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Strategies to Facilitate Acquisition and Use of Railroad Right of Way by Transit Providers

A report prepared under TCRP Project J-5, "Aspects of Transit and Intermodal Transportation Programs, "for which the Transportation Research Board is the agency conducting the research. The report was prepared by Kevin Sheys. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator.

THE PROBLEM AND ITS SOLUTION

In reauthorizing federal assistance for surface transportation programs through the 1990s, the Intermodal Surface Transportation Efficiency Act calls for the adaptation of new concepts and techniques in planning, funding, constructing, and operating these programs. These changes will affect the institutional framework--laws and administrative processes--as well as engineering and operational elements of these programs. The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and highways, and in some instances, waterways. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they share common interests (and responsibilities) with highway and water transport agencies in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private sector programs, and labor or environmental standards relating to transit operations. Emphasis would be on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

The foregoing research should prove helpful to transit providers, state and local departments of transportation, Metropolitan Planning Organizations, and regional authorities. Officials who need to understand the legal intricacies involved in acquiring railroad rights of way for transit use are governors, mayors, county executives, executive directors, planners, right-of-way officials, and lawyers. This material should be useful as background reading for attorneys and any of the above enumerated officials that are in the process of considering planning, or acquiring routes for transit rail services.

The acquisition of railroad rights of way sets into motion a complex and interrelated network of laws and regulations. An understanding of how these laws work is essential for officials involved in this process. This report focuses on strategies for transit providers to acquire railroad rights of way without the sometimes financially harsh consequences of these laws.

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Strategies to Facilitate Acquisition and Use of Railroad Right of Way by Transit Providers

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INTRODUCTION

Rail passenger transportation is in a state that many have characterized as a Renaissance. Elected officials and other leaders at all levels of government have recognized that rail passenger transportation is part of the solution to national, regional, and local transportation challenges, environmental problems, and infrastructure reclamation and improvement. Passage of the Intermodal Surface Transportation Efficiency Act, and before that, the Clean Air Act Amendments, are examples of a renewed national commitment to surface transportation in general and to rail passenger transportation in particular.

Among the challenges to the planners and managers of new rail passenger transportation projects is the need to minimize project costs and the disruption and dislocation associated with construction and operation of new transit systems.[1] Part of the answer to this challenge is full consideration of strategies that would allow a transit system to acquire or use existing railroad rights of way for transit projects. The acquisition or use of such rights of way may save taxpayers hundreds of millions of dollars and represents an opportunity to use existing transportation corridors for multiple purposes, thereby avoiding some of the less quantifiable costs of major public construction projects.

This article draws on the recent transit system rail corridor transactions and discusses critical provisions of federal railroad law to identify strategies that may facilitate continued acquisition and use of railroad rights of way by transit systems. The article also identifies possible solutions to the nagging problem of establishing a fair price for access and shared use of rights of way when negotiations between a transit system and a freight railroad are not successful and outlines some of the legal challenges presented by such solutions.

A FRAME OF REFERENCE

Before delving into the issues associated with acquisition/use of rights of way by transit systems, it is necessary to outline the key features of the railroad industry and the legal framework within which railroads operate.

There are over 500 railroads in the United States, not counting railroads operating within industrial plants or those that only haul the products or commodities of their owners. Taken together, these 500-plus railroads operate approximately 175,000 route-miles of rail line.

The largest railroads, measured by revenue, are often referred to as "Class I" railroads.[2] Today, there are just over a dozen Class I railroads, but Class I's employ 89 percent of the freight railroad industry's workers, operate 75 percent of U.S. railroad trackage, and earn 91 percent of freight railroad industry revenue. Most rail line sellers are Class I railroads. Class II--railroads-more often referred to by the roughly equivalent term "regional railroads"--number approximately 35 nationwide and have approximately 11 percent of the route mileage, 5 percent of the employment, and 5 percent of railroad revenue.[3] In almost all circumstances, Class I and regional railroads are the owners/operators of the rail rights of way of interest to transit systems.[4]

Railroads hauling the products and commodities of third parties are "common carriers" subject to regulation by the Interstate Commerce Commission (ICC) under the Interstate Commerce Act (ICA).[5] Under the ICA, and ICC cases construing the statute, a railroad's common carrier status imposes a duty to provide rail freight service on a nondiscriminatory basis to all those who request service. Generally speaking, all service is under published rates (tariffs) or pursuant to transportation contracts between railroads and shippers.

Under the ICA, the ICC also regulates the sale of rail lines, the termination of use of rail lines (abandonment), and the shared use of rail lines by multiple carriers (in most circumstances).[6]

Rail carriers also are subject to several other federal railroad laws relating to labor, employment, and employee benefits, including the following:

- The Railroad Retirement Act, a railroad counterpart to social security under which rail carriers and their employees make significantly higher rates of contribution for employee retirement than under the social security system.
- The Railroad Unemployment Insurance Act, a railroad-specific substitute for the state unemployment compensation laws, with contribution rates in excess of those under most state unemployment insurance programs.
- The Railway Labor Act, which governs labor-management relations on freight railroads and provides covered employees with substantially greater rights than the otherwise-applicable federal labor laws.
- The Federal Employers Liability Act (FELA), a fault-based workers' compensation system for most employees of interstate railroads.

Thus, carriers are subject to a whole host of industry-specific laws that mean regulatory burdens and higher operating expenses.

The freight railroad industry was partially deregulated by the Staggers Rail Act of 1980[7] and, to a lesser extent, two earlier laws. The Staggers Act amended the ICA in ways that have forced freight railroads to compete in order to survive. Since 1980, many Class I's have disposed of rail lines that were marginal or unprofitable on the Class I operating scale,[8] cut operating costs, and improved service to shippers. Even so, most Class I railroads do not generate sufficient revenue to cover their operating costs and earn an adequate rate of return on their invested capital.

Further improvements in the financial strength and profitability of freight railroads probably will come from more efficient use of existing assets and increases in market share through continued improvement in service and innovations (such as intermodal ventures with long-haul trucking companies).

Track maintenance and debt service on track assets are among the major expenses of railroad operations (along with wages and benefits, equipment costs, and fuel costs). To the freight railroads, the possibility of sharing rights of way with transit systems is both a solution and a threat to their efforts to attain and maintain profitability. Shared use offers freight railroads the opportunity to make better use of existing trackage and other assets, through the sale of operating rights and the sharing of maintenance expenses on a going-forward basis. On the other hand, shared rights of way may hinder freight access and thereby hurt railroads as they strive to improve service.

For the transit system evaluating right-of-way acquisition strategies, the critical points to remember are that

- Freight railroads have a common carrier obligation to their shippers;

- Freight railroads operate under a regime of burdensome and expensive employment laws;
- Freight railroads view control of their rail lines as essential to their longterm viability; and
- Freight railroads view the sale of rights of way and operating rights as among the best remaining opportunities to leverage their rail assets and lower their overall maintenance expenses.

COMMON ISSUES IN RAIL TRANSIT PROJECTS

Although every transit system considering commencement or extension of passenger rail service is distinct in some respect, transit systems with rail projects face some common challenges. All such systems are faced with significant urban and suburban growth and single-occupancy-vehicle traffic congestion, and many are in Clean Air Act nonattainment areas.

Many transit systems eventually focus on a particular, locally preferred rail corridor. If that corridor is abandoned or has light density traffic and is abandonable, the negotiation and other aspects of the acquisition may be a challenge, but operations likely will not present any significant ICA or freight railroad-related problems.

More often, however, the preferred rail corridor is not abandoned or abandonable. To the contrary, most rail projects involve long-term viable freight rail corridors. The owner/operator, which is almost always a Class I or regional rail carrier, has no intention of ending rail service on the line. In fact, service could not end even if the owner/operator wanted it to, because of the freight preservation provisions of the ICA.

In these circumstances, the transit system is faced with the dual challenge of negotiating for (i) access/usage rights and (ii) an operating plan that ensures reliable and safe operations, yet prevents the transit system from becoming a common carrier. These oftentimes conflicting goals must be achieved at an acceptable and reasonable price. On the other hand, the freight railroad's goals are to (i) preserve sufficient access/ usage rights on the line to ensure the continued viability of its freight railroad operations and (ii) maximize the compensation for the transfer of ownership or operating rights to the transit system.

Thankfully, the transit system's objectives usually can be met by understanding the motivations of the freight railroad seller and the relevant processes of the ICC, and avoiding certain legal pitfalls in the acquisition process. Many transit systems have successfully completed shared corridor acquisitions and left the other systems with a pattern to follow to maximize the likelihood of a successful outcome. Significant problems exist with regard to negotiating a reasonable and publicly acceptable purchase price, and the law does not offer transit systems any special advantages over private purchasers on this critical issue.

ORGANIZATION OF ARTICLE

This article is divided into two sections. The first section, entitled "Acquisition and Use Strategies with Willing Sellers," considers several typical voluntary sale scenarios. It identifies and develops strategies applicable to light-density freight lines that may be eligible for abandonment and shared-use strategies for lines that do not present viable abandonment candidates.

