

## COMMENT

### ABANDONMENT ISSUES: DEFENDING THE SURFACE TRANSPORTATION BOARD'S ADVERSE ABANDONMENT AUTHORITY

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As the railroad industry wanes, defunct railroad lines cross thousands of miles of property in the United States. If a landowner has a defunct railroad line on their property, a court cannot grant them their reversionary interest in the seemingly abandoned right-of-way. The court will tell them, “go talk to the Surface Transportation Board.” But can they go talk to the STB?

Recent interpretations of the STB’s abandonment statute as amended by the Interstate Commerce Commission Termination Act, including Justice Kavanaugh’s concurrence in *City of South Bend v. Surface Transportation Board* when he sat on the D.C. Circuit, threaten the ability of any third party to petition the STB for abandonment of a railroad line. This practice, called adverse abandonment, is the only way for landowners to exercise reversionary interests in de facto abandoned railroad rights-of-way, since the STB has exclusive jurisdiction over railroad lines’ abandonment. Worse yet, without adverse abandonment, de facto abandoned railroad lines would permanently stand between state and local governments and public development projects.

This Comment argues that the ICCTA did not extinguish the STB’s adverse abandonment authority. It synthesizes the arguments for and against the STB’s adverse abandonment authority as articulated by the parties in *City of South Bend*. It then harmonizes the abandonment statute, the ICCTA’s legislative history, and other statutes related to abandonment. Next, it traces adverse abandonment’s development back to its decisional-law origins and argues that adjudicators’ consistent treatment of adverse abandonment petitions in favor of the STB’s purpose to ensure the development and continuation of a sound rail transportation system makes extinguishing the STB’s adverse abandonment authority a sheer absurdity. This Comment concludes that the post-ICCTA version of the abandonment statute needlessly threatens a vital tool in the STB’s toolbox and calls for legislative change to address this oversight.

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#### INTRODUCTION

Say you own a parcel of property with a railroad line running through it. Most of the actual railroad track is gone, and someone has built a football field across where the track once was. No train has traveled along this line in years, and, clearly, no train could. Whatever interest the railroad had in this railroad line is now an abandoned property interest, right? You, the landowner, are excited to exercise your reversionary interest in this abandoned property and file suit in state court to do so. That court will tell you, “go talk to the Surface Transportation Board (STB).”<sup>1</sup>

Such were the facts and outcome of a real case.<sup>2</sup> To get rid of de facto abandoned railroad lines on your property, you must petition the STB for abandonment before a court can grant you a reversionary interest in the right-of-way.<sup>3</sup> This process is called “adverse abandonment.”<sup>4</sup> Whether

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1. Patrick Gallagher, *No Abandonment of Rail Easement Without Federal Approval*, AM. BAR ASSOC. (Sept. 30, 2016), <https://www.americanbar.org/groups/litigation/committees/real-estate-condemnation-trust/practice/2016/no-abandonment-of-rail-easement-without-federal-approval/> [<https://perma.cc/B77Y-7ZXE>] (“Do not pass Go. Do not collect \$200. Go directly to the federal Surface Transportation Board.”).

2. *Bitner v. Watco Cos., Inc.*, 226 P.3d 563, 564–66 (Kan. Ct. App. 2010).

3. *Id.* at 566.

4. SURFACE TRANSP. BD., FY 2017 ANNUAL REPORT 19 (2018) <https://www.stb.gov/wp->

you are a private landowner,<sup>5</sup> a state agency,<sup>6</sup> or the state itself, the STB must approve your adverse abandonment application before you can exercise a reversionary interest.<sup>7</sup> Non-use for an extended period of time alone is insufficient; the STB must approve an adverse abandonment application for a private landowner to succeed “in an action to quiet title to land encumbered by a seemingly abandoned railroad easement.”<sup>8</sup> Long before Congress passed the Interstate Commerce Commission Termination Act (ICCTA), which abolished the Interstate Commerce Commission (ICC) and created the STB in its place, courts recognized adverse abandonment as the sole remedy where a property owner with a reversionary interest in a protected railroad line may remove tracks from their property.<sup>9</sup> Deteriorated, almost unused railroad lines interrupting massive state highway projects still require STB approval for their abandonment.<sup>10</sup>

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content/uploads/files/docs/annualReports/Annual%20Report%202017.pdf  
[https://perma.cc/8BG4-LG85].

5. *La. & Ark. Ry. Co. v. Bickham*, 602 F. Supp. 383, 383–84 (M.D. La. 1985). In this case, the court held that Bickham, a private landowner, unlawfully removed railroad track from his property after the rail carrier had not used the railroad line for more than ten years. *Id.* at 383–85. The court recognized that the federal abandonment statute preempted any state law that would have extinguished the rail carrier’s servitude through de facto abandonment. *Id.* The landowner, remarked the court, “could have filed an application with the ICC to have the line declared abandoned prior to his destruction of the remaining tracks.” *Id.* at 384–85 (citing *Thompson v. Tex. Mexican Ry. Co.*, 328 U.S. 134, 145 (1946)).

6. *Ass’n of Am. R.Rs. v. Pub. Serv. Comm’n*, 745 F. Supp 1175, 1186 (S.D. W. Va. 1989).

7. *State v. Ill. Cent. R.R. Co.*, 928 So. 2d 60, 72–73 (La. Ct. App. 2005). In some states, such as Wisconsin, the STB’s abandonment approval might not be the end of the road for private landowners seeking to exercise reversionary interests. WIS. STAT. § 85.09(2)(a) (2019–20). Under Wisconsin’s “Acquisition of abandoned rail property” statute, “[t]he department of transportation shall have the first right to acquire, for present or future transportation or recreational purposes, any property used in operating a railroad or railway . . . that has been abandoned.” *Id.* Under this statute, the state deems property abandoned if “[a] certificate or approval of abandonment has been issued by the federal surface transportation board or federal court or any other federal or state agency having jurisdiction over the rail property.” WIS. STAT. § 85.09(3)(a).

8. Gallagher, *supra* note 1 (“Congress never intended for mere nonuse to constitute abandonment of a railroad easement.”) (citing *Murray v. Dep’t of Conservation and Recreation*, 55 N.E.3d 420 (Mass. 2016)); see 49 U.S.C. § 10501(b) (“The jurisdiction of the Board over . . . abandonment . . . even if the tracks are located . . . entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation . . . preempt the remedies provided under Federal or State law.”).

9. See, e.g., *La. & Ark. Ry. Co.*, 602 F. Supp. at 383–84.

10. See, e.g., *Wis. Dep’t of Transp.—Abandonment Exemption*, No. 31303, 1988 WL 225048, at \*4–6 (I.C.C. Nov. 23, 1988) (denying the Wisconsin Department of Transportation’s abandonment exemption request even where the Department needed the land for a freeway project, traffic on railroad lines was light, and the track was deteriorated).

As the railroad industry wanes, railroad lines continue to encumber a lot of land<sup>11</sup>—often in the form of right-of-way easements in which landowners have a reversionary interest.<sup>12</sup> Railroads have lost tens of thousands of miles of lines in the last century: large railroads owned more than 207,000 miles of line in 1960, which decreased by over 100,000 miles by the year 2000.<sup>13</sup> The number continues to decline steadily; as of 2016, large railroads own only 93,330 miles of railroad line.<sup>14</sup> According to the Association of American Railroads, rail carriers in the United States collectively own approximately 140,000 miles of railroad line.<sup>15</sup>

Yet, railroads and the STB, by their nature, hesitate to formally abandon railroad lines—a decision that is basically permanent.<sup>16</sup> Once the STB grants a petition for abandonment, “subservient landowners [may] exercise reversionary rights in, and local governments [may] condemn, the railroad’s right-of-way.”<sup>17</sup> These parties’ exercise of reversionary rights in and condemnation of railroad line rights-of-way make “reassembling” a right-of-way extremely difficult, if not impossible.<sup>18</sup>

Because railroad line rights-of-way are so difficult to reassemble, landowners with de facto abandoned railroad lines on their property who petition the STB for abandonment face an uphill battle to overcome the STB’s hesitancy.<sup>19</sup> Congress directed the STB to put its thumb on the “deny abandonment petitions” side of the scale.<sup>20</sup> As provided in the

11. See ABANDONED RAILS, [https://www.abandonedrails.com/\[https://perma.cc/4Y26-5UF5\]](https://www.abandonedrails.com/[https://perma.cc/4Y26-5UF5]) (last visited Nov. 8, 2022) (providing a crowd-sourced, state-by-state, interactive map of abandoned railroad lines across the country).

12. Michael L. Stokes, *Adverse Abandonment: Toward Allowing the States to Condemn or Dispose of Unneeded Railroad Land*, 31 TRANSP. L.J. 69, 74 & n.31 (2003); see Gallagher, *supra* note 1.

