

## **Casenote: Chicago and North Western Transportation Co. v. United States<sup>1</sup>**

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### I. INTRODUCTION

The 1970's saw a tremendous change in the rail industry. Once the dominant mode of both freight and passenger transportation, the railroads found their market shares dropping and their financial health declining.<sup>2</sup>

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1. 678 F.2d 665 (7th Cir. 1982).

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2. See Statement on signing S. 1946 into Law, 16 WEEKLY COMP. PRES. DOC. 2225 (Oct. 14, 1980); Benham, *The Transportation Industry And Its Changing Face*, in REFLECTIONS OF AMERICA 167 (1980).

Passenger service became the purview of the government owned National Railroad Passenger Corporation;<sup>3</sup> much of the freight service for the Midwest and Northeast became the responsibility of the government owned ConRail;<sup>4</sup> and two major transcontinental carriers, the Milwaukee<sup>5</sup> and the Rock Island<sup>6</sup> went bankrupt. As the 1980's began, the industry remained in poor health despite the fact that several significant rail mergers and acquisitions were approved to increase operating efficiencies and enabling the industry to better compete with other modes of transportation.<sup>7</sup>

To help the industry regain financial stability and to assist in the rehabilitation and financing of the rail system, Congress passed the Staggers Rail Act of 1980.<sup>8</sup> Although most of its changes concerned carrier rates, Congress also modified the means by which carriers are able to abandon unprofitable lines. Since 1920, carriers have been permitted to seek authority from the Interstate Commerce Commission to abandon their operations and discontinue their service.<sup>9</sup> If the public convenience and necessity permit, the Commission must authorize the abandonment. After abandonment is authorized and effectuated, the rail carrier no longer serves the shipper and communities on the line being abandoned, even if those parties desire and need service. The abandonment process, however, was often a lengthy one, allowing numerous opportunities for delay.<sup>10</sup>

Therefore, in the Staggers Act, Congress modified the abandonment procedures so that the application was handled more expeditiously. Under the Staggers Act changes, the Commission must issue a final decision in all abandonment proceedings within 255 days of the filing of the application.<sup>11</sup> Those abandonments with little or no opposition are decided within seventy-five or forty-five days, respectively, of the application's filing.<sup>12</sup>

However, while providing for expedited handling of abandonments, Congress also showed concern for the impact of abandonment on commu-

3. 45 U.S.C. § 541 (Supp. V 1981).

4. 45 U.S.C. § 741 (1976 & Supp. V 1981).

5. Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) filed a petition on December 19, 1977, for reorganization.

6. Chicago, Rock Island & Pacific Railroad Company (Rock Island) filed a petition on March 17, 1975, for reorganization.

7. Norfolk & W. Ry. — Control — Detroit, T. & I.R. Co., 360 I.C.C. 498 (1979); Burlington Northern, Inc. — Control & Merger, St. L., 360 I.C.C. 784 (1980); St. Louis S.W. Ry. — Pur. — Rock Island (Tucumcari), 363 I.C.C. 320 (1980); and CSX Corp. — Control — Chessie and Seaboard C.L.I., 363 I.C.C. 518 (1980).

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

9. 49 U.S.C. § 10903 (Supp. V 1981).

10. DEP'T OF TRANSPORTATION, A PROSPECTUS FOR CHANGE IN THE FREIGHT RAILROAD INDUSTRY, A PRELIMINARY REPORT BY THE SECRETARY OF TRANSPORTATION 51 (1978).

11. 49 U.S.C. § 10904(b), (c)(3) (Supp. V 1981).