The critical points identified in the first section of the article are as follows:

- In acquisitions of rail lines slated for abandonment, the ICA prefers a buyer who will continue freight service. If a transit system finds itself in competition with a buyer that makes a viable offer to buy the line for continued freight service, the best options may be to (i) work with the buyer in advance of the purchase to structure a shared-use arrangement or (ii) make a competing offer to continue freight service with the intention to contract for such service.
- In acquisitions of rail lines approved for abandonment, the ICA facilitates transit systems in acquiring the right of way after abandonment of freight service, but before the reversion of the right of way to adjacent landowners. Despite certain complications, the ICA does assist transit systems engaged in corridor preservation for future passenger service.
- In acquisitions of nonabandonable rail lines (or operating rights thereon), cases at the ICC have established a basic transaction structure, which allows shared use on a going-forward basis, without rendering the transit system a common carrier, provided the transit system can accept not having complete control of the corridor.

The second section of the article, entitled "Acquisition and Use Strategies with Unwilling Sellers," deals principally with the interplay between state condemnation powers and the ICA in the context of involuntary sales and involuntary rail line abandonments.

The critical points identified in the second section of the article are as follows:

- If a condemnation would interfere with the freight railroad's operations, the transit system's eminent domain power will be preempted by the ICA. Partial condemnation options present some intriguing possibilities, but are largely untested.
- Although a transit system has standing to seek abandonment of a rail line over the objection of the involved freight railroad, success in such cases is a remote possibility.
- A legislative change allowing transit providers access to rail lines upon payment of reasonable compensation could strengthen a transit provider's bargaining power and facilitate acquisition and use of railroad rights-of-way.

ACQUISITION AND USE STRATEGIES WITH WILLING SELLERS

Voluntary Sales-Abandonable Lines

Most existing rail corridors that are suitable for transit usage have a level of freight traffic that makes them unlikely abandonment candidates. On occasion, however, a rail line suitable for transit usage has such light freight traffic volume that continued freight usage is not planned by the owner. Instead, the owner plans to seek approval from the ICC to abandon the rail line and discontinue freight rail service on it.

Suppose that a transit system has come to agreement with a freight railroad to acquire an active light-density rail line scheduled to be abandoned. If the abandonment is consummated, there are no ICC regulatory problems, because the agency has no jurisdiction over fully abandoned rail lines. However, abandonments often are strongly opposed, and even if the selling freight railroad can successfully demonstrate that abandonment is warranted, a third party may offer to acquire the line for continued freight usage. This section of the article summarizes the pitfalls of the abandonment process from the perspective of the transit system "waiting in the wings" to acquire a rail line after abandonment.

Offers Of Financial Assistance

The ICA and the ICC's regulations allow for the possibility of continued freight rail service even after a line is authorized for abandonment.[9] The statute and rules provide that once a rail line abandonment is authorized, a person may make an Offer of Financial Assistance (OFA) for continued rail service on the line. The OFA may be an operating subsidy to compensate the current operator for continued service or a purchase offer for all or some portion of the line to be abandoned.[10] In practice, almost all OFAs are purchase offers.

Section 10905 of the ICA and the ICC regulations provide detailed procedures for notifying the owning railroad, obtaining information about the physical condition and traffic on the line, structuring offers, dealing with multiple offers, establishing the terms and conditions for OFAs when the parties cannot agree on terms and conditions, and all other matters related to OFAs.

Because the purpose of the financial assistance procedures is to foster continued common carrier rail service on lines that otherwise would be abandoned, the OFA rules are construed liberally in favor of the offeror, and offers need not be detailed.[11] An offeror need only show that it is financially responsible and that its offer is *bona fide*.[12]

The standard for a finding of financial responsibility is that the offeror "has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations."[13] The offeror need not show that its purchase price is the definitive fair market value, but only that the offer is *bona fide* and reasonable to initiate negotiations between the parties.[14] Even though the ICC favors OFAs and gives offerors the benefit of the doubt, on occasion it will reject OFAs.[15] Once an offeror has been determined to be financially responsible and an offer has been determined to be *bona fide*, the ICC will toll the effective date of any approved abandonment application or petition (or revoke an abandonment exemption if obtained by a notice). If the parties reach agreement or the Commission prescribes terms and conditions for sale pursuant to an OFA, the pending abandonment application or petition will be dismissed.

Upon consummation of a transaction under an OFA, the new operator has an obligation to provide service on the line for a minimum period of 2 years and must seek ICC approval for any abandonment of rail service after that period. In addition, except for transfers within its corporate family, the offeror/buyer of the rail line may not transfer it to any party other than the former operator/seller for a period of 5 years.[16]

An OFA has priority over Public Use conditions or rail-to-trails usage.[17] Thus, a party making an OFA will have priority over a transit system in any competition for the acquisition of a rail line subject to abandonment.

If faced with a competing OFA, a transit system has three general options. First, the transit system could make an agreement with the offeror for shared use of the rail line after the offeror's acquisition. The shared use of rail lines and rights of way is discussed below.

Second, the transit system could make its own OFA on the rail line. The ICC regulations allow the abandoning railroad to select the offeror it prefers when more than one OFA is made on the same rail line. The drawback to this option is that the transit system would have an obligation to provide continued rail freight service over a line acquired pursuant to an OFA. Accordingly, the transit system (or at least a subsidiary of the transit system formed to acquire the line) would be a common carrier subject to regulation under the ICA. Nevertheless, in a situation where a rail corridor is otherwise lost, common carrier status may be a modest price to pay for corridor preservation.

Finally, in some circumstances, the transit system has legitimate arguments that the offeror is not financially responsible or has not made a *bona fide* offer. With respect to the *bona fides* of the offer, the transit system usually will be able to rely on the railroad to assert the argument.[18] For example, if a transit system has offered to pay $5 million for a rail line and the offeror under an OFA has offered to pay $2.5 million, there is little chance that the freight railroad will view the offeror's price as *bona fide.* The railroad would have a specific offer in hand (from the transit system) to demonstrate to the ICC that an offeror's price is below the value of the subject line.[19]

Public Use Conditions and Rails-to-Trails

For abandonable rail lines, the absence of an OFA does not mean the transit company's acquisition is in the clear. In many cases, the abandonment of rail freight service causes a reversion of ownership of all or a portion of the right of way to adjacent landowners. To avoid the permanent loss of the corridor for any future rail or other public use, there are two federal laws designed to prevent or at least suspend the reversion. Through careful application of these two provisions, a transit system can acquire a viable transit corridor after abandonment, but before reversion of the property to third parties. However, as is explained below, these two provisions have their own peculiar complications.

Pursuant to 49 C.F.R. Part 1152, Subpart C, when the Commission issues a decision making the requisite findings for an abandonment, that decision also will include the agency's determination as to whether the rail line in question is "suitable for other public purposes." In practice, virtually all ICC abandonment decisions include a statement that the involved line "may be suitable for public purposes."[20]

Upon such a determination by the Commission, any party may seek a Public Use Condition (PUC) on the rail line at issue. A party making a PUC must submit a written request identifying the condition sought, the public importance of the condition, the time period for the condition, and a justification for the time period.[21]

A Commission-imposed PUC may include a prohibition against the disposal of rail assets on the line for a period of up to 180. days from the effective date of the abandonment, unless the properties have first been offered, on reasonable terms, for sale for public purposes. This PUC mechanism prevents the Commission from losing jurisdiction over a right of way slated for abandonment and gives transit providers a window of opportunity before the corridor is sold or liquidated for private use.

Based in part upon the conclusion that the PUC provisions of the ICA were not satisfactory and did not successfully establish a process to preserve railroad rights of way, Congress in 1983 enacted amendments to the National Trails System Act (Trails Act).[22] Under the Trails Act, the ICC is authorized to preserve, for possible future railroad use, all railroad rights of way not in service and to allow interim use of the land underlying such rights of way as recreational trails. Section 8(d) of the law provides that a railroad wishing to cease operations along a particular route may negotiate with a state, municipality, or private group that is prepared to assume responsibility for the right of way during the period of recreational use.[23]

Section 8(d) of the Trails Act provides that an interim trail use agreement "shall not be treated, for any purposes of any law or rule of law, as an abandonment of the use of such rights of way for railroad purposes."[24] Thus, the Trails Act provides a viable mechanism for preservation of rail rights of way if the transit provider is dealing with a cooperative and willing freight railroad.

However, the Trails Act contains two major drawbacks. First, abandoning railroads are not obligated to enter into a trail use negotiation or agreement. Because the program is voluntary from the railroad's perspective, it may be necessary to combine a trails request with a PUC request (which, if granted, is not voluntary) and pursue a dual purpose negotiation with the abandoning railroad.

The second drawback to the Trails Act is more difficult to resolve. The primary stated purpose of the Trails Act with respect to railroad rights of way is the preservation of rail freight corridors. Under the Commission's implementing regulations, interim trail use is subject to the possibility of future restoration of rail service.[25] The Commission has determined that a freight railroad's decision to enter into an interim trail use agreement may be withdrawn at any time the abandoning carrier wishes to reinstitute rail operations over the right of way. A freight railroad also may withdraw from a trail use agreement if it wishes to consummate the abandonment or transfer or dispose of its residual common carrier operating rights.[26] Thus, any rail line transaction involving application of the Trails Act must be structured in a fashion to make certain that the buyer acquires sufficient right, title, and interest to prevent the selling freight railroad from deciding (perhaps 10 or more years later) to reinstitute freight rail service on the line.

Apart from their possible utility in approved and finalized transit projects, the Rails-to-Trails and Public Use provisions of the ICA may assist transit systems that find themselves impeded by Federal Transit Administration (FTA) environmental regulations when they try to use FTA funds in right-of-way acquisitions for future transit projects.[27] For many transit systems, these ICA rules offer the possibility of corridor preservation with a cost within the range of local funds, thereby avoiding the need for FTA monies and the application of the environmental rules.

