. R.R. Co. v. Stoddard, 6 Minn. 92, 96 (1861)).

11. 1 Isaiah L. Sharfman, The Interstate Commerce Commission 240 (1931).

12. Stewart Rapalje and William Mack, A Digest of Railway Decisions 2 (1895), (citing People *ex rel.* Walker v. Louisville & N. R.R. Co., 10 N.E. 657, 666 (Ill. 1887).

13. Meyer, *supra* note 5, at 126.

railroad commissions to regulate abandonments.[14] State statutory authority usually was a prerequisite to abandonment.[15] The patchwork of regulations that resulted from the states' attempts to control railroads was inefficient and confusing. Professor Balthasar H. Meyer described the situation in 1903 by noting that "railway legislation in the United States is full of inconsistencies and anomalies, spasmodic expressions of legislative impulses, and the futile attempts of administrative bunglers."[16]

Collectively, the contractual obligations, charter limitations, and statutory rules presented more than an administrative headache for the railroads after the turn of the century. Maintaining unprofitable track was extremely expensive, and represented an expenditure that the railroads could ill afford. By the 1910's the railroads showed weak profits and even weaker credit. While testifying before the Senate Committee on Interstate Commerce, Alfred P. Thom, General Counsel of the Association of Railway Executives, stated that economic "[c]onditions in this country have been going on, tendencies have originated and are in operation, forces have grown into controlling power, that have made the flow of capital into these enterprises [railroads] come to a standstill, and it [capital] is no longer available."[17]

As a result of this capital crisis, railroads were unprepared to meet the increases in demand on track and equipment precipitated by World War I.[18] For example, in 1917, the Southern Railway found that the prices of bonds it had intended to utilize for its entire improvement fund had fallen so low that they could not sell them or even market new ones.[19]

VI. TRANSPORTATION ACT OF 1920

Relief for the railroads came in the form of the Federal Transportation Act of 1920.[20] Changes in railroad rate policies were the primary features of the Act, but it also contained, for the first time, a basis for

14. *E.g.*, Roy v. Illinois Commerce Comm'n, 153 N.E. 648 (Ill. 1926).

15. Lake Shore & Michigan S. Ry. Co. v. Baltimore & O. & C. R.R. Co., 37 N.E. 91, 94 (Ill. 1894); Bryan v. Louisville & N. R.R. Co., 244 F. 650, 654-55 (8th Cir. 1917).

16. MEYER, *supra* note 5, at 7.

17. ASSOCIATION OF RAILWAY EXECUTIVES, REMEDIAL RAILROAD LEGISLATION 1919, 119 (Robert Binkerd ed., preliminary ed. 1919) (Alfred P. Thom, General Counsel of the Association of Railway Executives, testimony before Senate Committee on Interstate Commerce, January 16, 1919). *See also* ALBRO MARTIN, ENTERPRISE DENIED (1971) (the major theme of which is that capital undernourishment of the railroads by the ICC beginning in 1906 precipitated the collapse of railroad profitability after 1911).

18. SHARFMAN, *supra* note 11, at 172.

19. REMEDIAL RAILROAD LEGISLATION 1919, *supra* note 17, at 149 (Alfred P. Thom testifying January 17, 1919).

20. Transportation Act, 41 Stat. 456 (1920) (codified in scattered sections of 49 U.S.C).

federal control over abandonments.[21] Both features of the Act were designed to improve the financial health of railroads.[22]

The Act enabled railroads to abandon unprofitable lines "despite the protest of the local authorities" if it could show the Interstate Commerce Commission (ICC) that the line unduly burdened interstate commerce.[23] Specifically, the law required the ICC to determine and foster "public convenience and necessity" by balancing the needs of interstate commerce against the needs of particular communities.[24]