12. *Id.* § 10904(b), (c)(2).

nities and shippers. It therefore gave the Commission the unprecedented power to force a railroad to sell the line authorized for abandonment, at fair market value, to a financially responsible entity who would continue the service.<sup>13</sup>

Prior to the Staggers Act, the Commission had attempted to force abandoning carriers to bargain in good faith with offerors by postponing the issuance of abandonment certificates indefinitely if the offeror and carrier failed to reach an agreement within six months. The Seventh Circuit rejected this attempt by the Commission to create a cram-down provision. The court held that if negotiations failed, a certificate must be issued at the end of the six month period.<sup>14</sup> Thus, the Commission was left with no power to force the abandoning carrier to negotiate in good faith with the offeror. Instead, it could only provide for the six month suspension of the grant of an abandonment certificate, while negotiations were attempted by the two parties.

Congress recognized the dilemma. A Senate report from the Committee on Commerce, Science, and Transportation states, "a railroad unwilling to consider subsidy or sale of the line can frustrate the intention of section 10905 of 49 U.S.C. by simply refusing to negotiate in good faith."<sup>15</sup> Congress amended section 10905 so that the intention of the statute could no longer be circumvented. The Commission now had the power to assure good faith negotiations. If negotiations break down, the Commission, at the request of one of the parties, can intervene and set the conditions of the sale.

This "cram-down" provision was first construed by the courts in *Chicago and North Western Transportation Co. v. United States*.<sup>16</sup> The questions before the court, and the ones addressed by this casenote, are questions of statutory construction.

## II. BACKGROUND: THE INTERSTATE COMMERCE COMMISSION'S DECISION

On December 31, 1979, Chicago and North Western Transportation Company (C&NW) filed an application with the Interstate Commerce Commission (ICC) seeking to abandon approximately seventeen miles of rail line between Ringwood, Illinois, and Lake Geneva, Wisconsin — the "Lake Geneva Line." Authority for such action by the ICC is found at 49 U.S.C. sections 10903-04. C&NW offered evidence showing "the line had been operating at a loss for the most recent three years; that traffic was thin and

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13. *Id.* § 10905.

14. *Chicago and North Western Transp. Co. v. United States*, 582 F.2d 1043, 1049 (7th Cir. 1978).

15. S. REP. NO. 470, 96th Cong., 1st Sess. 40 (1979).

16. 678 F.2d 665 (7th Cir. 1982).

was declining; that substantial rehabilitation was required on the line; and that it was incurring sizable opportunity costs<sup>17</sup> from its inability to withdraw its assets from this unprofitable operation."<sup>18</sup> On April 14, 1981, the Commission granted the abandonment.

Responding to the grant of the abandonment application, the Geneva Lake Area Joint Transit Commission (GLA), a "consortium of towns that is dedicated to preserving commuter rail service,"<sup>19</sup> offered C&NW \$985,000 for the line, pursuant to the offer of financial assistance provisions of 49 U.S.C. section 10905. The ICC found the consortium financially responsible and deemed its offer bona fide.<sup>20</sup>

GLA and C&NW began negotiations pursuant to the statute but failed to agree on the terms of the purchase. The major point of disagreement was the amount to be paid for the land which made up the rail corridor.<sup>21</sup> C&NW's estimate as to the value of the property and the rail materials escalated as the negotiations continued. GLA, frustrated by the negotiations and its failure to reach agreement with C&NW on the terms of the purchase, petitioned the ICC pursuant to 49 U.S.C. section 10905, which grants the ICC the power to set the terms of the purchase. The ICC, after taking evidence from both parties, set the price and the conditions of the purchase. The price set by the ICC was closer to GLA's estimate of the price of the line than C&NW's—\$1,003,321. The ICC accepted GLA's appraisal on both the property and on the price to be placed on the reus-

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17. The Commission's consideration of opportunity costs in abandonment proceedings is a recent development. As recently as 1979 a majority of the Commission decided that although there was nothing stopping it from using opportunity costs as a factor in abandonment proceedings, there were also no cases explaining how and when it could be used. *Texas and Pacific R. — Abandonment*, 360 I.C.C. 206, 207 (1979).