It may be helpful to summarize the problems faced by transit providers involved in FTA-funded advance corridor purchases. The environmental regulations applicable to right-of-way acquisitions made with FTA funds impose strict limitations on acquisition of existing rights of way for future transit projects. These rules only allow a transit system to make an advanced acquisition of a right of way for a future project if the acquisition will (i) alleviate an undue hardship on the current owner of the subject property or (ii) avoid an imminent development of the right of way which would preclude its future use for transportation purposes.[28] The "protective" acquisition exception may not be used for the sole purpose of reducing the cost of acquisition of a right of way for a future transit project.[29] Both exceptions are only permitted for the parcels to which they apply and therefore often do not apply to an entire right of way. Moreover, the acquisition exceptions are only available if they will not limit the evaluation of transportation alternatives in a future National Environmental Policy Act (NEPA) process.[30]

A transit provider interested in acquiring a rail corridor for a possible future rail transit project could seek a PUC and request trail use.[31] A trail use request includes a Statement of Willingness to Assume Financial Responsibility. The statement includes the trail proponent's expression of willingness to manage the trail, pay attributable property taxes on the trail, and accept any liability arising from the use of the right of way as a trail.[32]

Assuming that the PUC is granted by the ICC and its presence motivates the freight railroad to advise the ICC of its willingness to negotiate a trail use agreement, the Commission will enter a Certificate of Interim Trail Use (CITU).[33] A CITU gives the trail use proponent 180 days to negotiate a trail use agreement with the railroad. To the railroad, the advantage of a CITU is that it allows the railroad to cancel tariffs and salvage track or other equipment on the rail corridor 30 days after it becomes effective.

Although rail line abandonments, whether regulated or exempt, are subject to the ICC's NEPA requirements,[34] because the Commission does not have involvement in the negotiations between the railroad and the trail use proponent, the issuance of the CITU and the negotiation and consummation of a Trail Use Agreement do not trigger a separate NEPA review

If a Trail Use Agreement is reached, the parties are permitted to implement it without further ICC action, and the CITU remains in place. If no Trail Use Agreement is reached, the CITU automatically converts into an authorization for full abandonment of the rail corridor.

Significantly, the trail use proponents are extremely well organized and ably represented by the Rails-to-Trails Conservancy.[35] A transit provider interested in the preservation of a rail corridor for a possible future transit project could combine resources with a trails use group, including a Rails-to-Trails Conservancy-sponsored group, and meet the obligations of a trail use agreement (trail management, property tax payments, and acceptance of a Trail Use liability) with local funds, thereby avoiding the need for FTA purchase funds and the application of FTA's environmental requirements.

Voluntary Sales-Nonabandonable Lines

Suppose that a transit provider has come to agreement with a freight railroad to acquire an active rail line. The line has moderate traffic and therefore is not a viable abandonment candidate. Thus, the parties will share the right of way, and freight service will continue even after commuter or transit service begins.

Under ordinary circumstances, a rail line acquisition by a transit system in this context would make the transit system a common carrier subject to regulation under the ICA. Regulation under the ICA would, in turn, probably make the transit system a carrier for purposes of several other federal railroad laws relating to labor, employment, and employee benefits. The ICA and these federal railroad laws were not designed or intended to apply to transit systems.

A series of cases before the ICC have revealed a transaction structure through which transit systems may acquire active freight rail lines for future shared use without becoming common carriers. Application of this transaction structure can result in substantial cost savings in transit operations. However, the transaction structure is not simple and does not leave a transit system with unfettered control of the rail right of way. Even so, this transaction structure presents a viable and innovative cost saving option for transit service providers.

Carrier Status and Rail Line Acquisitions

Transit systems must have significant control over operations in shared corridors. Yet transit authorities that attempt to secure the control necessary for safe and reliable operations in shared corridors (and thus necessarily obtain and exercise

significant control over rail freight operations on those corridors) risk becoming rail carriers themselves, subject to regulation under the ICA.[36]

Carrier status and resulting regulation under the ICA has its own set of problems and costs. For example, the carrier owner of a rail line may have an obligation to seek abandonment authority in its own right upon the discontinuance of service by the freight railroad operator on the line, even if the owner conducts no rail freight operations itself.[37] Whenever the ICC grants abandonment authorization, it must impose labor protective conditions for the benefit of adversely affected employees.[38] If a transit system that owns a line subject to abandonment is a carrier, this status could mean that labor-protective benefits could be claimed by the transit system's employees. Whether the claims were valid would depend upon the factual circumstances. The point is merely that carrier status under the ICA has costs and potential liabilities for a carrier/owner even if the carrier/owner does not conduct freight service.

Apart from ICC regulation, a transit authority with carrier status under the ICA probably will be subject to certain other burdensome and costly federal laws that usually would not otherwise apply.[39]

The Railroad Retirement Act (RRA) is a federal, railroad-specific counterpart to social security, under which rail carriers and their employees make significantly higher rates of contribution to the employee retirement fund than under the general social security system. As a rule of thumb, employers under RRA pay approximately 23.75 percent versus approximately 7.65 percent under the Social Security Act (subject to several gross income payment ceilings), and employees pay approximately 12.55 percent under RRA versus approximately 7.65 percent under the Social Security Act.

The Railroad Unemployment Insurance Act (RUIA) is a railroad-specific substitute for the state unemployment compensation laws. The RUIA originally was designed to eliminate the confusion of applying various state unemployment laws to railroad employees. However, RUIA contribution rates exceed those under most state unemployment insurance programs and the law has comparatively lenient standards for benefits.[40]

The RLA governs labor-management relations on railroads. In several critical areas, the RLA provides covered employees with substantially greater rights than the otherwise-applicable federal labor laws.

The Federal Employers Liability Act (FELA) is a fault-based workers' compensation system for most employees of interstate railroads. Since an award of compensation or other damages under FELA depends, in part, on the level of negligence on the part of the injured employee, some employees go without any recovery for very real injuries. On the other hand, employees with little or no contributory fault may recover astronomical awards for modest and temporary injuries. FELA provides a striking contrast to most state no-fault workers' compensation laws, which have comparatively reasonable ranges of recovery.

Again, the significant point is that being a common carrier under the ICA means additional regulatory burdens and higher operating expenses.

Acquisitions Without Carrier Status

Pursuant to Sections 10501 and 10901 of the ICA, the Commission has jurisdiction over the acquisition by a noncarrier of railroad line owned by a rail carrier.[41] The ICA defines "railroad" to include ".. the road used by a rail carrier and owned by it or operated under an agreement. ."[42] The ICA defines "rail carrier" as a "person providing railroad transportation for compensation . .. ,"[43] and "transportation" to include "movement of... property ...." The typical acquisition of railroad line includes the conveyance of a property interest sufficient to permit the buyer to provide railroad transportation for compensation, and this conveyance is the basis of the Commission's jurisdiction over the transaction.

Assuming for the moment that one is pursuing a voluntary acquisition,[44] the first major legal issue[45] requiring early and clear resolution is how a transit system acquires ownership of the relevant rail corridor without becoming a common carrier.

Thankfully, ICC cases offer transit systems a reliable structure for rail corridor acquisitions that avoids carrier status for the system. Assuming that the ICC does not change its present course on this issue, the acquisition itself is the simplest aspect of a shared-use project.

While the buyer of a rail line subject to the jurisdiction of the ICC usually becomes a rail carrier upon consummation of the acquisition,[46] this result is not unavoidable. Interstate Commerce Commission (ICC) case law provides that a seller of an active rail line that retains from the sale a sufficient property interest may thereby retain sufficient rail carrier operating responsibilities and rights to remain a common carrier on the line.[47] In reliance on this concept the ICC has ruled in several cases that the buyer of the rail corridor does not by such sale become a common carner.[48]

In *State of Maine,* the ICC held that Maine, acting by and through its Department of Transportation (MDOT), could acquire an active rail line of Maine Central Railroad Company (MEC) without becoming a common carrier, because the transaction included MEC's retention of an easement for freight railroad operations. In so ruling the Commission analyzed the transaction as follows:

> Under Section 10901, we have exclusive jurisdiction over the acquisition of a railroad line by a non-carrier (including a State) where the common carrier rights and obligations are also being transferred, in whole or m part. [Citations omitted] Here, however, no common carrier rights or obligations are being transferred. Rather, both parties agree that MEC retains common carrier obligations and that it could not cease to offer service on the line without ICC permission. The permanent and unconditional easement which it retains ensures MEC (and its successors and assigns) both the full right and necessary access to maintain, operate and renew the line. [footnote omitted] In short, this record persuades us that there will no alteration of any common carrier obligation here and MEC has done nothing that impairs its ability to fulfill its continuing common carrier obligation. Under these circumstances we can see no reason to impose upon the purchaser of the underlying rail assets an additional common carrier obligation.[49]

In transactions of this type, it is essential that the seller retain a freight easement. If the buyer acquires the entire rail line and then grants back an easement or some other property or contract operating rights to the seller, the buyer will have rail carrier status. In a case that preceded the *State of Maine* case, the City of Austin, Texas, acquired full ownership in a rail line previously owned and operated by Southern Pacific Transportation Company (SP). The City then granted rail carrier operating rights to a third-party operator.[50] The Commission held that the initial transaction made the City a rail carrier and that the City's grant of rights to the third-party operator did not render the City free from rail carrier status. The rationale of the *City of Austin* case is that if the third-party operator failed to provide rail service, the ICC would have no choice but to look to the City for provision of rail service.[51]