These federal abandonment procedures facilitated many miles of track abandonment. By 1963, carriers had abandoned some 49,374 miles of the 252,588 miles of track existing in 1920.[25] However, the degree to which the ICC itself hindered or helped this abandonment is questionable.[26] Some commentators, looking at the 16:1 railroad victory to loss ratio before 1946 concluded that the ICC completely allied itself with railroad interests.[27] Other commentators implied that the high approval ratio was only due to the railroads' unwillingness to litigate the difficult cases. Data show that those cases which the railroads *lost* involved *greater* mileage, and presumably greater opposition from local interests. If the latter group of commentators is correct, then the ICC really acted as a judicial brake upon possible abandonments which, though never brought, may have been permissible under the Transportation Act of 1920. The railroads were successful in only minor cases and continued to lose revenue on the longer routes. However, data showed that those cases which the railroads *lost* involved *greater* mileage, and presumably greater opposition from local interests.[28] If the latter group of commentators was correct, then the ICC really acted as a judicial brake upon possible abandonments which, though never brought, may have been permissible under the Transportation Act of 1920. If the ICC acted as a judicial brake, then the railroads were successful in only the minor cases and continued to lose revenue on the longer routes.

For the railroads, the ICC opposition to larger abandonments was undoubtedly harmful. Presumably, this opposition saved the businesses

21. 49 U.S.C. § 10903 (1988).

22. BUREAU OF STATISTICS, ICC, INTERSTATE COMMERCE COMMISSION ACTIVITIES 1887-1937, 45 (1937).

23. SHARFMAN, *supra* note 11, at 6.

24. Colorado v. United States, 271 U.S. 153, 168-69 (1926).

25. MICHAEL CONANT, RAILROAD MERGERS AND ABANDONMENTS, 113 (1964) (using ICC statistics).

26. *See* RICHARD D. STONE, THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY, 34-35 (1991).

27. *See* CHARLES R. CHERINGTON, REGULATION OF RAILROAD ABANDONMENTS, 102 (1948).

28. CONANT, *supra* note 25, at 115.

of many local shippers. Railroads often provided the only access for their goods to move into the market rendering the local shippers captives of the railroad industry. The captive shipper problem appeared to be one of the chief concerns of Congress in formulating the "public convenience and necessity" standard.[29] The post-1920 ICC policy was apparently moderate; it permitted many shorter abandonments to help railroad profitability, but evidently denied longer abandonments to protect the majority of captive shippers.

VII. Competition from Trucks

With the development of truck transportation in the early 1930's, the captive shipper problem essentially evaporated. Although the motorized truck had proven useful during World War I,[30] it did not significantly impact interstate commerce until the early 1930's. At that point, three important technological innovations came together: 1) the pneumatic tire to cushion freight, 2) the hydraulic brake to safely increase the weight of a load, 3) and the network of paved intercity highways to provide a route.[31] With the extension of highways and reliable substitute service by truck, the ICC granted many more abandonment requests.[32]

That change of events was far more bitter than sweet for the railroads. While the railroads enjoyed the favorable response of the ICC regarding abandonments of unprofitable lines, abandoning did not replace the revenues lost to truck competition. Trucks exhibited certain market advantages over railroads that still exist today. First, highways are directly subsidized by the government.[33] Second, since truckers do not own the highways they do not pay property taxes on those millions of acres.[34] Third, in medium and short hauls, trucks deliver goods more quickly and safely by avoiding depots and transfers.[35] Fourth, although the motor carrier industry has been subject to some regulation,[36] those regulations are far less costly than rail regulations.[37] Finally, trucks enjoy a flexible route structure, whereas railroads must laboriously lay or abandon track to make fundamental route changes.

The speedy and customized service offered by trucks enabled the in-

29. Frank M. Cushman, Manual of Transportation Law, 130 (1951).

30. William R. Childs, Trucking and the Public Interest, 9-10 (1985).

31. *Id.* at 12-15.

32. ICC, Interstate Commerce Commission Activities 1887-1937, 195 (1937).

33. Stone, *supra* note 26, at 68.

34. Often the railroads paid taxes at discriminatory rates, having little local political support in tax districting arrangements. *Id.* at 69.

35. Childs, *supra* note 30, at 20.

36. *See generally*, Regulation and Deregulation of the Motor Carrier Industry (Dale G. Anderson & John R. Felton eds., 1989).