After acknowledging that the concept was a valid one, the Commission decided to get comments as to how opportunity costs should be used as a factor in abandonment proceedings. *Id.* at 208. After analyzing the many comments that were filed, the Commission decided that opportunity costs are a real, and, in some cases, very significant factor in determining whether the line at issue is imposing a burden on interstate commerce." *Abandonment of R.R. Lines — Use of Opportunity Costs*, 360 I.C.C. 571 (1980), *aff'd sub. nom. Farmland Indus., Inc. v. United States*, 642 F.2d 208 (7th Cir. 1981).

Having decided that opportunity costs were factors to be used in abandonment proceedings, the Commission proceeded to find that "a carrier's opportunity costs could be found by applying an adequate rate of return against the line's net liquidation value." *Texas and Pac. Ry. Abandonment*, 363 I.C.C. 666 (1980).

18. Brief for the Interstate Commerce Commission at 3, *Chicago and North Western Transp. Co.*

19. *Chicago and North Western Transp. Co.*, 678 F.2d at 666.

20. *Chicago and North Western Transp. Co. — Abandonment*, 363 I.C.C. 956 (1981).

21. *Id.* at 958-60. C&NW set the price of the corridor at \$763,100. GLA's final appraisal and offer was \$275,000. See also Brief for the Interstate Commerce Commission at 7-9, Brief for Chicago and North Western Transportation Company at 6, 28-31, *Chicago and North Western Transp. Co.*

able rail. The ICC accepted C&NW's valuation of track and structures exclusive of rail.<sup>22</sup>

The ICC also set the terms of the purchase; closing was to occur within ninety days at C&NW's request, and payment was to be by cash or certified check. As to the method of conveyance, the ICC stated: "In light of the clouded title under which C&NW holds most of the property, if GLA is willing to accept a quit-claim deed we have no objection."<sup>23</sup>

### III. THE STATUTE

In seeking judicial review of the ICC's decision, C&NW did not challenge 49 U.S.C. section 10905.<sup>24</sup> However, for a full understanding of the court's decision it is necessary to discuss the statute under which this cause of action originated.

Under section 10905, a financially responsible person may offer to purchase a rail line within ten days after the ICC publishes its decision in the Federal Register to allow abandonment of that line.<sup>25</sup> If within fifteen days after publication the ICC determines that the offeror is financially responsible and its offer bona fide, it must temporarily suspend its grant of abandonment so that the parties can negotiate the sale.<sup>26</sup> However, if the parties cannot reach an agreement within thirty days of the offer, either party may request the ICC to set the price and the terms of the sale.<sup>27</sup> Following the request, the ICC has sixty days to issue its decision setting the terms.<sup>28</sup> In no instance shall the price be lower than the fair market value of the line.<sup>29</sup> Once the ICC has set the terms, the offeror has ten days to withdraw his offer.<sup>30</sup> If the offeror fails to do so, the terms become binding and he must finalize the purchase. The purchaser must assure continued rail service over that line for no less than two years.<sup>31</sup>

The purpose of this statute<sup>32</sup> is to expedite negotiations and give relief to an offeror who is potentially being "held-up" by the abandoning rail car-

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22. "[W]here both offeror and offeree have submitted acceptable appraisals and where it is impossible to determine which valuation is more accurate, we shall accept the figure submitted by the offeree — railroad." *Chicago and North Western Transp. Co. — Abandonment*, 363 I.C.C. 956, 961-62 (1981).

23. *Id.* at 963.

24. 49 U.S.C. § 10905 (Supp. V 1981).

25. *Id.* § 10905(c).

26. *Id.* § 10905(d).

27. *Id.* § 10905(e).

28. *Id.* § 10905(f)(1)(A).

29. *Id.* § 10905(f)(1)(C).

30. *Id.* § 10905(f)(2).

31. *Id.* § 10905(f)(4).

32. See generally H.R. REP. No., 1430, 96th Cong., 2d Sess. 3, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4110, 4111.

rier.<sup>33</sup> In this manner Congress sought to force abandoning railroads to come to terms with financially responsible offerors so that rail service could be continued where it would otherwise be halted.<sup>34</sup>

#### IV. THE SEVENTH CIRCUIT'S DECISION

Since C&NW did not challenge the statute, 49 U.S.C. section 10905,<sup>35</sup> the Seventh Circuit was left with two related issues: (1) What was meant by the term fair market value, and (2) once this was determined, what was the value of the property and therefore its selling price?