The rule set forth in the *State of Maine* case has been followed and clarified in subsequent ICC cases. In the *UTA* case, the Commission held that Utah Transit Authority's (UTA) acquisition of active rail line from Union Pacific Railroad Company (UP) did not make UTA a common carrier, because UP retained a permanent freight operating easement.[52] The *UTA* case went one step further than *State of Maine.* Simultaneously with the conveyance of everything but a permanent freight operating easement to UTA, UP conveyed its retained easement to a third-party freight operator. The third-party freight operator separately obtained an ICC exemption to acquire the permanent freight operating easement. Thus, when the transactions were consummated, UTA owned an active rail line upon which a new rail carrier provided freight service subject to the jurisdiction of the ICC.[53]

Still later, in a case involving the Metropolitan Transit Authority of Harris County (METRO), the Commission held that METRO would not become a rail carrier subject to ICC jurisdiction by acquiring certain assets from SP, because SP would retain "permanent and unrestricted easements for the conduct of freight operations" on the active rail lines that were part of the transaction.[54]

The ICC applied the same test to hold that the Commuter Rail Division of the Regional Transportation Authority (Chicago METRA) could acquire a leasehold interest in active rail line owned and operated by Norfolk and Western Railway Company (N&W) without becoming a common carrier. The Commission's language in this case is a clear rendition of the *State of Maine* rule:

> If no common carrier obligation is being transferred, then nothing is occurring that invokes Commission jurisdiction. In ruling on whether we have jurisdiction over the proposed acquisitions, we look to whether the freight operator has retained a permanent and unconditional easement and whether it has sufficient interest and control over the line so that it cannot be prevented from carrying out its common carrier obligation.[55]

Equally important is the ICC's decision in a case involving the Los Angeles County Transportation Commission (LACTC). The Commission held that LACTC's acquisition of certain active rail lines from SP rendered LACTC a common carrier, because SP did not retain a sufficient property interest to conduct freight railroad operations on the subject rail line.[56] The ICC's holding in the *LACTC* case is dependent in large part on its conclusion that the transaction in question was similar to the transaction in the *City of Austin* case.[57]

Control of Management and Operations

Because a transit provider can successfully structure its transaction so as to avoid carrier status, it will be in the posture of attempting to gain as much control of management and operation of the shared corridor as it can without becoming a common carrier and incurring the accompanying costs of carrier status. This balancing act requires consideration of several factors, most of which are more difficult and challenging than the issues involved with the acquisition itself. Generally speaking, the most important considerations are as follows:

- How to accomplish a satisfactory level of control over dispatching;
- How to accomplish a satisfactory level of control over maintenance;
- How to establish "preference periods" for transit operations; and
- How to approach the long-term future of freight operations on the shared corridor.

As explained below, control of dispatching raises significant carrier status issues and may be the single most difficult aspect of this topic. Control of maintenance, while not free from doubt, appears to involve a less serious risk of causing a transit provider to incur carrier status. Establishing freight preference periods is acceptable under current ICC case law, provided that such preference periods are reasonable and flexible. Finally, it is clear from recent ICC decisions that imposing prohibitions on overhead freight traffic or attempting to control the eventual end of freight service on a shared corridor will be almost impossible if a transit system wants to avoid rail carrier status.

Dispatching

The implications of the possession of dispatching control by a transit system are unclear. In a very early case involving the Staten Island Rapid Transit Operating Authority (SIRTOA), the ICC found that SIRTOA's control of dispatching made it the entity "functionally responsible" for actively discharging common carrier duties, and thus a common carrier.[58] Although the *Staten Island* case appears to indicate that the control of dispatching goes hand in hand with common carrier status, it is significant to note that SIRTOA acquired the rail line outright and therefore was a carrier anyway.

Additional adverse precedent arises from the LACTC decision. In that case, the ICC's review of LACTC's possession of operations, maintenance and dispatching responsibility weighed heavily in its determination that LACTC was a carrier. Ultimately, the ICC concluded that the safety and convenience of passengers on the LACTC system might significantly restrict freight service.[59] Like the *SIRTOA* case, the discussion of dispatching in the *LACTC* case may have been colored by the fact that LACTC had numerous other controls over the rail line in question. As in *City of Austin*, LACTC also had structured its transaction as a purchase/grant-back rather than a purchase/easement retention--LACTC acquired the entire rail line in question, and *granted back* rights to the freight operator.

On the other hand, two cases involving the American Train Dispatchers Association held that the transfer of dispatching responsibility from one freight railroad to another freight railroad did not require ICC approval.[60] This suggests that transfer of dispatching, standing alone, does not implicate ICC jurisdiction. These cases offer enough support by analogy to be useful in any argument that a transit system's direct or indirect control of dispatching would not make it a common carrier.

Maintenance of Way/Signalization

Several of the recent ICC cases suggest that control of maintenance, without more, does not make the controlling entity a common carrier.[61]

In the *UTA* case, the ICC held that the Utah Transit Authority's (UTA) acquisition of rail line from Union Pacific Railroad Company (UP) would not make UTA a common carrier even though UTA would have direct and primary responsibility for maintenance on the shared corridor. The Commission's decision was based in part on the fact that if UTA failed to meet adequate maintenance requirements on the shared corridor, the freight operator had the right to step in and maintain the trackage in accordance with its own standards and for its own benefit. Similarly, in the *Chicago METRA* case (where METRA acquired a leasehold interest on an active rail line), the Commission found that METRA's obligation to maintain the track and signals did not make it a common carrier.

Additionally, the cases involving the American Train Dispatchers Association, *supra*, indicate that the simple transfer of maintenance responsibility over joint trackage does not constitute a significant change of control, and therefore does not implicate the ICC's jurisdiction.[62]

Preference Periods

The ICC decision in the *UTA* case indicated. that preference periods *(i.e.,* periods during which passenger rail operations have preference or exclusive use of a rail corridor) did not make the passenger entity a common carrier. This conclusion was followed in the case involving the Houston Commuter Rail Authority (Harris County METRO).[63] However, in a case involving Orange County Transportation Authority's acquisition of property and operating rights from the Santa Fe railroad, the Commission stepped back from the holdings on this point in the *UTA* and *Harris County* cases.[64] In the *Orange County* case, the Commission found that passenger preference periods together with dispatching control, limits on freight car loading and unloading, and other control factors made the involved transit systems carriers subject to Commission jurisdiction. Even so, the *Orange County* case did not overrule other cases on preference periods, and the viability of preference periods for noncarrier transit systems probably will be determined in subsequent cases.

Control Over Terminating Freight Service

It is clear from the Commission's LACTC decision that a transit system may not impose prohibitions or conditions on use of the shared corridor for overhead (as opposed to local) freight traffic. Doing so is deemed to be an undue control of freight service.

Similarly, the ICC has determined (again, in the *LACTC* case) that the right to compel the abandonment or discontinuance of freight service is tantamount to absolute control, and makes the entity having such power a common carrier. Thus, a transit system may not possess the power to compel or otherwise influence the abandonment or discontinuance of freight service on the shared corridor.

ACQUISITION AND USE STRATEGIES WITH UNWILLING SELLERS[65]

Involuntary Sales

A transit system faced with a freight railroad unwilling to sell rail line or grant access upon reasonable compensation and other terms has very limited options under present law. However, transit systems in this predicament are not at the mercy of freight railroads.

Transit systems have significant power to influence local and state governments, which in turn have considerable political sway with freight railroads. In addition, transit systems have the ability (in fact, the obligation) to study and consider numerous alternative solutions to public transit problems. Thus, in many cases transit systems are as able as any other buyer of property (or access rights) to create a competitive atmosphere among potential sellers of property (or access rights) for public transit. However, the legal options accompanying these other powers are limited.

In most cases the preemptive effect of the ICA limits a transit system's condemnation power. Moreover, forcing a railroad to abandon a rail line is very difficult under the ICA.

The most effective solution to the problem of the unwilling seller would be federal legislation giving transit systems a right to seek access to railroad rights of way for public transit service. Although this approach would raise formidable freight railroad industry opposition, legislation presents a possible acquisition/use strategy for transit providers.

Condemnation Generally

The power of eminent domain can aid a state or municipality in securing private property necessary to meet a public purpose. The eminent domain (or condemnation) power has been successfully employed to secure railroad property for public use in several contexts.[66] Clearest among these are situations where the condemning authority is taking railroad property that is not part of a rail line and right of way. In such cases, a railroad's status as a common carrier does not distinguish the railroad from any other private entity against which eminent domain power is exercised. Cases involving condemnation of an abandoned rail line or spur trackage (neither of which is subject to ICC jurisdiction) are also straightforward, so long as it is clear that the rail line in issue is in fact abandoned or spur trackage. Common to each of these types of cases is the fact that the condemnation does not have a material adverse impact on regulated freight railroad operations of the involved railroad.

At the other end of the spectrum are eminent domain cases involving rail lines used in interstate commerce (referred to herein for convenience as "active" rail lines), where condemnation would adversely impact freight railroad operations conducted on such property. In these cases, the state's power of eminent domain is preempted by the ICA and the ICC's exclusive jurisdiction thereunder to regulate railroad abandonments.[67] The use of eminent domain power on an active railroad line is dependent upon successfully demonstrating that taking the property sought will not adversely impact freight railroad operations.