13. Stokes, *supra* note 12, at 70 (citing U.S. DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION STATISTICS 3 (2002), [https://www.bts.gov/sites/bts.dot.gov/files/legacy/publications/national\\_transportation\\_statistics/2002/pdf/entire.pdf](https://www.bts.gov/sites/bts.dot.gov/files/legacy/publications/national_transportation_statistics/2002/pdf/entire.pdf) [<https://perma.cc/QWB4-6YPM>]).

14. BUREAU OF TRANSPORTATION STATISTICS, U.S. DEP’T OF TRANSPORTATION, NATIONAL TRANSPORTATION STATISTICS tbl.1-1 (2018) <https://rosap.ntl.bts.gov/view/dot/36435> [<https://perma.cc/8YQD-KCBB>].

15. ASS’N OF AMERICAN R.R.s., *Freight Rail in Your State*, <https://www.aar.org/data-center/railroads-states/> [<https://perma.cc/R4RB-GWE6>] (last visited Nov. 8, 2022).

16. *City of South Bend v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

17. *Id.* (citing *Hayfield N. R.R. Co. v. Chi. & N.W. Transp. Co.*, 476 U.S. 622, 633–34 (1984)).

18. *Id.*

19. See *id.*; *Chelsea Prop. Owners—Abandonment*, 8 I.C.C.2d 773, 791–92 (1992).

20. See, e.g., *Chelsea Prop. Owners—Abandonment*, 8 I.C.C.2d at 779 (“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.”).

STB's enabling statute, "[i]n regulating the railroad industry, it is the policy of the United States Government . . . to ensure the development and continuation of a sound rail transportation system."<sup>21</sup> Because the STB has exclusive jurisdiction over railroad line abandonment,<sup>22</sup> rail carriers "enjoy[] the benefit of [a] federally-protected legal occupancy"—even where they fail to maintain or use their railroad lines—through STB abandonment jurisdiction.<sup>23</sup> Rail carriers therefore often have no incentive to abandon lines and free the property up for other uses. Thus, landowners must struggle against unwilling rail carriers and a hesitant STB to exercise their reversionary interests.

To make matters worse, a dormant threat to the STB's abandonment petition process may prevent landowners from being able to seek any remedy at all. For nearly a century, parties other than rail carriers have been able to petition the STB, or its predecessor the Interstate Commerce Commission (ICC), for the abandonment of a rail carrier's railroad line—this is "adverse abandonment."<sup>24</sup> The STB's adverse abandonment authority, however, has attracted some scrutiny.<sup>25</sup>

The biggest threat to the STB's adverse abandonment authority is the ICCTA, which amended the language of the abandonment statute.<sup>26</sup> Rather than using passive voice—language which clearly left open which parties may file for abandonment—the new abandonment statute specifies that "[a] rail carrier . . . must" file for abandonment.<sup>27</sup> Rail carriers, and Justice Kavanaugh when sitting on the D.C. Circuit, have argued that this language suggests that *only* rail carriers may petition the STB for abandonment.<sup>28</sup>

Opponents of adverse abandonment argue that the ICCTA's language undercuts the STB's adverse abandonment authority as developed in decisional law interpreting the ICC's enabling statute, which contemplated any party being able to file for abandonment.<sup>29</sup> Opponents also emphasize that the ICCTA's legislative history reflects Congress' concern about

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21. 49 U.S.C. § 10101.

22. *Id.* § 10501(b)(2).

23. Stokes, *supra* note 12, at 74.

24. *City of South Bend*, 566 F.3d at 1168; *Colo. & S. Ry. Co.—Abandonment*, 166 I.C.C. 470, 471 (1930).

25. *City of South Bend*, 566 F.3d at 1171–72 (Kavanaugh, J., concurring).

26. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended at 49 U.S.C. §§ 10101–16101).

27. Compare 49 U.S.C. § 10903 (2018) ("A rail carrier . . . who intends to . . . abandon any part of its railroad lines . . . must file an application . . . with the [STB]."), with 49 U.S.C. § 10903 (1988) (amended 1995) ("A rail carrier . . . may . . . abandon any part of its railroad lines . . . only if the [ICC] finds . . . public convenience and necessity require or permit abandonment.").

28. *City of South Bend*, 566 F.3d at 1171–72 (Kavanaugh, J., concurring).

29. See 49 U.S.C. § 1a(1) (1976).

abandoned railroad lines.<sup>30</sup> Thus, they argue, the ICCTA limited the abandonment process to rail carriers *only*.

Interpreting the ICCTA as allowing *only* rail carriers to file for abandonment would mean that any private landowner, or any state or local government seeking to condemn abandoned railroad lines, must simply wait until a rail carrier—of its own volition—files for abandonment.<sup>31</sup> This interpretation has enormous consequences for transportation development, private land use, and even the preservation of railroad lines for future service.<sup>32</sup> For example, the uncertainty of whether a rail carrier will reactivate a rail line, thus requiring a state to replace infrastructure it removed for other projects, could be left eternally unanswered if the STB cannot accept adverse abandonment petitions.<sup>33</sup> Adverse abandonment is a key tool for the STB to prevent rail carriers from using STB jurisdiction for protection where the rail carrier is “not making serious efforts to put the line back in service.”<sup>34</sup> Without adverse abandonment, rail carriers will be able to retain property interests at the expense of landowners, state and local governments, and the health of the interstate rail system.

This Comment argues that the ICCTA did not extinguish the STB’s adverse abandonment authority. This Comment is the first to synthesize the arguments for and against adverse abandonment as presented by the arguing parties in *City of South Bend v. Surface Transportation Board*<sup>35</sup> and the first to harmonize the abandonment statute, the ICCTA’s legislative history, and other statutes related to abandonment.<sup>36</sup> It is also

30. 141 CONG. REC. H12253 (daily ed. Nov. 14, 1995) (“I want to emphasize as strongly as I can that it is essential to preserve rail service as provided in this legislation. . . . [T]housands of miles of track, whether we like it or not, are going to be abandoned.”) (statement of Rep. Bud Shuster).

31. See *Burgoyne, LLC v. Chi. Terminal R.R. Co.*, 169 N.E.3d 815, 828 (Ill. App. Ct. 2020) (“Unlike the types of property claims that may proceed in state court, [Petitioner’s] claims, if successful, would prevent or unreasonably interfere with rail transportation and are thus preempted by the ICCTA.”).

32. See *Stokes*, *supra* note 12, at 74.

33. *Id.* at 74–75.

34. *Id.* at 76.

35. 566 F.3d 1166, 1172 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (“We need not address that important and difficult statutory issue in this case because South Bend loses regardless whether the statute still allows adverse abandonment.”).

36. The parties in *City of South Bend* restricted their analysis to the legislative history’s effect on the abandonment statute itself. See Supplemental Post Argument Brief of Intervenor the Chicago, Lake Shore & South Bend Railway Co., LLC, *City of South Bend v. Surface Transp. Bd.*, 566 F.3d 1166 (D.C. Cir. 2009) (No. 08-1150) [hereinafter Intervenor’s Supplemental Brief]; Joint Supplemental Brief of Respondents Surface Transportation Board and United States of America, *City of South Bend v. Surface Transp. Bd.*, 566 F.3d 1166 (D.C. Cir. 2009) (No. 08-1150) (citing 49 U.S.C. § 10903) [hereinafter Respondents’ Supplemental Brief]; Supplemental Brief of City of South Bend, IN and Brothers of Holy Cross, Inc., *City of South Bend v. Surface Transp. Bd.*, 566 F.3d 1166 (D.C. Cir. 2009) (No. 08-1150) (citing 49 U.S.C. § 10903) [hereinafter Petitioners’ Supplemental Brief].

the first to trace adverse abandonment's development back to its origins<sup>37</sup> and the first to argue that adjudicators' consistent treatment of adverse abandonment petitions in favor of the STB's purpose makes extinguishing the STB's adverse abandonment authority a sheer absurdity.<sup>38</sup>

Part I describes the abandonment statute's structure. It then illustrates the controversy, as Justice Kavanaugh and the parties in *City of South Bend* articulated it, surrounding whether the ICCTA extinguished the STB's adverse abandonment authority. This Comment focuses on the parties' four main arguments: (1) statutory interpretation of the abandonment statute, § 10903, as compared to earlier abandonment statutes; (2) the ICCTA's legislative history; (3) the ICCTA's effect on longstanding adverse abandonment case law; and (4) adverse abandonment's effect on the STB's purpose and greater public policy.

Part II argues that the ICCTA, read along with several features of the STB's enabling statute and the ICCTA's legislative history, demonstrate that the STB inherited adverse abandonment authority from the ICC. This Part investigates and attempts to harmonize § 10903's plain meaning, statutory context, and the ICCTA's legislative history. Though the plain meaning of § 10903 suggests that adverse abandonment is no longer possible, the abandonment statute's provisions regarding offers of financial assistance and the Trails Act's references to § 10903 make more sense if third parties can file for abandonment. The legislative history of the ICCTA proves that Congress did not intend to abolish adverse abandonment. This Part concludes that there is a permissible reading of the statute that allows the STB to retain its adverse abandonment authority despite the "must" language in § 10903.