##### A. FAIR MARKET VALUE

Because this was the first proceeding interpreting this statute, the ICC had to first determine what was meant by the term fair market value. Analyzing this language, the ICC noted that in another forced sale provision enacted at the same time, Congress provided for the forced sale of non-abandoned rail property at the constitutional minimum value. Moreover, Congress defined the constitutional minimum value as being the greater of net liquidation value or going concern value. In its abandonment regula-

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33. Prior to the Staggers Rail Act of 1980, offers of financial assistance to purchase a railroad line being abandoned fell under 49 U.S.C. § 1a(6)(a) (1976). Under this section, permission to abandon a line would be temporarily suspended for six months while the offeror attempted to come to terms with the abandoning railroad as to the purchase of the line. There was, however, no relief for the offeror should the railroad refuse to negotiate in good faith. In this manner the abandoning carrier could hold out for a higher price. *Chicago and North Western Transp. Co. v. United States*, 678 F.2d at 667-68.

34. The cram-down provision also applies to responsible offers to subsidize an abandoning carrier. The subsidizer pays the railroad the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line plus a reasonable return on the value of the line. 49 U.S.C. § 10905(d)(2)(A) (Supp. V 1981).

35. C&NW did, however, challenge the procedures which implemented the statute. C&NW, in its brief stated, "the Commission has failed to provide North Western with any meaningful opportunity to be heard with respect to the fair market value of the Lake Geneva line." Brief for Chicago and North Western Transportation Company at 33, *Chicago and North Western Transp. Co. v. United States*. The Seventh Circuit addressed this issue at the conclusion of its decision.

We think the procedure whereby the Commission determined the fair market value of the Lake Geneva line was adequate. C&NW does not challenge the constitutionality of the 60-day deadline for the Commission's valuation. That concession, and another (its brief in this court states, 'It may be that the fault lies with the exceedingly tight 60-day time limit'), pretty much puts it out of court. Sixty days permit only summary procedures. The Commission acted on a written record based on the submissions of the parties and their written comments on each other's submission. No doubt there would have been time for some kind of oral hearing. . . . But in oral argument in this court C&NW's counsel disclaimed any desire to cross-examine GLA's witnesses. This disclaimer implies that oral hearing would have served no purpose. Since the benefits of additional procedural safeguards could have been zero, we need not concern ourselves with what the costs would have been; the procedure was constitutionally adequate under *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

*Chicago and North Western Transp. Co. v. United States*, 678 F.2d at 671.

tions, the ICC concluded that fair market value also was the greater of net liquidation value or going concern value.<sup>36</sup> These regulations, though issued after the ICC's decision setting the terms of purchase, were used by the ICC to support its position on appeal.<sup>37</sup>

The ICC still had to decide, however, whether the appropriate value in this proceeding was net liquidation value or going concern value. The ICC determined that C&NW, by its request for abandonment, was asserting that the line was a burden on interstate commerce. Therefore, there was no going concern value.<sup>38</sup> The ICC thus interpreted fair market value to be net liquidation value—what the carrier would have received if the line had been abandoned and the railroad had sold off its assets.<sup>39</sup> The carrier salvages the reusable rail line, sells the rest of the rail materials for scrap, and then sells off the real estate underlying the right-of-way.

The Seventh Circuit affirmed the ICC's interpretation of fair market value. The court stated:

But for the sale of the Lake Geneva Line to GLA at a price fixed by the Commission, C&NW would have abandoned the line — that is, would have sold the right of way and track and other property and facilities for nonrail uses and the price it would have received would have been the nonrail market value of these assets, which is what the Commission tried to estimate when it fixed the sale price.<sup>40</sup>

The court recognized that the government had a constitutional obligation to give, or determine that a specific party give, just compensation for property that it condemns.<sup>41</sup> This compensation must be an amount equivalent to what the railroad would have received without government intervention; in this instance, the amount the carrier would have been able to sell the assets for subsequent to the abandonment.<sup>42</sup> Compensation under this statute and based on these facts does not mean the market value of a working rail line.