A transit system wanting to acquire an active rail line and right of way but faced with an unwilling seller must either secure abandonment authority for the line from the ICC, presumably over the opposition of the carrier, or condemn the active line in a way that will not interfere with continued freight railroad operations. As explained below, these options are less than satisfactory under current law.

Interstate Commerce Act Limits on Condemnation

The ICC has exclusive and plenary jurisdiction over, *inter alia,* abandonment of rail lines subject to the ICA.[68] The ICC's authority over rail line abandonments extends to approval of the abandonment of purely local lines operated by interstate carriers.[69] State laws purporting to regulate the abandonment of rail lines subject to the jurisdiction of the ICC are preempted.[70] Thus, a state may not use its powers to condemn a line of railroad in the absence of ICC authorization for abandonment of the line.[71]

The *Ashley* case arose when the Kansas City Area Transportation Authority (KCATA) brought a condemnation action against a partnership (the Ashleys) that owned a freight line subject to the ICC's jurisdiction. At the time of the commencement of the condemnation action, the entire rail line owned by the Ashleys was subject to an ICC-approved embargo. So long as the embargo was in place, the Ashleys were not required to operate the freight railroad. Because the embargo had been in place for approximately 9 years, the railroad's track, road bed,

and equipment were substantially deteriorated at the time of the condemnation action. Nevertheless, the court in *Ashley* found that the condemnation action, if successful, would cause a permanent cessation of railroad service. Citing the section of the ICA that gives the ICC exclusive jurisdiction over rail line abandonments,[72] the court held that KCATA could not condemn the rail line, and remanded the case with directions to dismiss the condemnation action.[73]

The *Bartlett* case involved a condemnation action brought by the Massachusetts Bay Transportation Authority (MBTA) against a rail line owned by the Boston and Providence Railroad Company (BPR) and leased to the New York, New Haven and Hartford Railroad Company (New Haven). Both BPR and the New Haven were common carriers subject to the ICA. The rail line in question, a 7mile segment located in the city of Boston, was an active rail line likewise subject to ICC jurisdiction.[74] On cross motions for declaratory judgment regarding the authority of the MBTA to condemn the rail line, the court held that MBTA's taking and use of the rail line under state law of eminent domain would constitute an abandonment of the property taken and therefore required prior approval of the ICC.[75]

Partial Condemnation

Thus, an ordinary condemnation of active rail line is preempted by the ICC's authority under the ICA, and an attempt at involuntary abandonment before the ICC provides only a tenuous alternative. However, based upon the common use of partial condemnation approaches in other contexts, there may be at least one option left for a transit system faced with an unwilling seller.

In some circumstances, a transit system could condemn a portion of a right of way for transit usage without condemning so much as to unreasonably interfere with freight railroad operations. This option presupposes that the right of way is wide enough (with sufficient clearance, grade, curve, etc.) to accommodate multiple tracks and to allow safe and efficient operations. Subject to railroad safety and operating considerations, this possibility could be viable. In any case, it does not pose any distinct ICA issues. It is merely a partial condemnation of a right of way.

On the other hand, in cases where the physical characteristics are not conducive to a partial right-of-way condemnation, one must push the partial condemnation concept to its extreme. It is at least theoretically possible to condemn an easement for transit service or, conversely, to condemn everything except for an easement for continued freight service. Conceptually, there is no difference between condemning an easement and condemning everything except for an easement. The critical common factor is that such a condemnation applies to a portion of a rail line (i.e., the track and track materials) on a right of way that will not accommodate a separate rail line.

The ICC cases involving voluntary line sales for shared freight and passenger usage (discussed at length above) are very instructive in the context of a partial rail line condemnation. The ICC cases establish that a transit system may acquire an active rail line without becoming a common carrier, if the selling freight railroad retains a permanent freight railroad operating easement and the other terms related to shared usage of the line (maintenance, dispatching, times of access, etc.) do not materially interfere with freight railroad operations on the line.

The rationale for this line of cases is that the freight railroad *retains* the rights and obligations associated with freight rail operations, and therefore there is no reason to make the transit system a carrier subject to ICC jurisdiction. For purposes of partial condemnation theory, the noncarrier status of the buyer/transit system is significant because it presupposes that nothing implicating the ICA has happened. Thus, nothing has been acquired that interferes with freight railroad operations.

A partial rail line condemnation (as opposed to a partial right-of-way condemnation) poses substantial federal regulatory issues and would invite strong opposition, and perhaps protracted and vigorous litigation. Nevertheless, partial condemnation presents a viable option for transit systems faced with unwilling sellers.

Involuntary Abandonments

Although the state power of eminent domain over an active rail line is preempted by the ICA, this does not automatically preclude the condemnation and acquisition of active rail lines by transit providers. If the ICC authorizes abandonment of a rail line sought for transit use, the transit system is free to proceed with condemnation of the line. The ICC will authorize the abandonment of rail line upon a showing that the public convenience and necessity require or permit the termination of rail service.[76]

Ordinarily, abandonment applications or petitions for exemption[77] are filed by railroads seeking authority to end unprofitable rail service. Railroads typically abandon light-density lines-those lines that have so little traffic that they do not attract short line or regional railroad operators and therefore do not represent salable assets. A railroad seeking abandonment authority attempts to demonstrate to the ICC that the avoidable costs of operations exceed the revenues gained from operations (or that such revenues do not cover avoidable costs plus a prescribed cost of capital).

While rare, it is possible for a party other than the railroad itself to seek ICC authorization for abandonment of the railroad's operations. Any person may initiate an abandonment, provided that the person establishes a proper interest in the abandonment.[78]

A case involving the Kansas City Area Transportation Authority (KCATA) is a very good example.[79] That case concerned an 8-mile segment of rail line in Kansas City, MO, which was owned by Kansas City Public Service Freight Operation (the KCPS). KCPS embargoed all rail movements on the line in 1968, after which the line was then used for a parking lot. Thereafter, state agencies made repeated efforts to have the line condemned. These efforts were unsuccessful because KCPS used the active status of the line to preempt state condemnation. In 1980, Modern Handcraft, Inc. (an adjacent landowner) and KCATA (a bi-state transit authority) filed separate Applications for Abandonment of the subject line, which were opposed by KCPS.

As a preliminary matter, the ICC determined that KCATA and Modern Handcraft each had a sufficient interest in the line to bring an abandonment application. Thus, *Modern Handcraft* is authority for the proposition that transit authorities have standing to bring involuntary (or adverse) abandonment applications *(Id.* at 971).

Modern Handcraft went on to find that KCPS had ceased all service and made no effort to restart service or attract shippers to the line. The ICC concluded that the KCPS's principal interest in opposing the abandonment was to secure a higher purchase price and more favorable terms in any sale of the line.

After reaffirming its exclusive and plenary jurisdiction over rail line abandonments, the ICC stated "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."[80] Based on the facts in the case, the Commission found that the public convenience and necessity did not require further protection of the KCPS line, and therefore granted the adverse abandonment applications.[81]

Although *Modern Handcraft* answers many of the broad questions regarding involuntary abandonments, it' does not provide much additional specific insight because it was such a factually compelling case in favor of abandonment. There had been freight traffic on the line for many years and there was no prospect of future traffic.

In all but the most exceptional cases, rail lines potentially useful for transit service are in areas with some commercial activity. Thus these rail lines are likely to have some freight traffic, at least the potential for freight traffic. Even very modest traffic--at levels which might support an abandonment sought by the carrier--may make an involuntary abandonment a tenuous proposition.

A case involving a short segment of rail line in Colorado Springs, Colorado, provides a good example.[82] The Colorado Springs and Eastern Railway Company (CS&E) owned and operated a 3.3-mile segment of active rail line in Colorado Springs. On its east side, the line connected with a 70-mile line between Colorado Springs and Limon, where the line connected with Union Pacific Railroad Company and other freight carriers. On its west side, the CS&E line connected with a short segment of track owned and operated by the Denver and Rio Grande Western Railroad Company (DRGW), which itself connected with Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company. Thus, the CS&E line was a short link between two other east-west lines, each of which connected with main lines of major freight railroads.

The city of Colorado Springs and the Metex Metropolitan District (collectively referred to herein as the City) proposed to reconstruct and expand a highway that crossed the CS&E line. Because the CS&E line would interfere with the road expansion, the City filed an exemption petition at the ICC for abandonment of the CS&E line. The City noted that a portion of the CS&E track had been paved over for more than 2 years and that there had been virtually no traffic on the line for 6 years. A bridge on the CS&E line had been washed out 6 years prior to the City's abandonment petition, and there were several other washouts on the line of later vintage. CS&E had no employees and no railroad equipment. Although CS&E had some locomotives, none of the locomotives were dedicated to the CS&E line. The City estimated that it would cost approximately $547,000 to rehabilitate the line and charged that CS&E's only motive in opposing the abandonment was to thwart the City's efforts to condemn the line to expand the road in question.

The railroad responded by explaining that there was substantial potential for overhead traffic between Colorado Springs and Limon. It cited requests for eastbound and westbound traffic that would preserve the CS&E line. It charged the City with responsibility for the aforementioned bridge washout (based on the City's changes in irrigation patterns) and for the paving of a portion of the CS&E line. CS&E explained that the operator of the line east of its line intended to lease or purchase the CS&E line in order to facilitate potential overhead traffic. CS&E also controverted the City's estimate of rehabilitation expenses, asserting that it would only cost approximately $200,000 to rehabilitate the line.

The City's response was to characterize CS&E's traffic projections as entirely speculative and motivated by a desire to gain a higher purchase price in the eminent domain proceeding.