Part III investigates how the ICCTA might affect longstanding adverse abandonment case law. Tracking adverse abandonment to its origins demonstrates that the ICCTA comports with adverse abandonment's decisional foundations. Though earlier opinions interpreted the old abandonment statute, policy considerations, rather than raw statutory interpretation, drove these adjudicators' development of adverse abandonment. This Part concludes that adverse abandonment case law's deeper reasoning squares just as easily with the ICCTA's language as it did with the old language.

Part IV investigates adverse abandonment's effect on the STB's purpose and greater public policy. It argues that the ICC, the STB, and

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37. See, e.g., Petitioners' Supplemental Brief, *supra* note 36, at 2 (attributing adverse abandonment's origins to 1946 caselaw).

38. But see, e.g., Stokes, *supra* note 12, at 79–80 (discussing how the STB's public inconvenience and necessity standard "weighs in favor of rail transportation" and emphasizes that "the STB will decide the issue in accordance with its view of what will best serve the national rail transportation policy") (emphasis omitted).

reviewing courts have faithfully reviewed adverse abandonment applications in a way that enhances and effectuates the STB's purpose, which is to "ensure the development and continuation of a sound rail transportation system."<sup>39</sup> It also draws out the public policy implications of an extinguished adverse abandonment authority to demonstrate that adverse abandonment is a necessary feature of American railroad law that serves the general public interest while maintaining the public's interest in an interstate rail system. This Part concludes that adverse abandonment is a necessary public policy tool that only helps, and never hurts, the STB's purpose.

The better interpretation of the law is that the ICCTA did not extinguish the STB's abandonment authority. That said, this Comment recognizes that the opposite is also a plausible reading. Because a plain-meaning reading of the statute needlessly threatens the STB's adverse abandonment authority, and because adverse abandonment advances the STB's purpose, this Comment recommends that Congress amend the statute to more clearly establish the STB's adverse abandonment authority.

#### I. HOW THE STB'S ADVERSE ABANDONMENT AUTHORITY WORKS AND HOW THE ICCTA THREATENS IT

This Part describes the abandonment statute, its structure, and the changes Congress made to the statute through the ICCTA. This description focuses on newly appearing "must" language that rail carriers have interpreted as extinguishing the STB's adverse abandonment authority, which contrasts with the passive language in earlier versions of the abandonment statute. It then introduces the controversy surrounding adverse abandonment as it arose in *City of South Bend* as demonstrated through a rail carrier's, the STB's, and a third party's arguments for and against the STB's adverse abandonment authority. The strengths and weaknesses of the parties' arguments are further evaluated throughout this Comment.

##### A. How Adverse Abandonment Works: Section 10903

Rail carriers cannot abandon railroad lines without first receiving STB approval.<sup>40</sup> The STB has exclusive jurisdiction over railroad lines.<sup>41</sup>

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39. 49 U.S.C. § 10101(4).

40. *City of South Bend*, 566 F.3d at 1168 ("Congress has delegated to the [STB] exclusive jurisdiction to regulate . . . 'abandonment or discontinuance' of rail facilities . . .").

41. 49 U.S.C. § 10501(2)(b)(2).



This is true even if the railroad lines are contained entirely in one state.<sup>42</sup> For landowners to exercise their reversionary interest in de facto abandoned railroad lines, the STB needs to approve the abandonment.<sup>43</sup>

The STB's abandonment determinations must comport with the STB's stated policy imperative, which heavily disfavors abandonment.<sup>44</sup> Congress charged the STB with carrying out "the policy of the United States Government . . . to ensure the development and continuation of a sound rail transportation system . . . ."<sup>45</sup> In light of this purpose, the STB will grant abandonment (whether adverse or as requested by the rail carrier) only where "the Board finds that the present or future public convenience and necessity require or permit the abandonment."<sup>46</sup> Future public convenience and necessity are of a particular concern with adverse abandonment, since those seeking adverse abandonment likely intend to use the property in such a way that would prevent a rail carrier from obtaining the right-of-way in the future.<sup>47</sup> Once a rail carrier abandons a railroad line, "reassembling a right-of-way may be difficult if not impractical . . . ."<sup>48</sup> Thus, the STB "must, before authorizing an abandonment, give weight to its 'statutory duty to preserve and promote continued rail service.'"<sup>49</sup>

Yet, the STB does grant abandonment in many cases.<sup>50</sup> The question remains whether adverse abandonment comports with this stated purpose to ensure the development and continuation of a sound rail transportation system.<sup>51</sup> How can an abandonment regime that allows third parties to file for abandonment possibly fulfill that purpose? The answer lies in making sense of the scheme and context of the abandonment statute and understanding how adverse abandonment works in practice.

42. *Id.* ("[T]he . . . abandonment . . . of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located . . . entirely in one State, is exclusive.") (emphasis added).

43. *Landowners—Motion for Declaratory Order and Injunctive Relief*, No. AB1065, 2020 WL 268384, at \*4 (S.T.B. Jan. 24, 2020) ("To abandon a line of railroad, a railroad must seek advance authority from the Board under 49 U.S.C. § 10903.").

44. *See* 49 U.S.C. § 10101(4).

45. *Id.*

46. *City of South Bend v. Surface Transp. Bd.*, 566 F.3d at 1166, 1168 (D.C. Cir. 2009) (citing 49 U.S.C. § 10903(d)).

47. *Id.* (citing *N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1187 (D.C. Cir. 2004)).

48. *Id.*

49. *Id.*

50. *See, e.g., Mod. Handcraft, Inc.—Abandonment*, 363 I.C.C. 969, 971 (1981); SURFACE TRANSP. BD., FY 2017 ANNUAL REPORT 19 (2018), <https://www.stb.gov/wp-content/uploads/files/docs/annualReports/Annual%20Report%202017.pdf> [<https://perma.cc/MX8J-4FBC>] ("In FY 2017, the Board authorized approximately 745 miles of rail line for abandonment in 34 exemption proceedings.").

51. 49 U.S.C. § 10101(4).

The current abandonment statute, § 10903, as revised by the ICCTA, provides the basic rule of railroad line abandonment:

(a)(1) *A rail carrier* providing transportation subject to the jurisdiction of the Board under this part who intends to . . . abandon any part of its railroad lines; . . . *must* file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.<sup>52</sup>

On first blush, the process following from this statute seems simple: a rail carrier who wants to abandon a railroad line files an application to the STB for abandonment.<sup>53</sup> From the plain language of this statute, the “rail carrier . . . must” language suggests that only the rail carrier may file this application.<sup>54</sup> For nearly a century, however, the STB, the ICC, and reviewing courts have allowed third parties to petition the STB for railroad line abandonment over the will of the rail carrier.<sup>55</sup> This is “adverse abandonment.”<sup>56</sup>

Under the old abandonment statute, the plain meaning of the text supported, or at least did not contradict, the STB’s adverse abandonment authority. Until 1995, the abandonment statute read in the passive voice: “*an application* for such a certificate *shall be submitted* to the Commission.”<sup>57</sup> With this passive language, abandonment statutes predating the ICCTA left open which entities may file for abandonment.

The ICCTA, through § 10903, changed this passive language: read literally, it suggests that only rail carriers may petition the STB for abandonment. The ICCTA’s enactment, and this new “must” language in § 10903, begs a question: does the change in language to “[a] *rail carrier*

52. 49 U.S.C. § 10903(a)(1) (emphases added).

53. Indeed, the Surface Transportation Board itself characterizes this process as straightforward. SURFACE TRANSP. BD., FY 2017 ANNUAL REPORT 19 (2018), <https://www.stb.gov/wp-content/uploads/files/docs/annualReports/Annual%20Report%202017.pdf> [<https://perma.cc/6N2T-6B2Y>] (“Abandonment or discontinuance authority may be sought by an entity with operating authority over the line, or an ‘adverse’ abandonment or discontinuance action may be brought by an opponent to a line’s continued operation.”).

54. 49 U.S.C. § 10903(a)(1).

55. *R.R. Comm’n of Cal. v. S. Pac. Co.*, 264 U.S. 331 (1924). This case does not use the term “adverse abandonment” but does contemplate parties other than rail carriers being able to petition the ICC for abandonment. *Id.* at 345.

56. *City of South Bend v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

57. 49 U.S.C. § 1a(1) (1976) (emphases added); *see also* 49 U.S.C. § 1(18) (1940) (“[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and *until there shall first have been obtained from the commission* a certificate that the present or future public convenience and necessity permit of such abandonment.”) (emphasis added).