The court went on to discuss C&NW's contention that net liquidation value was not the appropriate standard. Instead, C&NW asserted that going concern value should be applied. C&NW argued that because the statute intended that rail service be continued for two years, this in fact imbued

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36. "Abandonment of R.R. Lines & Discontinuance of Serv.," 365 I.C.C. 249 (1981).

37. Brief for the Interstate Commerce Commission at 13 n.10 Chicago and North Western Transp. Co. v. United States.

38. Chicago and North Western Transp. Co. — Abandonment, 363 I.C.C. at 957-58.

39. *Id.*

40. Chicago and North Western Transp. Co. v. United States, 678 F.2d at 668.

41. *Id.*

42. *Id.*

the line with going concern value.<sup>43</sup> GLA would be operating the line in the same manner as C&NW had in the past. The Seventh Circuit rejected this contention. The court stated:

We are not sure why this should make a difference. Whatever the intended use by the government, the condemnee who asks for more than what the property would have been worth to him if the government had not wanted the property is trying to engross 'hold-out' values — the very thing, one might have thought, that the eminent domain power was intended to excuse the government from having to pay.<sup>44</sup>

And further: "[W]e think it irrelevant whether private property is taken for a new use or to continue an old one, and even question whether this is a meaningful distinction.<sup>45</sup>

### B. THE VALUE OF THE PROPERTY

Having decided to value the property according to net liquidation value, the ICC and the Seventh Circuit still had to resolve the specific disputes as to the value assigned to the rail property.

C&NW contended that the ICC should take into account the assembled value of the rail property.<sup>46</sup> In this way the value of the property is substantially increased. GLA, on the other hand, argued that the value of the property should be determined as if C&NW had actually abandoned the line—that is, the property's value if it had been sold off by the abandoning carrier for nonrail usage. Using this method, GLA placed no value on land which could not be conveyed if an actual sale of the parcel for nonrail use had occurred. Therefore, GLA argued, any property which would revert to the original owner once the line was abandoned was rendered worthless to C&NW. This included any land that was held by adverse possession or easement.<sup>47</sup>

Having decided to rely on net liquidation value, it would have been inconsistent for the ICC to value the property as a corridor for rail use when it was prepared to grant C&NW's abandonment petition on the grounds that it was unprofitable for such use. Thus, the ICC rejected C&NW's argument.<sup>48</sup> In affirming that finding, the court noted that, although their conclusion that GLA could acquire the Lake Geneva Line at salvage value might appear harsh, it was inescapable since the proper standard was fair

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43. Brief for Chicago and North Western Transportation Company at 13-20, Chicago and North Western Transp. Co. v. United States.

44. Chicago and North Western Transp. Co. v. United States, 678 F.2d at 669.

45. *Id.*

46. Brief for Chicago and North Western Transportation Company at 14-16, Chicago and North Western Transp. Co. v. United States.

47. Brief for the Interstate Commerce Commission at 21-22, Chicago and North Western Transp. Co. v. United States.

48. Chicago and North Western Transp. Co. — Abandonment, 363 I.C.C. at 957-58.

market value.<sup>49</sup>

#### V. POSTSCRIPT

In its July 23, 1981, decision setting the price and other terms of sale, the ICC held that if GLA accepted the terms, consummation of the transaction must occur within ninety days of the service date of the decision.<sup>50</sup> However, prior to that date, C&NW petitioned the Seventh Circuit for a review of the decision.

On September 28, 1981, GLA filed a petition seeking a stay of the ninety day consummation period because of the court review.<sup>51</sup> C&NW concurred in that request. In a decision served October 20, 1981, the ICC agreed to the modification of the consummation deadline.<sup>52</sup> It ordered consummation to occur within ninety days of the entry of a decision by the Seventh Circuit.