The ICC denied the City's Petition for Abandonment on procedural grounds, reaffirming that a third party may not use an exemption petition to force an abandonment where the carrier opposes the abandonment.[83] Even though the Commission had denied the City's Petition for Abandonment, it reviewed and discussed the merits of the requests.

First, the Commission said that the "issuance of involuntary abandonment authority is not an action that [it] would take lightly."[84] After citing and discussing the facts in *Modern Handcraft*, the Commission concluded that the facts in the *Metex* case were distinguishable. CS&E had not embargoed the line and had continued to hold itself out as willing to provide freight service. Efforts were being made to solicit traffic, and several potential shippers on the line had opposed abandonment. Thus, even if the Commission had authority to grant an exemption petition for abandonment filed by a third party and opposed by the railroad, it would not have done so because of the potential for traffic on the line."[85] Clearly, any colorable assertion of continuing freight railroad viability may defeat a forced abandonment effort.

A wholly unsubstantiated assertion of future freight traffic potential, however, will not be sufficient to defeat a third-party abandonment application. Upon application by adjacent property owners and the Metropolitan Transit Authority of the State of New York (MTA), the ICC authorized abandonment of a 1.45-mile line of railroad in the Borough of Manhattan after the Applicants demonstrated that Consolidated Rail Corporation's (Conrail) plans for rehabilitation and use of the line to service a waste haulage facility were totally unworkable.[86] Conrail ceased operations over the subject line in the mid-1970s. In 1982, Conrail eliminated rail facilities used for loading and unloading cars on the line. After Applicants sought abandonment authorization, Conrail announced plans to use the line for solid waste shipments under a contract with Browning Ferris Industries.

The Applicants characterized Conrail's plan as a sham and presented evidence that waste haulage was unworkable and would not generate sufficient revenue to cover the capital cost necessary to rehabilitate the line for service. The Applicants argued that the ICC should not let its jurisdiction over rail line abandonments shield Conrail from the state condemnation process, which otherwise would allow the removal of elevated rail structures on the right of way and allow use of the property for an important public purpose.

The ICC held that the Applicants had met their burden of proof to demonstrate that Conrail's waste haulage plan was neither operationally nor economically feasible, and therefore granted the abandonment application. However, in reaching its conclusion, the ICC reaffirmed two important points. First, it noted a reluctance to second-guess a railroad's judgment about the viability of a line:

> Where the protesting carrier raises future traffic potential to defend against an adverse abandonment application, the line's present unprofitability is not a major consideration.[87]

Secondly, the ICC subordinated state and local projects to interstate rail service:

> The impediments to State and local government projects, although entitled to some weight, are nevertheless required to give way to our statutory duty to

> preserve and promote continued rail service, where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.[88]

The fact that the ICC clearly considered *Chelsea Property* to be a close case does not bode well for transit authorities considering involuntary abandonments. Under the *Chelsea Property* precedent, the opposing carrier may not need to make a significant showing to persuade the ICC to deny the abandonment application of a third party.

Legislative Action For Right-of-Way Access

In two contexts, federal law contemplates the forced access by a railroad operator on rail line and right of way owned and operated by another railroad. A discussion of these provisions helps to understand how the transit industry might structure a legislative proposal for right-of-way access.

The National Railroad Passenger Corporation (Amtrak) has the statutory right to gain access to a rail line operated in interstate commerce, notwithstanding the objections of the freight railroad that owns or operates the line, if the line is necessary for interstate passenger service. Amtrak's power is contained in Section 402 of the Rail Passenger Service Act (RPSA).[89] Under Section 402(a)(1), Amtrak may contract with a freight railroad for the use of rail line and right of way and the provision of services by the freight railroad. If Amtrak and a freight railroad cannot agree on terms, Amtrak may file an application for the ICC to establish terms. Essentially, the ICC's role is to determine whether an impasse exists and provide the freight railroad with reasonable compensation for the access and services provided to Amtrak. Under Section 402(d), if Amtrak and a railroad cannot agree on terms for Amtrak's acquisition of the railroad's property required for intercity rail passenger service, Amtrak may seek an ICC order establishing terms for a forced sale.[90]

Rail carriers subject to the jurisdiction of the Commission under the ICA also may seek access to a rail terminal (and trackage for a reasonable distance outside the terminal) owned or operated by another rail carrier.[91] The carrier seeking access has the burden to demonstrate, among other things, that terminal access is in the public interest. If the carriers cannot agree as to terms, the Commission has authority to prescribe terms.

For purposes of developing a legislative proposal for the transit industry, Amtrak's power under the RPSA seems to be a much better model than terminal access under the ICA. Terminal access under the ICA offers very little guidance, because under Commission cases it is virtually impossible to secure such access.[92] Moreover, any expansion of the terminal access provision of the ICA presumably would benefit only transit systems that were rail carriers subject to the jurisdiction of the Commission. This would defeat other cost saving efforts often sought by transit systems.

Without detracting from the possibility of a legislative solution, it is important to note that the freight railroad industry may oppose a legislative initiative to secure right-of-way access for public transit. For this article, the point is that the RPSA offers a useful model for any transit industry legislative initiative.

CONCLUSION

What is most clear for managers, planners, and attorneys involved in the establishment and development of transit systems is that present law provides good opportunities for voluntary acquisition and use of railroad rights of way, whether transit use is exclusive or on a shared freight corridor.

With respect to active rail lines, the most common prospects, freight railroads are motivated to sell rights of way or grant access rights to transit providers. Sales and shared-use agreements represent good opportunities for freight railroads to leverage assets and share certain operating expenses. Numerous ICC cases have established a pattern for voluntary sales of nonabandonable lines to transit systems for shared use, without subjecting transit systems to the costly and burdensome laws that plague the freight railroad industry. In most cases, these cases permit transit systems to have sufficient--although not complete--control over rail corridors in which they operate, enabling them to establish safe and reliable transit service.

For abandonable rail lines, the ICA contains substantial, though not ideal, provisions to ensure that public use of a rail line has precedence over a private use or loss of the corridor.

Equally clear, yet less satisfactory, is the fact that present law does not give transit providers distinct or significant rights with regard to involuntary line sales. A transit provider's condemnation power is of no use with respect to an active freight line. Partial condemnation options remain largely untested theories. In addition, involuntary abandonment cases before the ICC are tenuous prospects on all but the lightest density rail lines.

The crux of the problem is that a transit provider planning for the acquisition and use of an existing right of way is the potential buyer of a distinct and therefore valuable asset, which is owned by a business with an obligation to maximize shareholder value and with ample federal protection from state interference with its operations.

In these circumstances, a transit provider currently has two basic options: reduce the freight railroad's perceived value of the right of way; or pursue a condemnation that does not interfere with freight railroad operations and therefore does not implicate the ICA.

To reduce the perceived value of a right of way, it is necessary to establish, as best as possible in the facts of a particular case, a competitive field of sellers. Transit providers must identify and foster all viable alternative corridors and transportation plans so that a particular right of way is not the only alternative and a particular freight railroad is not the only potential seller. In essence, marshaling all possible rights of way and transportation alternatives devalues each seller's assets by reducing its distinctness.

If establishing competition is not possible or fails, the other alternative is to take property or access rights without interfering with a freight railroad's common carrier service by partial condemnation. At some point, a transit provider will attempt a partial condemnation. Even a single successful partial condemnation case in a transit/freight railroad context could substantially increase the bargaining power of transit providers in right-of-way acquisitions.

For the longer term, a legislative change may present the best solution. There is nothing particularly complicated about the form of such a legislative change. However, any effort to secure a legislative solution must consider the effectiveness of freight railroad industry opposition.

NOTES

[1] Although there are other possible uses for rail corridors, this article is designed for managers, planners, and attorneys involved in light rail and commuter rail transit systems.

[2] The Interstate Commerce Commission divides railroads into three classes, primarily based on revenue. Class I railroads have revenue in excess of $96.1 million (1991 dollars). *See* 49 C.F.R. § 1201.

[3] Class II railroads have revenue between $96.1 and $19.1 million, in 1991 dollars.

[4] The third category of freight railroads, Class III or short line railroads, is the most numerous of the freight railroads in the United States. Many short lines have significant trackage. However, they are typically in rural/remote areas and therefore rarely own rights of way that are of interest to transit systems. The only significant exceptions are switching and terminal railroads, which are Class III railroads (regardless of revenue) and sometimes own rights of way in urban or suburban areas.

[5] 49. U.S.C. §§ 10101-11917.

[6] Railroad safety is regulated by the Federal Railroad Administration (FRA), under the Federal Railroad Safety Act and certain older rail safety laws. *See* 45 U.S.C. § 431(e). The FRA has statutory authority to regulate all railroad operations other than those of disconnected rail transit systems. The FRA has authority to regulate rail transit operations that take place on the general railroad system, including shared corridor operations, discussed herein.

[7] Pub. L. No. 96-448, 94 Stat. 1912 (October 14, 1980).

[8] These sales created many of the regional railroads.

[9] 49 U.S.C. § 10905; 49 C.F.R. § 1152.27. *See* Exempt. Of Rail Abandonments-Offers of Finan. Assist,, 4 I.C.C.2d 164 (1987) (Exempt OFA); Abandonment of R. Lines & Discontinuance of Serv., 367 I.C.C. 808 (1983).