37. Stone, *supra* note 26, at 70.

dustry to devour the railroad industry's market share of freight revenue. In 1920 railroads had a virtual monopoly on the nation's freight revenue.[38] By 1940, rails had only 75.42% of all freight revenue, while motor carriers had captured 17.74% of the market.[39] During World War II, rails enjoyed a brief resurgence of business, due to the shortage of gasoline and rubber required by trucks.[40] However, by 1970, rail freight revenue slumped to 40.62% of the total and was still falling.[41] Motor carriers captured the lion's share of this lost business with a total share of 53.26%, while airways captured 2.61%, and oil pipelines another 2.17% of the revenue.[42]

By 1973, the formerly great railroads of the Northeast were on the verge of bankruptcy.[43] Fundamental shifts in the economy added to the railroad industry's woes. America produced less of the dense, bulky goods such as steel and coal, best suited to transport by rail,[44] and more of the low density high value merchandise better handled by truck.[45] The country also began to produce more goods from plants located in the suburbs, which are more easily accessed by truck.[46]

VIII. THE 4R ACT

In February 1976, President Gerald Ford signed the Railroad Revitalization and Regulatory Reform Act (4R).[47] The 4R provided funds for consolidation of the failing Northeastern railroads into Conrail.[48] It also contained provisions affecting the abandonment process; the most notable provision imposed a time limit on the ICC's deliberation in abandonment cases.[49] This was a major improvement, since the average length of time from filing to decision during the 1960's was 410 days.[50] Reducing the length of time for administrative decisions was and still is paramount in abandonment considerations, because in such situations railroads might lose tens of thousands of dollars per mile per year.[51] The 4R also

38. *See* CONANT, *supra* note 26, at 43.
39. AM. TRUCKING ASS'NS, AMERICAN TRUCKING TRENDS 1979-1980, 35 (1980).
40. STONE, *supra* note 26, at 43.
41. AM. TRUCKING ASS'NS, *supra* note 39, at 35.
42. *Id.*
43. STONE, *supra* note 26, at 55.
44. *Id.* at 69.
45. W. Abdelwahab and M. Sargious, *Modeling the Demand for Freight Transport*, 1992 J. TRANSP. ECON. & POL'Y, 49, 63.
46. STONE, *supra* note 26, at 69.
47. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31.
48. STONE, *supra* note 26, at 76.
49. *Id.* at 97.
50. *Id.*
51. McFarland, *supra* note 1, at 336.

provided a new fast track for abandonments through a provision that gave the ICC authority to exempt railroads from regulations.[52] The 4R held great promise for the railroads, and great disappointment for abandonment opponents. However, the ICC did not unlock the potential of these deregulatory provisions until the Carter presidency.

IX. The Carter Push

James Earl Carter was an unexpected champion of railroad deregulation. His anti-regulation stance hardly fit the big-government Democrat stereotype. His native Georgia had no special love for railroads, having enacted anti-rail provisions into its Constitution a century earlier.[53] However, President Carter entered office during a period of economic recession with high inflation and viewed deregulation as a pro-consumer move designed to bring down inflation.[54] First, he successfully deregulated the airline and trucking industries, then advocated similar steps for railroads.[55]

Jimmy Carter had both the will and the means to effect substantial changes in ICC policy. The ICC was traditionally a less political, more independent, bipartisan agency,[56] but in 1969, the President was given the authority to appoint the ICC Chairman.[57] Jimmy Carter radically changed the composition of the ICC's membership;[58] and since the Commission had such a pathetic reputation while supervising the collapse of America's rail system, no one protested.[59]

The new ICC wasted no time in deregulating the railroad industry. By 1980 the Commission had reinstated contract rates for coal, deregulated the movement of produce, expedited mergers, and freed up major aspects of car service.[60] It also took a major step in favor of railroad abandonment by allowing an opportunity cost factor to figure into the public interest evaluation.[61] Traditional factors for determining whether or not to approve an abandonment included only: the needs of the shippers, the availability of substitute service, and the amount of losses on the

52. 49 U.S.C. § 10505 (1988).