... *must*<sup>58</sup> allow *only* rail carriers to petition the STB for abandonment?<sup>59</sup> Those adopting a literal reading of the abandonment statute might argue that the STB's exercise of adverse abandonment authority is, lacking a statutory directive, an illegitimate exercise of authority.<sup>60</sup> Indeed, this question came to the fore in *City of South Bend*.<sup>61</sup>

*B. The ICCTA Threatens the STB's Adverse Abandonment Authority:  
City of South Bend*

*City of South Bend* is the case which most directly confronts whether adverse abandonment conflicts with the statutory directive in § 10903.<sup>62</sup> In this case, a city and a church petitioned the STB for adverse abandonment of a rail carrier's railroad line so that the city and church could exercise their reversionary interests.<sup>63</sup> The STB denied the petitioners' application, and the D.C. Circuit denied the petitioners' petition for review.<sup>64</sup> Because the D.C. Circuit affirmed, the court's majority opinion did not reach the issue whether the STB may continue to exercise adverse abandonment authority under the ICCTA.<sup>65</sup>

Justice Kavanaugh, then on the D.C. Circuit, concurred in *City of South Bend*, with a critical eye toward whether § 10903 extinguished the STB's adverse abandonment authority. His concurrence recognized that the STB and ICC had been exercising adverse abandonment authority for decades, but remarked that, "[i]t appears, however, that the statute as amended by the [ICCTA] may allow only a railroad that owns the tracks—not a third party—to seek abandonment of a rail line."<sup>66</sup>

Before issuing its opinion, the D.C. Circuit asked the parties to file supplemental briefs on whether the STB may exercise adverse abandonment authority. The petitioners, the STB as respondent, and the rail carrier as an intervenor each filed supplemental briefs. The parties' arguments centered around: (1) the differences between the abandonment statute prior to the ICCTA and the abandonment statute after the ICCTA; (2) the ICCTA's legislative history; (3) how the ICC, the STB, and reviewing courts have interpreted the abandonment statute; and (4)

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58. 49 U.S.C. § 10903(a)(1) (emphasis added).

59. *City of South Bend*, 566 F.3d at 1171–72 (Kavanaugh, J., concurring).

60. *Id.* (Kavanaugh, J., concurring).

61. *Id.* at 1172 & n.2 (Kavanaugh, J., concurring).

62. *Id.* at 1168.

63. *Id.*

64. *Id.* at 1167, 1171.

65. *Id.* at 1172 (Kavanaugh, J., concurring).

66. *Id.* at 1171–72 (Kavanaugh, J., concurring).

whether adverse abandonment comports with the STB's purpose and greater public policy.<sup>67</sup>

Justice Kavanaugh's concurrence, these parties' filings, the state of the present abandonment statute, and the settled practice of the STB's adverse abandonment authority beg three important questions about the legitimacy of the STB's adverse abandonment authority as it stands today. First, how has the STB, and its predecessor the ICC, been exercising adverse abandonment authority for so long without a statutory directive? Second, where did adverse abandonment originate? Finally, is there any reason to think that the statute as amended reflects Congressional intent to extinguish the STB's adverse abandonment authority? The controversy around these questions reveals that the ICCTA's lack of clear statutory language authorizing adverse abandonment has put a vital tool in the STB's administrative toolbox at risk.

The ICCTA did not extinguish the STB's adverse abandonment authority. Statutory provisions relating to § 10903 make more sense if adverse abandonment is possible. The legislative history of the ICCTA does not mention adverse abandonment at all. Further, the STB's and reviewing courts' treatment of adverse abandonment effectuates the STB's purpose and serves greater public policy imperatives. Though adverse abandonment is a legitimate and needed practice, a plausible but hyper-literal reading of the plain meaning of § 10903 needlessly threatens adverse abandonment. Congress should amend § 10903 to address this threat.

## II. THE ICCTA RETAINED THE STB'S ADVERSE ABANDONMENT AUTHORITY

Analyzing the abandonment statute's context and history proves that Congress did not intend to extinguish the STB's adverse abandonment authority. Reading the abandonment statute along with related statutes reveals that adverse abandonment is not at odds with the STB's purpose.<sup>68</sup> These related statutes demonstrate that adverse abandonment will only apply in situations where continued rail service is not possible.<sup>69</sup> Per the STB's purpose, the entire statutory framework of railroad line abandonment seeks to preserve railroad lines for future use.<sup>70</sup> In several ways, adverse abandonment provides a solution to promote the STB's

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67. Intervenor's Supplemental Brief, *supra* note 36, at 1–4, 7; Respondents' Supplemental Brief, *supra* note 36, at 7; Petitioners' Supplemental Brief, *supra* note 36, at 1–2.

68. *See infra* Part II.A.

69. *N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1182 (D.C. Cir. 2004) (citing *Chelsea Prop. Owners—Abandonment*, 8 I.C.C.2d 773, 791 (1992)).

70. *See infra* Part II.A.

purpose where defunct railroad lines would otherwise lie fallow indefinitely.<sup>71</sup>

Also, the ICCTA's legislative history raises several concerns about abandonment, but does not discuss adverse abandonment at all.<sup>72</sup> Congress was instead concerned with maximizing the opportunity for other rail carriers to acquire railroad lines that would otherwise be abandoned.<sup>73</sup> This Part argues that the legislature's intent to maximize opportunities for other rail carriers to do so through offers of financial assistance actually reflects its intention to retain the STB's adverse abandonment authority in the ICCTA.<sup>74</sup>

*City of South Bend* demonstrated how dangerous § 10903's "must" language is to the STB's adverse abandonment authority. The parties in *City of South Bend* argued about the effect of the "must" language in the abandonment statute.<sup>75</sup> The rail carrier in this case, perhaps predictably, preferred a strictly textual reading of the abandonment statute.<sup>76</sup> This interpretation, as stated above, would make railroads the only party able to file for abandonment.

Conversely, the STB and the third parties insisted that the language clarified the roles of the STB and rail carriers with respect to each other and that the language did not exclude third parties from the abandonment process.<sup>77</sup> The STB and the third parties argued that the word "abandonment" in the statute remained "broad enough to encompass adverse abandonments" and that the current statute still does not "specify[] who may initiate the process."<sup>78</sup> The STB interpreted the statute as addressing "the more specific topic of how a *railroad* initiates the abandonment process when it is the one doing so[]" rather than "a limitation on the Board's ability to rule on third-party abandonment requests."<sup>79</sup> The petitioners interpreted the "must" language in a similar way: "In other words, a railroad may not *sua sponte* abandon a line without Board approval. However, nothing in the statute decrees that *only* a rail

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71. See *infra* Part II.A.

72. See *infra* Part II.B.

73. See *infra* Part II.B.

74. See *infra* Part II.B.

75. Intervenor's Supplemental Brief, *supra* note 36, at 3–4, 7; Respondents' Supplemental Brief, *supra* note 36, at 7–8; Petitioners' Supplemental Brief, *supra* note 36, at 1.

76. Intervenor's Supplemental Brief, *supra* note 36, at 3–4 ("[T]he ICCTA not only states that it is a *rail carrier* that *must* file the application for authority but adds that 'abandonment or discontinuance may be carried out *only* as authorized under this chapter.'") (citing 49 U.S.C. § 10903(a)(1)).

77. Respondents' Supplemental Brief, *supra* note 36, at 7; Petitioners' Supplemental Brief, *supra* note 36, at 1.

78. Respondents' Supplemental Brief, *supra* note 36, at 7.

79. *Id.* at 7–8.

carrier may invoke the STB's . . . jurisdiction over the abandonment of railroad lines."<sup>80</sup>

Though the rail carrier's plain-meaning reading of the abandonment statute seems more plausible on its face, a deeper look at the abandonment statute's context and history lends support to the STB's and the petitioners' arguments. As crucial as it is, a plain-meaning reading of the abandonment statute needlessly threatens the STB's adverse abandonment authority. Reading the abandonment statute in its context shows that adverse abandonment necessarily follows from the STB's statutorily defined purpose to "ensure the development and continuation of a sound rail transportation system[.]" from the statute's position within a wider abandonment scheme, and from the statute's legislative history.<sup>81</sup>

*A. The Availability of Financial Assistance Offers Makes Sense Only If Adverse Abandonment Is Possible*

The abandonment statute's "offers of financial assistance" provisions strongly indicate that the STB retains adverse abandonment authority.<sup>82</sup> Since offers of financial assistance from any rail carrier interested in continuing service on a to-be-abandoned railroad line can interrupt any abandonment proceeding, offers of financial assistance are a baked-in protection that prevents unused but potentially viable railroad lines from going out of service.<sup>83</sup> The "offers of financial assistance" provisions contemplate adverse abandonment's existence, because allowing third parties—in this case, other rail carriers—to file for adverse abandonment over the will of rail carriers that are not using their lines actually promotes the health of the interstate railroad system.<sup>84</sup>

The STB cannot approve an abandonment application until it determines that no offer of financial assistance under § 10904 will succeed.<sup>85</sup> The abandonment process begins with the railroad carrier filing for abandonment with the STB, and ends with the STB determining whether "present or future public convenience and necessity require or permit the abandonment."<sup>86</sup> The Board's determination on this matter is subject to § 10904, which provides for "offers of financial assistance."<sup>87</sup> Section 10904 provides that "[a]ny rail carrier which has filed an

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80. Petitioners' Supplemental Brief, *supra* note 36, at 1.

81. 49 U.S.C. § 10101(4); *see* §§ 10903–05; 141 CONG. REC. H12248-02, *supra* note 30.