Since the Seventh Circuit's decision was entered on April 26, 1982, C&NW claimed that the consummation deadline was July 25, 1982.<sup>53</sup> However, on July 16, 1982, GLA filed a telegram with the ICC requesting that the alleged July 25, 1982, consummation deadline be postponed until the ICC ruled on the question raised in a petition for clarification filed by C&NW on July 21, 1982. GLA's request was granted by the ICC Chairman Reese H. Taylor, Jr., in a decision served July 23, 1982. Chairman Taylor indicated that a new consummation date would be set by the ICC in its decision addressing C&NW's petition.

In a decision served August 31, 1982, the ICC addressed C&NW's petition for clarification.<sup>54</sup> The primary question raised by C&NW concerned the method by which the property would be transferred. C&NW wanted to transfer the property by quitclaim deed.<sup>55</sup> GLA, on the other hand, wanted either a warranty deed or a quitclaim deed accompanied by

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49. Chicago and North Western Transp. Co. v. United States, 678 F.2d at 670.

50. Chicago and North Western Transp. Co. — Abandonment, 363 I.C.C. at 964.

51. GLA also sought a stay of the 10-day withdrawal period. That request was denied because: (1) it was late-filed since the 10-day period expired on August 2, 1981, and (2) the 10-day period is statutorily mandated, 49 U.S.C. § 10905(f)(2) (Supp. V 1981). Chicago and North Western Transp. Co. — Abandonment — Between Ringwood, IL and Geneva, WI — No. AB-1 (Sub-No. 70) (I.C.C. served Oct. 20, 1981).

52. *Id.*

53. C&NW's assertion was contained in a petition for clarification it filed with the Commission on June 21, 1982. Petition for Clarification of the Commission's Decision served July 23, 1981, Establishing Purchase Price and Other Terms at 1-2 n.1.

54. Chicago and North Western Transp. Co. — Abandonment — Between Ringwood, IL and Geneva, WI, No. AB-1 (Sub-No. 70) (I.C.C. served Aug. 31, 1982).

55. Petition for Clarification of the Commission's Decision served July 23, 1981, Establishing Purchase Price and Other Terms at 2-6.

title insurance purchased at C&NW's expense.<sup>56</sup> The problem was how to interpret the following paragraph from the ICC's July 23, 1981, decision: "GLA has not addressed C&NW's request that the property be conveyed by quitclaim deed. In light of the clouded title under which C&NW holds most of the property, if GLA is willing to accept a quitclaim deed we have no objection."<sup>57</sup> C&NW argued that this language was ambiguous and therefore must be clarified by the ICC.<sup>58</sup>

The ICC granted C&NW's petition and determined that C&NW would be allowed to convey by quitclaim deed.<sup>59</sup> It also rejected GLA's requested title insurance condition but noted that GLA was free to attempt to acquire its own title insurance policy.<sup>60</sup> The ICC also allowed GLA ten days to accept or reject the terms as clarified in its decision because it concluded that GLA may not have originally agreed to acquire the property by quitclaim deed.<sup>61</sup> If GLA accepted the clarified terms, the ICC indicated that consummation had to occur within thirty days of the service date of the decision.<sup>62</sup>

On September 10, 1982, GLA notified the ICC of its decision to accept the terms of sale as clarified by the ICC's August 31, 1982, decision. Accordingly, pursuant to 49 U.S.C. section 10905(e), the ICC issued a decision on September 23, 1982, dismissing the C&NW abandonment application and authorizing the sale.<sup>63</sup> Consummation was scheduled to occur on September 30, 1982.

On September 30, 1982, however, GLA petitioned the ICC for a sixty day extension of time to consummate in order to complete financing arrangements.<sup>64</sup> In its petition GLA noted that the ICC normally provided parties with ninety days to consummate a section 10905 sale and that its request, if granted, would provide the ninety days.