53. Ga. Const. art. IV, §4 (repealed 1933).

54. *See* President James Carter, Annual Message to the Congress (Jan. 25, 1979) *in* 1 Pub. Papers 110, 113, 130-131 (1980).

55. Stone, *supra* note 26, at 104-106.

56. Ernest W. Williams, *Richard D.Stone's The Interstate Commerce Commission and the Railroad Industry*, 31 Transp. J. 72 (1992) (book review).

57. *Id.* The President also had the authority to appoint other commission members.

58. By September 30, 1980 four of the top six ICC positions were held by Carter appointees. Stone, *supra* note 26, at 103.

59. Williams, *supra* note 56, at 72.

60. Stone, *supra* note 26, at 88-100.

61. 1980 ICC Ann. Rep. 39.

line in relation to the financial stability of the carrier as a whole.[62] By introducing opportunity costs as a new measure of the burden on railroads, it tilted the balance decidedly in the favor of the railroads. Under the old formula, any line showing a net trickle of profit did not qualify for abandonment. A similar line under the new formula might have qualified for abandonment if the railroad showed that the trickle of profit is insufficient with respect to the large capital investment in the line. In other words, the new formula permitted railroads to show that the level of the line's profits did not justify the capital tied up in the line and that the capital could be put to better use elsewhere to further the interest of national commerce. A successful railroad established that the ratio of profit to investment fell below a "reasonable rate of return."[63]

X. STAGGERS ACT OF 1980.

It has been said that the Staggers Rail Act of 1980[64] was merely a move by Congress to codify the *de facto* deregulation established by the ICC in the late 1970's.[65] Although this was in large part true, the Staggers Act had a somewhat mixed effect on the deregulation of railroad abandonments. In keeping with the ICC's deregulatory motif, the Staggers Act reduced the time limits on deadlines for filings to oppose abandonments and for the ICC to reach decisions in abandonment cases,[66] and allowed the ICC to approve proposed abandonments without the lengthy investigation procedure.[67]

The Staggers Act also provided a new weapon *against* railroad abandonment: the forced-sale, or cram-down provision. Before 1980, 49 U.S.C. § 1a(6)(a) (1976) provided interested parties a chance to purchase or subsidize a line slated for abandonment. Yet, there was no requirement, and often no incentive, for the railroad to negotiate in good faith. Thus, the railroad was permitted to hold out for a last-minute above-market offer.[68] The Staggers Act modified this provision by giving the ICC power to set the terms of sale or subsidy if the railroad could not reach agreement with a *bona fide* offeror.[69] The cram-down provision con-

62. CUSHMAN, *supra* note 29, at 133-34.

63. The ICC publishes annual reasonable rates of return on capital to use in this formula. In 1991, the rate was 11.6%. John K. Maser III, *Rail Transportation*, 59 TRANSP. PRAC. J. 434, 436 (1992).

64. Staggers Rail Act 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 49 U.S.C.)[hereinafter Staggers Act].

65. STONE, *supra* note 26, at 113.

66. Elizabeth B. Michel, *Casenote*: Chicago & N.W. Transp. Co. v. United States, 13 TRANSP. L.J. 245, 246 (1984).

67. STONE, *supra* note 26, at 129.

68. *See, e.g.*, Chicago & N.W. Transp. Co. v. United States, 582 F.2d 1043 (7th Cir. 1978).

69. 49 U.S.C. §§ 10905, 10910 (1988).

tained some safeguards for railroads. The terms could never be lower than the net liquidation value of the route because to do so could constitute an unconstitutional taking of property.[70] Further, the *purchaser* could not abandon the route or sell the pieces (as the original owner might have wanted to do), but rather had to continue rail service for at least two years.[71] Still, rail advocates were bitter about the cram-down provision, especially concerning forced subsidies, that required railroads to keep servicing unwanted customers on unwanted routes.[72]