82. *See* § 10904.

83. *Id.*

84. §§ 10904, 10101(4).

85. §§ 10903(d), 10904(d)(1).

86. § 10903(a)(1), (d).

87. § 10904.

application for abandonment . . . shall provide promptly to a party considering an offer of financial assistance” the information necessary to evaluate the viability of an offer of financial assistance.<sup>88</sup> Within four months of an abandonment application, “any person may offer to . . . purchase the railroad line that is the subject of such application.”<sup>89</sup>

This Section seeks to open up applications to adopt, in a sense, the railroad line to other persons who could “subsidize or purchase” the railroad line at an amount which would be “required to continue rail transportation over that part of the railroad line.”<sup>90</sup> Section 10904 provides that a rail carrier that has filed an application for abandonment triggers offers of financial assistance process and requires that said rail carrier provide the necessary information for “any person” to “subsidize or purchase the railroad line.”<sup>91</sup>

Section 10904’s offers of financial assistance provisions do not square perfectly with a railroad line abandonment regime that either allows or forbids adverse abandonment. Adverse abandonment does seem to be in some conflict with § 10904’s plain meaning. However, adverse abandonment is necessary to effectuate § 10904’s purpose.

Adverse abandonment is in some logical tension with the plain meaning of § 10904. First, like § 10903, § 10904 seems to contemplate the “rail carrier” leading the process of abandonment.<sup>92</sup> Second, even if one reads “rail carrier” to mean “third parties,” the logic of § 10904(b) breaks down. Say, for example, that a municipality files for adverse abandonment of a railroad line, and another rail carrier offers financial assistance to avoid abandonment. The somewhat counterintuitive conclusion of adverse abandonment under § 10904(b) requires the original rail carrier that did not “file[] an application for abandonment” to provide the information required to complete an offer of financial assistance.<sup>93</sup> Requiring the original rail carrier to do so conflicts with the plain meaning of § 10904.

Yet, adverse abandonment effectuates the purpose of § 10904 by making offers of financial assistance possible where the original rail carrier’s objection would prevent the possibility of continued service. Abandonment is an exception where a petitioner demonstrates to the STB that the public interest outweighs the prospect of continued rail service.<sup>94</sup>

Adverse abandonment applications as they relate to § 10904, then, promote continued rail service because they have only two outcomes—both of which serve the STB’s overall purpose of “ensur[ing] the

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88. § 10904(b).

89. § 10904(c).

90. § 10904(b)–(c).

91. § 10904(b).

92. § 10904(b).

93. *Id.*

94. *See Chelsea Prop. Owners—Abandonment*, 8 I.C.C.2d 773, 791 (1992).

development and continuation of a sound rail transportation system.”<sup>95</sup> The first outcome results where a rail carrier has a railroad line on which it does not provide rail service but which it refuses to abandon. Here, the adverse abandonment application results in a rail carrier’s dispossession of its defunct railroad line so that another rail carrier may swoop in with an offer of financial assistance and continue rail service on the line.<sup>96</sup> The second outcome results where a rail carrier has a railroad line which could continue rail service only if another party is willing to offer financial assistance but would otherwise be in the public interest to abandon.<sup>97</sup> Here, third parties may reclaim their reversionary interest or otherwise make use of land once encumbered by a railroad line at no expense to the national rail transportation system.

Without adverse abandonment, there would be no way for third-party rail carriers willing to provide service on a now-defunct railroad line to take over those lines. An abandonment regime that disallows adverse abandonment, then, leaves the STB’s hands tied where a rail carrier uses STB jurisdiction to leave a railroad line indefinitely fallow at the expense of other rail carriers who would provide service on that line. This notion runs counter to the STB’s purpose and proves that Congress did not intend to extinguish the STB’s adverse abandonment authority through the ICCTA.

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95. See § 10101(4); *see also* § 10101(5) (“In regulating the railroad industry, it is the policy of the United States Government . . . to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes . . .”).

96. § 10903(c).

97. § 10903(d).



*B. Railbanking Provides an Alternative to Abandonment and Indicates the Existence of Adverse Abandonment*

Other innovative mechanisms through which rail carriers can preserve their rights-of-way also indicate Congress's continued recognition of the STB's adverse abandonment authority. As the discussion above regarding offers of financial assistance demonstrates, adverse abandonment to the end of taking over railroad line is only applicable where a rail carrier holds a protected interest in its underused or unused railroad line. One might argue, however, that simply because a defunct railroad line does not currently or prospectively provide service does not mean that it will never provide service again. Even a decades-long lack of service might not warrant abandonment, since the STB's purpose is to ensure the *continuation* of the nation's rail transportation system.<sup>98</sup> A railroad line that is defunct today might prove invaluable decades from now. What then, can justify an abandonment regime that allows third parties to deprive rail carriers of their de facto abandoned railroad lines with no concrete assurance that the public will not need a rail carrier to provide service on those lines in the future?

The justification is that Congress provided a way for rail carriers to preserve their railroad lines indefinitely through a process called railbanking.<sup>99</sup> Railbanking allows rail carriers to transfer a railroad line to an interim trail user to convert the railroad line into a recreational trail until such time that the rail carrier needs to reactivate the line for future rail service.<sup>100</sup> As its name suggests, railbanking allows a rail carrier to "bank" a railroad line for later use.<sup>101</sup> Section 1247(d) provides in part:

[T]he Chairman of the Surface Transportation Board . . . shall encourage State and local agencies and private interests to establish appropriate trails. . . . and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, . . . in the case of interim use of any established

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98. § 10101(4).

99. 16 U.S.C. § 1247(d). *See also Railbanking*, RAILS-TO-TRAILS CONSERVANCY, <https://www.railstotrails.org/build-trails/trail-building-toolbox/acquisition/railbanking/> [https://perma.cc/KWX7-MPLT] (last visited Nov. 8, 2022) ("Railbanking . . . is a voluntary agreement between a railroad company and a trail sponsor (such as a trail organization or government agency) to use an out-of-service rail corridor as a trail until a railroad might need the corridor again for rail service."). Scholars have dedicated some attention to whether such uses of abandoned or railbanked railroad lines effectuate a taking, Richard A. Allen, *Does the Rails-To-Trails Act Effect a Taking of Property?*, 31 *TRANSP. L.J.* 35 (2003), but this notion is beyond my Comment's scope.

100. 16 U.S.C. § 1247(b)–(d).

101. *See* § 1247(d).

railroad rights-of-way pursuant to donation, transfer, lease, sale . . . if such interim use is subject to restoration or reconstruction for railroad purposes, *such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.*<sup>102</sup>

Railbanking thus addresses a major concern for rail carriers and the STB<sup>103</sup> by providing an option to preserve a rail carrier's valuable right of way even where continued rail service is not on the horizon.<sup>104</sup> In any case where an interim trail user could convert a railroad line into a recreational trail, the STB is not faced with the difficult task of determining whether future interest in continued rail service weighs against abandonment.<sup>105</sup>

More importantly, the railbanking statute's guarantee that interim trail use will not count as abandonment only makes sense if the STB retained adverse abandonment authority. Because the STB has exclusive jurisdiction over railroad line abandonment,<sup>106</sup> and because the railbanking statute provides that "interim use shall not be treated, for purposes of any law or rule of law, as an abandonment,"<sup>107</sup> Congress could only have meant to preclude third parties from arguing to the STB that interim trail use constitutes abandonment. Otherwise, this provision in the railbanking statute would protect rail carriers from petitioning for abandonment of their own railroad lines, which, as stated above, rail carriers would have no reason or incentive to do.<sup>108</sup> Further, if the railbanking statute's

102. *Id.* (emphasis added).

103. See SURFACE TRANSP. BD., FY 2017 ANNUAL REPORT 21 (2018), <https://www.stb.gov/wp-content/uploads/files/docs/annualReports/Annual%20Report%202017.pdf> [<https://perma.cc/U5KZ-8YC5>] ("During FY 2017, the Board granted 15 requests for railbanking and interim trail use.")

104. *Id.* at 20–21. This has the effect of an interim trail user 'stepping into the shoes' of a rail carrier for abandonment purposes as far as the STB is concerned. *Id.* The STB's decision whether to grant a railbanking petition, like an abandonment petition, requires the STB to "find[] that the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 C.F.R. § 1152.1(a) (2022). Railbanking petitions can also be interrupted by offers of financial assistance, just as abandonment petitions can. §§ 1152.1(b), 1152.29(c)(1).

105. To get a sense of the vast scale of railbanking's effect on railroad line preservation, see the Surface Transportation Board's Web Map on Abandoned and Railbanked Rail Lines. SURFACE TRANSPORTATION BOARD, ABANDONED AND RAILBANKED RAIL LINES, <https://stb.maps.arcgis.com/apps/mapviewer/index.html?webmap=59c5662600854756a7e6f18bca1a0f44> [<https://perma.cc/79J7-M9E8>] (last visited Nov. 8, 2022).