C&NW quickly filed a petition opposing the extension of time.<sup>65</sup> More-

56. Response to Petition for Clarification of the Commission's Decision served July 23, 1981, Establishing Purchase Price and Other Terms at 3.

57. Chicago and North Western Transp. Co. — Abandonment, 363 I.C.C. at 963.

58. Petition for Clarification of the Commission's Decision served July 23, 1981, Establishing Purchase Price and Other Terms at 2-6.

59. Chicago and North Western Transp. Co. — Abandonment — Between Ringwood, IL and Geneva, WI, No. AB-1 (Sub-No. 70) (I.C.C. served Aug. 31, 1982).

60. *Id.*

61. *Id.*

62. *Id.*

63. Chicago and North Western Transp. Co. — Abandonment — Between Ringwood, IL and Geneva, WI, No. AB-1 (Sub-No. 70) (I.C.C. served Sept. 23, 1982).

64. Petition for Extension of Time to Close, Chicago and North Western Transp. Co. — Abandonment, 363 I.C.C. 956 (1981) (filed by GLA on September 30, 1982).

65. Petition to Vacate Decision Served September 23, 1982 and for Issuance of a Certificate of Abandonment, Chicago and North Western Transp. Co. — Abandonment, 363 I.C.C. 956 (1981) (filed by C&NW on October 1, 1982).

over, C&NW requested that the September 23, 1982, decision dismissing its abandonment application be vacated and that it be authorized to immediately abandon the line because GLA had defaulted on its obligations by failing to consummate on September 30, 1982.

In a decision served October 26, 1982, the ICC granted GLA's request but with conditions attached.<sup>66</sup> First, the ICC indicated that GLA's failure to comply with its conditions would result in immediate issuance of an effective abandonment certificate. Second, GLA was required to compensate C&NW for any losses incurred during the sixty day extension. GLA was ordered to subsidize C&NW's operations for the period commencing September 30, 1982, and ending November 29, 1982, or earlier if consummation occurred prior to that date. The subsidy would be calculated according to the ICC's subsidy regulations, which provide for carrier reimbursal for operating losses as well as a return on assets invested in the line.<sup>67</sup> GLA was given until November 8, 1982 to notify the ICC and C&NW of its decision accepting or rejecting these conditions. Rejection of the conditions or failure to notify the ICC by that date would result in an immediate issuance of an effective certificate permitting abandonment. To put teeth into this decision, the ICC vacated its September 23, 1982, decision that authorized the transfer and dismissed the abandonments.

Because GLA neither accepted nor rejected the conditional extension by November 8, 1982, the ICC issued a certificate and decision on November 10, 1982, which authorized C&NW to abandon the line immediately.<sup>68</sup> C&NW consummated the abandonment on November 15, 1982.

## VI. CONCLUSION

As indicated by a 1979 Senate report,<sup>69</sup> the railroad industry is of vital

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66. *Chicago and North Western Transp. Co. — Abandonment — Between Ringwood, IL and Geneva, WI*, No. AB-1 (Sub-No. 70) (I.C.C. served Oct. 26, 1982).

67. 49 CFR § 1152.27 (1982).

68. After consummating the abandonment, C&NW filed a petition with the ICC seeking an award of \$21,116.47 in damages against GLA because of GLA's failure to consummate the purchase of the line. On April 18, 1983, the Commission issued a decision finding that, "in the absence of any showing of bad faith . . . the award of monetary damages is not 'appropriate action.'" Accordingly, the Commission dismissed C&NW's petition for damages. *Chicago and North Western Transp. Co. — Abandonment — Between Ringwood, IL and Geneva, WI*, No. AB-1 (Sub-No. 70) (I.C.C. served Apr. 18, 1983).