[10] If the OFA takes the form of a subsidy, the subsidy must be equal to the difference between the attributable revenues and the avoidable costs of providing rail freight service on the rail line, plus a reasonable return to the rail operator. 49 U.S.C. § 10905(d)(2)(A). If the OFA takes the form of a purchase offer, the purchase price must equal the greater of the going concern value or the net liquidation value of the line. Because of the absence of any significant going concern value for rail lines subject to abandonment, it is almost always the case that the purchase price must equal the net liquidation value of the track materials, plus the value of the railroad's ownership interest in the land, if any. The prevalence of reversionary interests held by adjacent landowners may mean that the railroad has no post-abandonment property interest in the land. 49 U.S.C. § 10905(d)(2)(B). *See* Chicago and North Western Transportation Company v. United States, 678 F.2d 665 (7th Cir. 1982).

[11] *See* Conrail Abandonments under NERSA, 365 I.C.C. 472 (1981); Docket No. AB-32 (Sub-No. 42X), Boston and Maine Corp. and Springfield Terminal Railway Company--Abandonment and Discontinuance Exemption--In Berkshire County, MA (not printed), served August 1, 1990.

[12] *See* Exempt OFA at 165.

[13] 49 C.F.R. §§ 1152.27(c)(2)(iii) and 49 C.F.R. §§ 1152.27(c)(1)(B). In the absence of evidence to the contrary, this standard is met if the offeror's ready funds exceed its offer price. *E.g.,* Docket No. AB-167 (Sub-No. 488N), Conrail Abandonment In Northumberland and Union Counties, PA--In The Matter Of An Offer Of Financial Assistance (not printed), served April 11, 1988.

[14] Docket No. AB-33 (Sub-No. 62), Union Pacific Railroad Company--Abandonment--Between Telos and Fairfield, In Whitman and Spokane Counties, WA (not printed), November 15, 1990. To establish that an offer is *bona fide*, the offeror must advance a "colorable argument as to value." Docket No. AB-19 (Sub-No. 125X), Baltimore & Ohio Railroad Company-Exemption-Abandonment In Harrison, Doddright, Ritchie and Wood Counties, WV, In The Matter Of An Offer Of Financial Assistance (not printed), served September 14, 1987.

[15] *E.g.*, Docket No. 80 AB-1 (Sub-No. 202), Chicago and North Western Transportation Company--Abandonment In Nobles and Rock Countries, MN, and Minnehaha County, SD--In The Matter Of An Offer Of Financial Assistance (not printed), served August 25, 1988.

[16] 49 C.F.R. § 1152.27(i)(2)(ii).

[17] Docket No. AB-33 (Sub. No. 67X), Union Pacific Railroad Company--Abandonment Exemption--In Douglas County, NE (not printed), served July 19, 1991; Docket No. AB-33 (Sub-No. 64) Union Pacific Railroad Company—Abandonment--Between Bascule Bridge and Clarksburg, Yolo County, CA (not printed), served September 26, 1990. Public use conditions and rail-to-trails certificates are discussed below.

[18] In rare cases, the transit provider may have an argument that the offeror has no actual intent to provide rail service, and simply intends to hold the line for salvage or a later sale at a higher price. *E.g.,* Docket No. AB33 (Sub-No. 71X), Union Pacific Railroad Company--Abandonment Exemption--In Lancaster County, NE (not printed), served September 28, 1992.

[19] This example presupposes that the abandoning carrier has fee title to the underlying real estate. Only the real estate value attributable to the land because of its potential for transit usage and corridor development could drive up the net liquidation value of a line. It is important to remember that defeating an OFA on *bona fides* grounds requires a showing that the offeror is not offering net liquidation value, rather than a showing that the transit provider would be willing to pay more after abandonment.

[20] 49 C.F.R. § 1152.28(a)(1); *See, e.g.* Union Pacific R. Co.--Abandonment--Fremont & Teton Counties, ID, 6 I.C.C.2d 641 (1990).

[21] 49 C.F.R. § 1152.28(a)(2).

[22] Codified at 16 U.S.C. § 1241 *et. seq.*

[23] 16 U.S.C. § 1247(d).

[24] 16 U.S.C. § 1247(d). *See* Preseault v. I.C.C., ____ U.S. _____, 110 S. Ct. 914 (1990).

[25] *See* 49 C.F.R. § 1152.29.

[26] In two cases involving the restoration of freight rail service on a line subject to a Trails Act agreement, the Commission has found that the former freight railroad's agreement to enter into a interim trail use agreement meant that it had not consummated its abandonment. As a consequence, the former freight operator retains a residual common carrier obligation. Norfolk & W Ry. Co.--Aban.--St. Marys And Minster In Auglaize County, OH, 9 I.C.C.2d 1015 (1993); Iowa Power--Const. Exempt.--Council Bluffs, IA, 8 I.C.C.2d 858 (1990).

[27] The FTA's environmental regulation for major capital investment projects will be the subject of a forthcoming Notice of Proposed Rulemaking. Section 3012 of ISTEA requires that FTA conform its National Environmental Policy Act regulations to

analogous highway project rules. *See* 58 Fed. Reg. 56765-56766 (October 25, 1993). That NPRM may include proposed modifications to ease the restrictions on advanced right of way acquisitions and FTA certainly anticipates comments advocating such change. A full explanation of the problems caused by the current restrictions on advanced right of way acquisitions is beyond the scope of this article. For further information, see the preamble published with the final version of the current environmental rules. 52 Fed. Reg. 32646-32660 (August 28, 1987).

[28] 49 C.F.R. Part 622; 23 C.F.R. § 771.117 (d)(12).

[29] 23 C.F.R. § 771.117 (d)(12), footnote 3.

[30] An applicant availing itself of the hardship or protective purpose acquisition exception must demonstrate that the specific conditions or criteria for its use are satisfied and that its use will not have significant environmental impacts. *See* 23 C.F.R. § 771.117(d). Thus, the hardship and protective purpose acquisition exceptions are not automatic categorical exclusions.

[31] A mentioned above, a joint filling is most effective because of the absence of a valid PUC request, the freight railroad might be inclined (as would be its right) to decline to negotiate for a trail use agreement.

[32] Importantly, the Statement of Willingness to Assume Financial Responsibility does not contractually bind the trail proponent to some undefined terms and conditions. It merely reflects the trail proponent's willingness to negotiate with the freight railroad for establishment of a trail.

[33] Because of procedural difference, the order entered by the ICC for trail use negotiation in an abandonment commenced under the exemption procedures is called a Notice of Interim Trail Use (NITU). For all practical purposes, an NITU and a Certificate of Interim Trail Use (CITU) are the same thing.

[34] 49 C.F.R. § 1105-6.

[35] The Rails-to-Trails Conservancy has its national office in Washington, D.C., and has several state chapters including those in Florida, Illinois, Michigan, Ohio, Pennsylvania, and Washington.

[36] The Federal Railroad Administration (FRA) administers a number of federal laws regulating railroad safety. These laws include: the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 *et seq.*, the Safety Appliance Acts, 45 U.S.C. § 1 *et seq.*, the Locomotive Inspection Act, 45 U.S.C. § 22 *et. seq.*, the Accident Reports Act, 45 U.S.C. § 38 *et seq.*, the Hours of Service Act, 45 U.S.C. § 61 *et. seq.*, and the Signal Inspection Act, 49 U.S.C. § 26 *et. seq*. The FRA also enforces the increasingly important Hazardous Materials Transportation Act, 49 U.S.C. § 1801 *et. seq.*, to the extent it relates to railroad transportation or shipment of hazardous materials. The rules governing the federal railroad safety laws are found at 49 C.F.R., Parts 209-236. *See also Statement of Agency Policy Concerning Enforcement of Federal Railroad Safety Laws*, which is Appendix A to 49 C.F.R. Part 209. Taken together, these laws and rules give the FRA authority to comprehensively regulate all operations by all types of railroads. Carrier status is incidental with regard to FRA enforcement, and passenger service on active rail line will be subject to FRA regulation regardless of the carrier or noncarrier status of the service provider.

[37] *See* Southern Pacific Trans. Co.--Abandonment, 8 I.C.C.2d 495 (1992) *clarified*, 9 I.C.C.2d 385 (1993); Finance Docket No. 31248, North Carolina Ports Railway Commission--Petition for Declaratory Order or Prospective Abandonment (not printed), served September 30, 1988; Finance Docket No. 30861 (A), City of Austin, Texas--Acquisition--Southern Pacific Transportation Company (not printed), served November 4, 1986.

[38] *See* Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

[39] The federal employee railroad laws include: the Railway Labor Act (RLA), 45 U.S.C. § 151 *et. seq.*, the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. § 351 *et seq.*, the Railroad Retirement Act (RRA), 45 U.S.C. § 231 *et seq.*, and the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq*. While the RLA, the RRA, and the RUIA have separate statutory definitions, they are similar to the extent they are tied to the ICA.

[40] Apart from direct out-of-pocket costs and expenses, the Railroad Retirement and Unemployment Acts such include its own share of accounting and reporting obligations and other typical compliance responsibility.

[41] *E.g.*, Black v. Interstate Commerce Commission, 762 F.2d 106 (D.C. Cir. 1985).

[42] 49 U.S.C. § 10102(21)(B).

[43] 49 U.S.C. § 10102(20) and U.S.C. § 10102(26).

[44] No matter what the nature of the future shared use on an active rail corridor, it is corridor, it is always preferred to pursue a voluntary acquisition strategy. As discussed below, forced acquisition strategies on active rail corridors are fraught with practical limitations. Even if these limitations are overcome, further cooperation and negotiation are inherent in shared corridor usage.