106. 49 U.S.C. § 10501(b)(2); *Jie Ao & Xin Zhou—Petitioner for Declaratory Order*, No. FD 35539, 2012 WL 2047726, at \*6 (S.T.B. June 4, 2012) (holding that the STB's exclusive authority under § 10501(b) preempted the petitioner's adverse possession claim over railbanked railroad line).

107. 16 U.S.C. § 1247(d).

108. Stokes, *supra* note 12, at 74.

guarantee did not offer a meaningful incentive through abandonment protection, rail carriers would have no reason to bank their rails. In the absence of adverse abandonment, the rails are already permanently banked under the protection of STB jurisdiction.<sup>109</sup> Therefore, when Congress passed the railbanking statute, it could only have done so with adverse abandonment in mind.

While adverse abandonment is in undeniable tension with the abandonment statute's plain meaning, reading the statute to allow for adverse abandonment presents the only avenue for parties to use the abandonment statute to effectuate the STB's purpose and Congress' intent. The abandonment statute's provisions for offers of financial assistance and the railbanking statute only make sense where adverse abandonment is allowed. An appreciation for Congress's innovation and the STB's purpose, then, allows a reading of § 10903 that recognizes the STB's continued adverse abandonment authority.

*C. Congress Did Not Intend to Extinguish the STB's Adverse  
Abandonment Authority*

Read uncritically, changing the abandonment statute's language from "[a]n application for such a certificate shall be submitted"<sup>110</sup> to "[a] rail carrier . . . must file an application[,]"<sup>111</sup> § 10903 seems to reflect Congress's concern about adverse abandonment. The abandonment statute's legislative history, however, does not mention this concern. This Section provides an overview of the ICCTA's legislative history as is relevant to abandonment. The legislative history's silence on adverse abandonment, combined with the history's deep concern for making short line railroads available for purchase, indicates that Congress intended the STB to retain adverse abandonment.

The *City of South Bend* parties argued about the effect of the ICCTA's legislative history on the meaning of § 10903's "must" language.<sup>112</sup> The rail carrier recognized that the ICCTA's legislative history did not "specifically address the issue of who can seek abandonment authority,"<sup>113</sup> but the rail carrier concluded that Congress intended for the STB "to interpret the abandonment statute very literally in carrying out its abandonment responsibilities" because the "principal focus [of the legislative history] is the preservation of uneconomic branch lines by short

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109. *Id.*

110. 49 U.S.C. § 1a(1) (1976).

111. 49 U.S.C. § 10903(a)(1).

112. Intervenor's Supplemental Brief, *supra* note 36, at 3; Respondents' Supplemental Brief, *supra* note 36, at 8.

113. Intervenor's Supplemental Brief, *supra* note 36, at 6.

line railroads” and because § 10903’s language “limited the class of parties eligible to initiate an abandonment proceeding.”<sup>114</sup>

The STB’s and the petitioners’ arguments emphasized that there is no legislative history suggesting that Congress intended to extinguish the STB’s adverse abandonment authority. The STB noted that “ICCTA’s legislative history gives no hint of such an intent.”<sup>115</sup> The STB recognized that the “oral argument originated in the House version of the bill that became the ICCTA . . . would have changed the agency’s power over abandonments in certain ways that were not ultimately included in [the] ICCTA[,]” but noted that “[t]he House Report . . . made no mention of any changes to the agency’s power over adverse abandonments.”<sup>116</sup> Likewise, the petitioners argued that “nothing in the legislation’s history or language indicates that Congress intended . . . to alter the Board’s exclusive jurisdiction over abandonments or to overrule the Supreme Court’s holding in *Thompson* . . . which has long provided the legal foundation for . . . adverse abandonment.”<sup>117</sup>

Among these legislative history arguments, the STB’s and the petitioners’ arguments that the legislative history reflects no intention to extinguish adverse abandonment clearly carry the day. The legislative history does not even mention adverse abandonment.<sup>118</sup> This silence, combined with the manifestation of particularized abandonment concerns in the legislative history that made it into the ICCTA, suggests that this change is a drafting oversight rather than a reflection of Congress’s intent to extinguish the STB’s adverse abandonment authority.

First, the legislative history makes no mention of rail carriers being the only parties able to file for abandonment. The House Report’s discussions of abandonment petitions phrase abandonment similarly to the old abandonment statute’s passive language: “This provision . . . streamlines and modernizes the processing of applications for the abandonment or discontinuance of service on a rail line.”<sup>119</sup> While the Senate Reports for the statute recognize that “under [§ 10903] carriers must receive advance authorization to abandon a rail line[,]” in discussion of § 10904, the Reports do not indicate specifically that *applications* for

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114. *Id.* at 6–8.

115. Respondents’ Supplemental Brief, *supra* note 36, at 8.

116. *Id.* at 8–9.

117. Petitioners’ Supplemental Brief, *supra* note 36, at 2 (citing *Thompson v. Tex. Mexican Ry. Co.*, 328 U.S. 134, 145 (1946)).

118. In fact, as articulated by one Senator, the most pressing issue relating to abandonment concerned the capacity of smaller operators to purchase lines that the larger operators were abandoning: “The most controversial issue in the bill relates to labor reforms on small railroad transactions. . . . Without these reforms that reduce the cost of purchasing these lines by small operators . . . , this rail service is going to be lost forever.” 141 CONG. REC. H12248-02, at H12253 (1995).

119. H.R. REP. NO. 104-311, at 102 (1995).

abandonment must come from *rail carriers*: “This section would amend [§ 10903]—which contains the procedural requirements for applications to abandon a rail line.”<sup>120</sup>

Second, though Congress feared excessive abandonment, its main concern was related to contemporary consolidation of railroad lines and the effect of imposing labor protections on short line railroads that would take the large railroads’ place.<sup>121</sup> Congress addressed this problem by “reconfigur[ing] [abandonments] to make them more viable as stand-alone short lines and reduc[ing] the review period for abandonment from 6 months to 4 months.”<sup>122</sup> Today’s § 10904 reflects these changes by allowing ample opportunity for offers of financial assistance and a relatively speedy review process.<sup>123</sup> The legislature had this in mind when it drafted what is now § 10903: “This provision . . . maximize[s] the opportunity for [a] line to be acquired for continued operation by a smaller railroad, even though the line is revenue-deficient for a large trunk carrier.”<sup>124</sup>

Though Congress was concerned about mass abandonment affecting the railroad-line infrastructure, one would expect that Congress’s mass-abandonment discussion would mention adverse abandonment if it were of any concern. The legislative history, then, does not support the argument that Congress intended to extinguish adverse abandonment authority through the ICCTA. Congress’s hope to make more lines available to small carriers by way of adjusting offers of financial assistance supports, rather than contradicts, the notion that third parties should be able to swoop in and make use of railroad lines that would otherwise be abandoned.

In sum, reading § 10903 in its context among related statutes and together with the ICCTA’s legislative history proves that Congress did not intend to extinguish the STB’s adverse abandonment authority. Congress would not have extinguished the STB’s adverse abandonment authority while maintaining other parts of the statutory scheme which contemplate adverse abandonment without mentioning adverse abandonment even once.

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120. S. REP. NO. 104-176, at 35 (1996).

121. 141 CONG. REC. 12266 (1995) (statement of Rep. James Oberstar).

122. *Id.*

123. 49 U.S.C § 10904.

124. H.R. REP. 104-422, at 180–81 (1995) (Conf. Rep.).

III. CONGRESS DID NOT INTEND TO UNDO ADJUDICATORS' CAREFUL,  
CENTURY-LONG DEVELOPMENT OF ADVERSE ABANDONMENT

The doctrines the ICC, the STB, and reviewing courts have developed around adverse abandonment limit adverse abandonment to a rare and useful tool for the well-being of the interstate rail system. These adjudicators' policy reasoning remains the same even though they originally developed adverse abandonment when the abandonment statute language was passive. Congress did not, simply by introducing the "must" language into § 10903, silently undo the carefully crafted adverse abandonment scheme that these adjudicators developed.

The *City of South Bend* parties argued about the current abandonment statute's effect on long standing adverse abandonment authority precedent.<sup>125</sup> All parties in this case dated adverse abandonment's origin back to the Supreme Court's decision in *Thompson*.<sup>126</sup> The rail carrier noted that the *Thompson* Court "never used the term 'adverse' abandonment," but that *Thompson* "has generally been cited for the proposition that a party having an interest in a rail line may seek authority for . . . abandonment."<sup>127</sup> The rail carrier argued that it was this authority that Congress sought to limit through the ICCTA.<sup>128</sup>

The STB likewise cited *Thompson*, noting that "the Supreme Court construed this passively worded language [of the old abandonment statute] as permitting a party other than the incumbent railroad to file an application for abandonment authorization."<sup>129</sup> The STB argued that the "ICCTA did not change the relevant statutory language upon which *both* the Supreme Court in *Thompson* and the ICC in *Modern Handcraft* based the agency's adverse abandonment authority."<sup>130</sup> The language "remain[ing] substantively unchanged by ICCTA," argued the STB, raises the presumption that Congress was "aware of and . . . adopt[ed] . . . a[] . . . judicial interpretation of that statute."<sup>131</sup> The petitioners likewise argued that "absent a clear manifestation of contrary intent, a newly enacted or revised statute is presumed to be harmonious with existing law and its

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125. Petitioners' Supplemental Brief, *supra* note 36, at 2.