69. An efficiently operating transportation system is essential to the well-being of the nation. About 20 percent of our total annual expenditures for goods and services goes for transportation of people or freight. More than 12 percent of our total civilian employment is in transportation or related industries, amounting to more than 10 million jobs in 1977. The tremendous demands on the national transportation network to move goods are evident when total freight ton-miles number over 2 trillion annually. Of this total tonnage, railroads carry over 70 percent of coal ton-miles and 60 percent of grain ton-miles. They are also the principal mode for pulp and paper products, automotive products, foodstuffs, chemical and primary metals. Unfortunately, at a time when the need for increased trans-

importance to the nation and is in serious trouble. It is also obvious that if service is disrupted, for any reason, the ramifications will be severe. Shippers will be unable to move their goods, and commuters will be cut off from access to their employment. An abandonment of a rail line is a total and final disruption of service. Shippers and communities can file objections with the ICC when a railroad petitions for abandonment, but these objections are rarely successful. In the fiscal year 1981, 140 applications for abandonment were decided and of those, 139 involving 2,914 miles of rail line were granted.<sup>70</sup> In the fiscal year 1982, 423 applications for abandonment were decided; 380 involving 5,168 miles of rail line were granted, 40 were withdrawn and only 3 were denied.<sup>71</sup> These figures will undoubtedly escalate unless the shippers using the rail industry dramatically increase the use of rail lines, and the rail industry experiences a dramatic improvement in earnings.

It is also important to realize that these abandoned rail lines are lost for all time. The possibility of another railroad constructing a new rail line between points that lose service is remote, as the cost of constructing new rail line is prohibitive.<sup>72</sup>

Section 10905 is not a complete solution to the abandonment problem.<sup>73</sup> However, it is an important alternative to an almost automatic cessation of service. It also constrains the abandoning railroad from holding up the offeror. The ICC can set the conditions of the sale at the request of one of the parties if the negotiations break down. Since the enactment of the amendment to section 10905, the ICC has received 105 offers of financial assistance. Thirty-eight purchases were made and twelve subsidies were arranged. Five purchase offers are currently pending. Service will continue over these lines for at least two years. The program, it appears, is working. Rail service is continuing where it otherwise would have been permanently disrupted.

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port capacity is developing at a rapid pace, the railroads are the weakest sector in our transportation system, and the ability of the railroad industry to meet its future responsibilities to society is considered by many to be in doubt.

S. REP. No. 470, 96th Cong., 1st Sess. 2 (1979).

70. 95 ICC ANN. REP. 37 (1981).

71. Figures obtained in an informal discussion with Louis E. Gitomer, Deputy Director Rail Section, Office of Proceedings, Interstate Commerce Commission (Oct. 22, 1982).

72. For example, in 1982 the ICC approved a request by Somerset Railroad Company to construct a 27.4 mile line of railroad at an estimated cost of \$44 million. *Somerset R. Corp.—Constr.—Niagara County, NY*, 366 I.C.C. 144 (1982). Similarly, on October 4, 1982, the Denver and Rio Grande Western Railroad Company filed an application to construct a 62 mile line at an estimated project cost of \$70 million. Finance Docket No. 30044, *The Denver and Rio Grande Western Railroad Company, Application to Construct and Operate a Line of Railroad in Carbon and Emery Counties, UT*.

73. 49 U.S.C. § 10905 (Supp. V 1981).

GLA felt that rail service was so important to the community that it was formed for the sole purpose of preserving this valuable service:

GLA, made up of local public bodies in Wisconsin and Illinois was created to maintain and enhance rail service on this line. The on-line municipalities, on-line shippers and the public have evidenced their desire for continued train service by their protests and requests for investigation. Indeed, GLA's existence as the first transit commission in Wisconsin and first bi-state rural transit commission anywhere attest to the public's desire to retain rail service.<sup>74</sup>

The Seventh Circuit preserved the integrity of this very important statute. By using this program, the community and shippers will receive continued rail service, and the railroad will receive the fair market value for its property.

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74. Opening Statement On Behalf of Protestant Geneva Lake Area Joint Transit Commission at 6, Chicago and North Western Transp. Co. — Abandonment, 363 I.C.C. 956 (1981).