XI. Effects of Deregulation

On the whole, railroads benefitted tremendously from ICC and Congressional efforts over the last two decades. From 1981 to 1987 railroads' average rate of return on investment rose from 2% to 7%.[73] The availability of cheaper and easier abandonments was a significant factor in this profitability increase. Although absolute revenues continued to fall due to truck competition and other factors, relative rates of return climbed; railroads were able to reduce costs faster than revenues fell.[74] Still, railroads remain a relatively unprofitable industry. A 1988 GAO study of twenty-one industries ranked railroads dead last in return on equity.[75] Many commentators attribute at least part of the problem on the remaining administrative impediments to abandonments.[76] There is more than just railroad profit at stake in the concern for efficient railroads. Rectifying inefficiencies in the nation's transport system saves the nation many times over in terms of business logistics costs. Better, cheaper, and faster rail service due to deregulation has already saved the nation some five billion dollars over the last decade.[77]

XII. Rail Corridors

If this were a simple question of economics, more deregulation of abandonments could hardly be questioned. However, other important considerations come into play when discussing abandonments. Aside from the immediate value of service to individual shippers along the

70. Also called "constitutional minimum value." Michel, *supra* note 66, at 250-51.

71. 49 U.S.C. § 10905(f)(4) (1988).

72. *See generally* William R. Black, Railroads for Rent (1986).

73. Robert V. Delaney, *The North American Scene: A Macro-Economic View*, 46 Transp. Q. 19, 25 (1992).

74. *Id.* at 25.

75. Frank Wilner, *The Railroads' Productivity Challenge*, 59 Transp. Prac. J. 15, 32 (1991), (citing U.S. Gen. Acct. Off., Economic and Financial Impacts of the Staggers Rail Act of 1980, 47 (1990)).

76. *See, e.g.*, Ann F. Friedlaender et al, *Rail Costs and Capital Adjustments in a Quasi-Regulated Environment*, 27 J. Transp. Econ. & Pol'y 131 (1993).

77. Delaney, *supra* note 73, at 19-26.

routes, the corridors themselves may be valuable for a variety of public purposes. The corridors are often well suited for other roads or highways, power lines, telecommunications, commuter operations, recreational trails, and possibly other unforeseen uses.[78]

After abandonment, a corridor is not likely to remain intact. The railroads hold the land under their tracks in a variety of legal property interest forms.[79] These forms depend upon the terms of the original acquisition of land and prevailing state law. The railroad often owns land in fee simple absolute and may sell it after abandonment. However, other railroad corridors carry the possibility of reversion to the previous landowners because they are held in property interests akin to fee simple determinable or easements with possibilities of reverter.[80] In such cases, abandoning the rails is usually the determinable event, at which point reversion takes place;[81] therefore, an abandonment presents a distinct likelihood that the corridor of land will revert to multiple individual landowners, and forever cease to be a corridor.

It is imperative that parties wishing to conserve a corridor obtain ownership of the corridor *prior* to the railroad's legal abandonment of the line and take care not to subsequently abandon the line themselves. What constitutes an abandonment remains a matter of state law[82] and usually involves an *objective* measure of intent to abandon, such as removal of track.[83] Therefore, the alternative uses themselves, since they are not railroad uses, could give rise to an abandonment. It is a complicated matter to purchase a line in tact and then use it for some purpose other than railroading, which is what many corridor conservationists seek to do.

XIII. RAILBANKING

The corridor reversion problem was addressed by Congress in Section 8(d) of the National Trails System Act.[84] Added in 1983, this provision expressly provided that if an interested party purchases a corridor with a view to any public purpose, and if the railroad agrees to cooperate, no abandonment (and therefore no reversion) under state law takes place.[85] Commonly called "railbanking," the process keeps the land

78. Charles H. Montange, *Conserving Rail Corridors*, 10 TEMP. ENVTL. L. & TECH. J. 139 (1991).

79. *Id.* at 160-61.

80. *See* Glosemeyer v. Missouri-Kan.-Tex. R.R., 879 F.2d 316, 318 (8th Cir. 1989), *cert. den.* 494 U.S. 1003 (1990).

81. MONTANGE, *supra* note 77, at 162.

82. Lawson v. State, 730 P.2d 1308, 1316 (Wash. 1986).

83. *See, e.g.*, Idaho v. Oregon Short Line R.R. Co., 617 F.Supp. 213, 218 (D. Idaho 1985).