126. Intervenor's Supplemental Brief, *supra* note 36, at 4 (citing *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 145 (1946)); Respondents' Supplemental Brief, *supra* note 40, at 6–7 (citing *Thompson*, 328 U.S. 134); Petitioners' Supplemental Brief, *supra* note 36, at 2 (citing *Thompson*, 328 U.S. at 145). While these parties are correct that *Thompson* is often cited as being the original adverse abandonment case, *Thompson* relies on an adverse abandonment precedent based on authority predating *Thompson* by twenty-two years. *Thompson*, 328 U.S. at 145 (citing *Atchison v. R.R. Comm'n*, 328 U.S. 380, 393–94 (1931)).

127. Intervenor's Supplemental Brief, *supra* note 36, at 4.

128. *Id.* at 6.

129. Respondent's Supplemental Brief, *supra* note 36, at 2.

130. *Id.* at 6.

131. *Id.* at 6–7.

judicial construction.”<sup>132</sup> The petitioners noted that “nothing in the legislation’s . . . language . . . overrule[s] the Supreme Court’s holding in *Thompson* . . . , which has long provided the legal foundation for the adverse abandonment concept.”<sup>133</sup>

Tracing adverse abandonment back to its origins further bolsters the STB’s and the petitioners’ arguments that the ICCTA did not extinguish the STB’s adverse abandonment authority. While all parties in *City of South Bend* cite the 1946 case *Thompson* as the original adverse abandonment case, adverse abandonment actually dates to 1924.<sup>134</sup> This Part traces the history of adverse abandonment back to its origins to demonstrate adverse abandonment’s necessity for the health of the interstate rail system as understood by adjudicators for nearly a century. Reviewing the reasoning of the ICC, STB, and reviewing courts proves that adverse abandonment developed for reasons that never depended on the passive language of the old abandonment statute.

Cases reviewing STB adverse abandonment decisions often cite the 1981 case *Modern Handcraft Inc.—Abandonment*<sup>135</sup> for the proposition that “[a] rail carrier may abandon a line upon its own petition or that of a third party with a ‘proper interest.’”<sup>136</sup> Before tracking *Modern Handcraft*’s proposition through history, it is again important to note that the ICC’s abandonment statute looked very different from the contemporary STB abandonment statute.<sup>137</sup> Again, notice that this language does not specify which entities may file for abandonment:

No carrier by railroad subject to this chapter shall abandon all or any portion of any of its lines of railroad . . . unless such abandonment . . . is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or permit such abandonment. . . . *An application for such a certificate shall be submitted to the Commission . . . and shall be in accordance with such rules and regulations as to form,*

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132. Petitioners’ Supplemental Brief, *supra* note 36, at 2 (citing *U.S. v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995), *cert. denied*, 516 U.S. 1083 (1996)).

133. *Id.* (citing *Thompson*, 328 U.S. at 145).

134. *R.R. Comm’n v. S. Pac. Co.*, 264 U.S. 331 (1924).

135. 363 I.C.C. 969 (1981).

136. *See, e.g., City of South Bend v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009) (citing 366 I.C.C. at 971); *Consolidated Rail Corp. v. ICC*, 29 F.3d 706, 710 (D.C. Cir. 1994); *Minn. Com. Ry. Co.—Adverse Abandonment*, No. AB-884, 2008 WL 2752933, at \*5 (S.T.B. July 15, 2008).

137. *Compare* 49 U.S.C. § 10903(1)(a), *with* 49 U.S.C. § 1a(1) (1976).

manner, content, and documentation as the Commission may from time to time prescribe.<sup>138</sup>

This passive language was not, however, the determinative factor in *Modern Handcraft's* reasoning. Even when the statute left open which entities could file for abandonment, the *Modern Handcraft* court recognized that adverse abandonment is counterintuitive: “[t]he situation presented here—where a rail line abandonment is sought by noncarrier applicants and opposed by the rail carrier—while uncommon, is not unique.”<sup>139</sup> *Modern Handcraft* cites *Baltimore & Annapolis Railway Company—Abandonment*<sup>140</sup> and *Thompson* to support its proposition that “[s]ubject to establishing a *proper interest* in an abandonment proposal, any person may institute a proceeding for . . . abandonment of a rail line.”<sup>141</sup> Though *Modern Handcraft* treats a third-party’s “proper interest” as determinative, this language has never appeared in any iteration of the abandonment statute.<sup>142</sup>

Nor do older cases rely on express statutory authority to justify adverse abandonment. The cases *Modern Handcraft* cites do not explain *why* any person may, subject to establishing a proper interest in an abandonment proposal, file for adverse abandonment. Indeed, these cases cite the proposition just as matter-of-factly as did *Modern Handcraft*. *Baltimore & Annapolis* also cites *Thompson* for the proposition that “[t]here is no requirement that an abandonment application be made by the carrier itself. Any person with a proper interest in the subject matter may file for a certificate of public convenience and necessity authorizing abandonment of a line of railroad.”<sup>143</sup>

Indeed, *Thompson* makes no reference to statutory authority. *Thompson* cites *Atchison, Topeka & San Francisco Railway Company v. Railroad Commission*<sup>144</sup> and *Colorado & Southern Railway Company—Abandonment*<sup>145</sup> for the proposition that “[t]here is no requirement . . . that the application be made by the carrier whose operations are sought to be abandoned. It has been recognized that persons other than carriers ‘who

138. 49 U.S.C. § 1a(1) (1976) (emphasis added).

139. *Mod. Handcraft*, 363 I.C.C. at 971.

140. 348 I.C.C. 678, 704 (1976).

141. *Mod. Handcraft*, 363 I.C.C. at 971 (emphasis added).

142. See 49 U.S.C. § 10903(a)(1); 49 U.S.C. § 1a(1) (1976).

143. *Balt. & Annapolis R.R. Co.—Abandonment*, 348 I.C.C. 678, 704 (1976) (citing *Thompson v. Tex. Mexican Ry. Co.*, 328 U.S. 134 (1946)) (holding without further justification that the DNR and a private party are “interested persons” and therefore proper parties to file an abandonment application even where the parties themselves did not actually file for adverse abandonment).

144. 283 U.S. 380, 393–94 (1931).

145. 166 I.C.C. 470 (1930).



have a proper interest in the subject-matter' may take the initiative."<sup>146</sup> Though *Colorado & Southern* entertained (but ultimately denied) the "city and county of Denver[']s]" adverse abandonment petition, it neither questioned nor supported the propriety of an adverse abandonment petition.<sup>147</sup> *Atchison*, on the other hand, holds that the adverse abandonment statute "do[es] not exclude appropriate action by the commission upon applications by those who have proper interest in the subject matter, although they are not carriers."<sup>148</sup>

The case law hits bottom in 1924 with *Railroad Commission v. Southern Pacific Company*.<sup>149</sup> This case reveals that adverse abandonment was born of public policy imperatives rather than on the language of the relevant statute.<sup>150</sup> Though seemingly matter-of-fact, the *Atchison* holding discusses adverse abandonment as dicta that developed into binding law because it served an essential purpose.<sup>151</sup> Discussing *Railroad Commission v. Southern Pacific Company*, the *Atchison* Court noted that "this Court said that it was advised that the city of Los Angeles had filed a petition with the Interstate Commerce Commission and that the course taken by the city 'was the correct one.'"<sup>152</sup> "While the statement was obiter," wrote the *Atchison* Court, "it intimated an opinion which has been confirmed by further consideration of the purpose and terms of the statute."<sup>153</sup> In its reasoning, the Court gives its first hint about why parties with a proper interest may file for abandonment: "application could properly be made by the authorities of the state, assuming that with such certificate that were entitled to require the establishment of the station."<sup>154</sup>

This obiter from *Railroad Commission v. Southern Pacific Company* that the *Atchison* court had since found was "confirmed by further consideration of the purpose and terms of the statute" is revelatory:

We were advised by statements at the bar that . . . the city of Los Angeles filed a petition with the [ICC], asking for an order to provide, maintain, and use a union station . . . For the reason given, we think that the course taken by the city of Los Angeles was the correct one. Until the [ICC] shall have acted . . . the respondent railways cannot be required to provide a new

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146. *Thompson*, 328 U.S. at 145.

147. *Colo. & S. Ry. Co.*, 166 I.C.C. 470, 470 (1930).

148. *Atchison, Topeka, & Santa Fe R.R. Co. v. R.R. Comm'n*, 283 U.S. 380, 393–94 (1931).

149. 264 U.S. 331 (1924).

150. *Id.*

151. *Atchison*, 283 U.S. at 394.

152. *Id.* (citing *S. Pac. Co.*, 264 U.S. at 347–48).