[46] Despite their importance, purchase price and corridor selection are not legal issues.

[46] *See* Common Carrier Status of States, State Agencies, 363 I.C.C. 132 (1980) *aff'd*, Simmons v. I.C.C., 697 F.2d 326 (D.C. Cir. 1982).

[47] Maine DOT--Acq. Exemption--Maine Cent. R. Co., 8 I.C.C.2d 835 (1991) (State of Maine). *See also*, Southern Pacific Transp. Co.--Abandonment, 8. I.C.C. 2d 495 (1992), *clarified* 9 I.C.C.2d 385 (1993) (LACTC).

[48] The origin of this concept is found in *State of Vermont* and the cases cited therein. *See also* Brotherhood of Loco, Engineers v. Staten Island, 360 I.C.C. 464 (1979), affd, State Island Rapid Transit Operating Authority v. I.C.C., 718 F.2d 533 (2d Cir. 1983) (Staten Island); *see* e.g. Finance Docket No. 32186, Utah Transit Authority--Acquisition Exemption--Line of Union Pacific Railroad Company (not printed), served December 31, 1992, denied *petition for reconsideration denied*, served April 14, 1993 (UTA).

[49] Maine DOT--Acq. Exemption--Maine Cent. R. Co., *supra* at 836-837. In the *State of Maine* case, the Commission established a procedure for review and clearance of transactions where the buyer intends not to become a rail carrier. *Id.* At 837-838. (We caution that any similar transactions should likewise be submitted to us in advance, together with a copy of the agreement between the railroad and the entity **acquiring** its right of way, for a jurisdictional determination).

[50] Finance Docket No. 30861 (A), City of Austin, Texas--Acquisition--Southern Pacific Transportation Company (not printed), served November 4, 1986 *(City of Austin).*

[51] In the *State of Maine* case, supra the ICC cited and distinguished the *City of Austin* case. *State of Maine*, at 837.

[52] UTA, *supra* at 3.

[53] *Id.*

[54] Metro. Transit Auth. Of Harris County, TX--Decla. Order, 9 I.C.C.2d 559 (1993) (Harris County).

[55] Finance Docket No. 32279, Norfolk and Western Railway Company--Petition for Declaratory Order--Lease of Line (not printed), served

May 28, 1993, at 2, *pet. to reopen denied*, Norfolk & W. Ry. Co.-Lease of Link in Cook & Will Count., IL, 9 I.C.C.2d 1155 (1993), *appeal docketed*, No. 94-1037 (D.C. Cir. January 21, 1994)

[56] Southern Pacific Transp. Co.--Abandonment Exemption--Los Angeles County, CA, 8 I.C.C.2d 495, 498 (1992) (SP did not retain rights, but LACTC agreed to give new rights to SP in the near future), *See also* Orange County Transportation Authority et al--Acquisition Exemption--The Atchison, Topeka and Santa Fe Railway Company, 10 I.C.C.2d 78 (1994) (Orange County).

[57] Id. At 505. The ICC concluded as follows:

In sum, in *City of Austin* and other cases, this agency has made it clear that any party that acquires an active line of railroad acquires the common carrier obligation to provide service over it, even if the purchaser disavows that duty and another party, by agreement with the purchaser, obligates itself to provide service by operating trains on the line.

[58] Staten Island, at 471.

[59] LACTC at 508; *See also* Orange County, 10 I.C.C.2d 78 (1994).

[60] American Train Dispatchers Assn. v. Union Pacific R. Co., 363 I.C.C. 143 (1980) (ATDA/UP); American Train Dispatchers Assn. v. Chicago & N.W., 360 I.C.C. 457 (1979) (ATDA/CNW),

[61] The *SIRTOA*, *LACTC*, and *Orange County* cases are adverse, but may be distinguishable because of the transaction structure (in *SIRTOA* and *LACTC)* and the other extensive controls each passenger authority had in those cases. *See* Orange County 10 I.C.C.2d at 86.

[62] ATDA/UP at 147; ATDA/CNW at 461-462.

[63] Harris County, 9 I.C.C.2d 559.

[64] Orange County, 10 I.C.C.2d at 83-86.

[65] Of course, what constitutes an "unwilling" seller is a matter of perspective. In most cases railroads are willing to sell if their price and terms are met. Most often, the "unwilling" seller is the one with which the transit provider cannot come to terms, especially with respect to price.

[66] *E.g.*, City of Houston v. Ft. Worth & Denver Railway, 619 S.W.2d 234 (Tex. Civ. App. 1981); State of Missouri v. The Kansas City Southern Railway Company, 558 S.W.2d 229 (Mo. Ct. App. 1977); Georgia Southern and Florida Railway Company vs. State Road Department of Florida, 176 So. 2d 111 (Fla. Dist. Ct. App. 1965).

[67] *E.g.*, Kansas City Area Transp. v. Ashley, 555 S.W.2d 9 (Mo. 1977), *cert. denied*, 434 U.S. 106 (1978) (Ashley); Commonwealth of Massachusetts v. Bartlett, 266 F Supp. 390 (D. Mass. 1967), *aff'd* 384 F.2d 819 (1st Cir. 1967) (Bartlett).

[68] Chicago and Northern Western Transportation Company v. Kalo Brick & Tile Company, 450 U.S. 311, 67 L. Ed 2d 258; 101 S. Ct. 1124 (1981) (Kalo Brick).

[69] Kalo Brick at 320.

[70] Kalo Brick at 324; Louisiana & Arkansas Railway Company v. Bickham, 602 F Supp. 383 (M.D. La. 1985).

[71] Ashley; Bartlett.

[72] Now codified at 49 U.S.C. § 10903.

[73] Ashley at 10.

[74] Bartlett at 391.

[75] Bartlett at 393.

[76] 49 U.S.C. § 10903.

[77] For a railroad, there are three ways to seek ICC authority to abandon rail line. The railroad may file an Application for Abandonment, pursuant to 49 U.S.C. Sections 10903-10905 and the regulations at 49 C.F.R. Section 1152. It may file a Petition for Exemption pursuant to 49 U.S.C. Section 10505. Finally, it may file a Notice of Exemption for abandonment, pursuant to 49 C.F.R. Section 1152.50 *et seq.*, if no traffic has been originated or terminated on the line in the previous 2 years, any traffic traversing the entire line *(i.e.*, end-to-end, "bridge" or "overhead" traffic) can be rerouted, and certain other conditions are met.

[78] Thompson v. Texas-Mexican Ry. Co., 328 U.S. 134 (1946); *See* Baltimore and Annapolis R. Co.--Abandonment, 348 I.C.C. 678 (1976). It is important to remember that any third party seeking abandonment must file an Application for Abandonment. The ICC has determined that the nature of orders exempting abandonments from regulation *(i.e.*, abandonments by Petitions or Notices) precludes usage by third parties. *See* Finance Docket No. 31303, Wisconsin Department of Transportation-Aband. Exempt. (not printed), served December 5, 1988 (WisDOT); Chelsea Property Owners--Aban.--Consol. R. Corp., 8 I.C.C.2d 436 (1992) (Chelsea Property).

[79] Modern Handcraft, Inc.--Abandonment, 363 I.C.C. 969 (1981).

[80] *Id.* at 972.

[81] *Id* at 973. An abandonment granted under an application (like that granted under a petition for exemption) is permissive. It does not (and cannot) require the railroad to abandon the line. However, the ICC has frequently noted that an ICC abandonment decision *(i.e.*, a certificate of abandonment) is evidence in any court proceeding that the line covered is not required by the public for interstate rail operations. *E.g.*, Modern Handcraft at 972 ("Should an issue involving this property arise before any Missouri court, our jurisdiction should not be seen as an impediment to the disposition of the property") *citing* AB-71 (Sub-No. 1), Anne Arundel County and the City of Annapolis-Abandonment over the Baltimore and Annapolis Railroad Company From Glen Burnie to The City of Annapolis (not printed), decided February 27, 1980.

[82] Finance Docket No. 31271, City of Colorado Springs and METEX Metropolitan District-Petition For Declaratory Order-Abandonment Determination (not printed), served March 31, 1989 (Metex), *citing* WisDOT.

[83] Metex.

[84] *Id.* at 6.

[85] *Id.* at 7.

[86] Chelsea Property, 8 I.C.C.2d 773, 791-793 (1992).

[87] *Id.* at 778, *citing* WisDOT

[88] *Id.* at 779, *citing* WisDOT and Metex. WisDOT, *supra*, which was relied upon and quoted within Chelsea Property, was not a close case. The rail line **in** question had active shippers, and the owner of the line had recently acquired it in an effort to revitalize rail service. The WisDOT decision contains the strongest language to date adverse to third parties seeking abandonments. The language in WisDOT has been quoted in several subsequent cases, including Chelsea Property.

[89] 45 U.S.C. § 562.

[90] *See* National Railroad Passenger Corporation-Conveyance of Boston and Maine Corporation Interests in Connecticut River Line in Vermont and New Hampshire, 4 I.C.C.2d 761 (1988).

[91] 49 U.S.C. § 11103(a).

[92] *See, e.g.*, Midtec Paper Corp. v. Chicago and N.W. Transp. Co., 3 I.C.C.2d 171 (1986), *appeal denied*, Midtec Paper Corporation v. U.S., 857 F.2d 1487 (D.C. Cir. 1988); Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), *appeal denied*, Baltimore Gas and Electric v. U.S., 817 F.2d 108 (D.C. Cir. 1987).

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