84. 16 U.S.C. § 1247(d) (1988).

85. *Id.*

under federal ICC jurisdiction, thereby staving off reversions under state law.[86] It is also popularly known as the "rails to trails" program, since the interim public use is often a recreational hiking or biking trail.[87]

XIV. Other Preservation Methods

Of course, other ways exist for preserving rail corridors. A group may petition the state for a special enactment of its eminent domain power;[88] however, this is a lengthy and uncertain process ill suited to the task of fighting abandonments. A concerned party may also ask the railroad to discontinue service, instead of fully abandoning the line; this choice is undesirable from the railroads' perspective because taxes on the railroad continue to accrue and the track cannot be removed and reused or sold.

Local preservation groups can and do operate corridors as short line railroads. It is surprising that such ventures ever work, considering that slating a line for abandonments requires that an *experienced* railroad could not find sufficient profit in the line. However, new lines which operate without expensive union labor and tailor their operations to local markets often succeed.[89] Approximately one-third of the land disposed of by Class I railroads each year is purchased by smaller roads.[90] The short line trend has become so popular that the ICC now disseminates a pamphlet entitled *So You Want to Start a Small Railroad*, which contains advice for newcomers. Page one admonishes the innocent upstarts that "[a]n attorney or ICC practitioner experienced in railroad matters and ICC regulations and requirements could prove most helpful."[91]

Challenging an abandonment directly is a costly and bold endeavor.[92] Simple arguments of hardship rarely find favor with today's Commission.[93] Rather, one must be prepared to engage in a battle of statistics with the railroad, challenging, for example, its estimate of opportunity costs.[94] One must also meet short, strict, filing deadlines, and

86. Montange, *supra* note 78, at 154-56.

87. The provision was sustained against constitutional attacks from abutting landowners. Preseault v. ICC, 494 U.S. 1 (1990).

88. Montange, *supra* note 78, at 148.

89. Henry B. McFarland, *Railroad Abandonment Policy in the 1990's*, 58 Transp. Prac. J. 331, 338 (1991).

90. *Id.*

91. Office of Public Assistance, ICC, So You Want to Start a Small Railroad 1 (6th ed. 1992).

92. Montange, *supra* note 78, at 146-47.

93. *Id.*

94. *Id.*; *see also* Office of Public Assistance, Interstate Commerce Comm'n, A Guide for Public Participation in Rail Abandonment Cases Under the Interstate Commerce Act 25-42 (4th ed. 1993).

hire experts to sort through data.[95] As a result, only fifteen to twenty percent of corridors proposed for abandonment by railroads are ultimately conserved.[96]

XV. Mining and Heavy Industry Needs

The captive shipper problem largely evaporated with the rise of the motor carrier. However, certain industries ship goods which are not effectively movable by truck; chiefly minerals, including coal and iron. Trucks are not a viable substitute service for these industries, and the captive shipper problem is formidable for them. Therefore, in 1984, the mining industry joined forces with the coal-dependent electric utility industry to create a lobby against wide-open deregulation.[97] The Consumers United For Rail Equity (CURE) was formed to voice their opinion[98] and to propose legislation restricting abandonments.[99] It seems, however, that CURE's efforts are destined to fail year after year because of opposition from the great majority of industries who benefit from rail deregulation.[100]

XVI. Conclusion

Railroad abandonments have been extremely important economically and have literally reshaped the map of the nation. An issue of this magnitude deserves close attention by railroads, government planners, and citizen groups. But surprisingly, the topic of abandonments has been largely ignored in academic publications; it was overshadowed by its cousin, rate regulation, despite the fact that the two went hand in hand through the early patchwork of state regulations, later federal regulation, the competition from motor carriers, and ultimately deregulation. The more recent public concern with rails to trails has pushed rail abandonments closer to the limelight and hopefully will produce much needed scholarship on the issue.

95. Montange, *supra* note 78, at 146-47.
96. *Id.* at 167.
97. Stone, *supra* note 26, at 170-71.
98. *Id.*
99. *Id.* at 169-74.
100. *Id.*