153. *Id.* (emphasis added).

154. *Id.*

interstate union station and to extend their main tracks thereto as ordered by the state Railroad Commission.<sup>155</sup>

In sum, the story of the STB's adverse abandonment authority starts with dictum nearly one hundred years ago reflecting a specific policy basis for third-party filing of abandonment applications—state and local governments needing some means of controlling the construction of railroad line associated projects.<sup>156</sup> This dictum has developed into an authority which modern-day cases employ with established-practice style reasoning.<sup>157</sup> Thus, adverse abandonment never depended on the passive language of the old abandonment statutes. Adverse abandonment as developed by the ICC, the STB, and reviewing courts had always been grounded in consideration of the purposes and terms of the abandonment statute. So, adverse abandonment should live beyond § 10903's "must" language so long as the STB employs it to effectuate the STB's overall purpose. Because this is what the ICC, the STB, and reviewing courts have always done, there is little reason to believe they will not do so moving forward.

#### IV. ADVERSE ABANDONMENT EFFECTUATES THE STB'S PURPOSE AND PUBLIC POLICY

The ICC, the STB, and reviewing courts have faithfully reviewed adverse abandonment applications in a manner that effectuates the STB's purpose. In application, third parties who apply for adverse abandonment face a tremendous uphill battle and must meet fantastic burdens to have the STB approve an adverse abandonment application.<sup>158</sup> The STB and reviewing courts have created several doctrines that insulate railroad lines from adverse abandonment petitions. At bottom, adverse abandonment adjudications disfavor adverse abandonment so heavily that there is no threat to rail carriers where the STB retains adverse abandonment authority.

The *City of South Bend* parties argued about whether adverse abandonment comports with the STB's purpose and public policy. The rail carrier emphasized the policy in § 10101(4): "to ensure the development and continuation of a sound rail transportation system."<sup>159</sup> The rail carrier noted the "need to protect the public from unnecessary discontinuance,

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155. *S. Pac. Co.*, 264 U.S. at 347–48.

156. *Id.*

157. *City of South Bend v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009) (citing *Mod. Handcraft, Inc.—Abandonment*, 363 I.C.C. 969, 971 (1981)).

158. *See supra* Part II.A.

159. Intervenor's Supplemental Brief, *supra* note 36, at 8 (citing 49 U.S.C. § 10101(4)).

cessation, interruption, or obstruction of available rail service.”<sup>160</sup> The rail carrier argued that:

[A]llowing a nonrailroad applicant . . . to seek abandonment authority would be contrary to [these] Congressional goals, [and that] the grant of “adverse” abandonment requests could present a serious threat to the long-term viability of the national rail infrastructure, by gradually chipping away pieces of the nation’s rail system.<sup>161</sup>

The STB argued that:

To divest the Board of the [adverse abandonment authority] would leave [it] unable to prevent a rail carrier from holding on to unused and neglected rail property indefinitely while enjoying the protective shield of the Board’s preemptive jurisdiction, and would leave affected parties with no other way to assert their interests.<sup>162</sup>

The STB offered that government entities, communities, and adjacent landowners would have no ability to acquire unused rail lines for public purposes, to remove blight, or to exercise their reversionary interests respectively.<sup>163</sup> The STB noted that this would “be to significantly intrude on state interests, where no federal purpose would be served by withdrawing that power.”<sup>164</sup> The petitioners echoed these arguments,<sup>165</sup> adding that extinguishing adverse abandonment authority gives a rail carrier “a strong incentive to manipulate the STB’s jurisdiction to better its bargaining position with the local public authority.”<sup>166</sup>

A review of the decisional law regarding adverse abandonment disproves rail carriers’ concern that allowing adverse abandonment will chip away at the interstate rail system. It also supports the notion that adverse abandonment effectuates, rather than harms, the STB’s purpose while also preventing the STB from being a meaningless obstacle to land use and development. Decisional law has tailored adverse abandonments to limit the parties to whom adverse abandonment is available and to place extremely high burdens on parties seeking adverse abandonment. The

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160. *Id.* (citing *Yakima Interurban Lines Assoc.—Adverse Abandonment*, STB No. AB-600, slip op. at 4 (Nov. 19, 2004)).

161. *Id.* (citing *Seminole Gulf Rwy., L.P.—Adverse Abandonment*, STB No. AB-400 (Sub-No. 4), slip op. at 6 (Nov. 18, 2004)).

162. Respondents’ Supplemental Brief, *supra* note 36, at 9.

163. *Id.* at 9–10.

164. *Id.* at 10.

165. Petitioners’ Supplemental Brief, *supra* note 36, at 8–10.

166. *Id.* at 9 (quoting Stokes, *supra* note 12, at 86).

STB, the ICC, and reviewing courts have fashioned doctrines around adverse abandonment such that it serves a particular use that actually supports the STB's purpose to "[e]nsure the development and continuation of a sound rail transportation system."<sup>167</sup> As the cases discussed below demonstrate, the STB grants adverse abandonment applications only where it effectuates the STB's purpose.<sup>168</sup>

*A. Case Law Greatly Limits Parties Who Have "Proper Interest" to  
Petition for Adverse Abandonment*

The STB, and the ICC before it, have long limited adverse abandonment to third parties with a "proper interest."<sup>169</sup> In *Modern Handcraft*, the ICC first characterized the kinds of third parties who have a "proper interest" and who may "institute a proceeding . . . authorizing abandonment of a rail line."<sup>170</sup> It limited these parties to an adjacent owner with a "reversionary interest in abandoned rail property" and a "bi-state transportation authority with . . . plans for mass transit use of the right-of-way."<sup>171</sup> Though the STB and reviewing courts have extended "proper interest" status to entities such as state transportation agencies and municipalities, these entities appear to be on the outer limits of "proper interest."<sup>172</sup> Further, the steep \$27,000 filing fee for abandonment no doubt deters parties with frivolous claims.<sup>173</sup>

Because the STB and reviewing courts have limited parties with a "proper interest" so tightly, rail carriers will not face attacks from parties with no interest in the land encumbered by the rail carriers' railroad lines. As discussed in more detail below, the STB has limited the availability of adverse abandonment to parties who could have so strong an interest in abandonment that abandonment would overcome any benefit the de facto abandoned railroad line would offer to the integrity of the interstate rail system.

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167. 49 U.S.C. § 10101(4); *see supra* Part II.A.

168. *See supra* Part II.B

169. *See, e.g., Mod. Handcraft, Inc.—Abandonment*, 363 I.C.C. 969, 971 (1981).

170. *Id.* (citing *Thompson v. Tex. Mexican Ry. Co.*, 328 U.S. 134 (1946)).

171. *Id.*

172. *See Wis. Dep't of Transp.—Abandonment Exemption*, No. 31303, 1998 WL 225048, at \*2–3 (I.C.C. Nov. 23, 1988); *City of South Bend v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

173. *See HOLLAND & KNIGHT LLP, When Is a Railroad Line "Abandoned?"* (Jan. 31, 2020), <https://www.jdsupra.com/legalnews/when-is-a-railroad-line-abandoned-45560/> [<https://perma.cc/M27Z-NBF3>] ("The Board was not sympathetic with the landowners, who had candidly stated in another forum that they had chosen the declaratory order approach in part to avoid the STB's \$27,000 filing fee for an adverse abandonment.") (citing *Landowners—Motion for Declaratory and Injunctive Relief*, STB No. AB 1065 (Sub-No. IX), 2020 WL 468384, at \*3 (Jan. 27, 2020)).

*B. The Public Convenience and Necessity Standard in Adverse Abandonment Cases Effectuates the STB's Purpose*

Turning from the parties that may file for abandonment to the practical effects of abandonment, it is clear that the actual outcomes of adverse abandonment do not threaten the STB's purpose of ensuring the development and continuation of a sound rail transportation system.<sup>174</sup> This protection is built into § 10903: "A rail carrier . . . [may] . . . abandon any part of its railroad lines . . . only if the Board finds that the present or future public convenience and necessity require or permit the abandonment."<sup>175</sup> The STB's and the reviewing court's applications of the "public convenience and necessity"<sup>176</sup> standard weighs heavily against third parties and protects rail carriers' interests.

The D.C. Circuit made clear in *New York Cross Harbor Railroad v. Surface Transportation Board*<sup>177</sup> that the STB may not grant an adverse abandonment application where a rail carrier is operating on the line *at all*.<sup>178</sup> "For starters . . . the STB succinctly stated: 'Neither the Board, nor the [ICC] before it, has *ever* granted an adverse abandonment when the carrier was operating over the line.'<sup>179</sup> In *New York Cross Harbor Railroad*, the D.C. Circuit reversed the STB's grant of adverse abandonment in which the STB reasoned that "[t]he weighing of relevant interests is an inherently fact-specific process, and there is no impediment to authorizing an adverse abandonment of an active line where, as here, the situation warrants such action."<sup>180</sup> The D.C. Circuit held that the Board's order was arbitrary and capricious in light of the Board's deference to the third-party petitioner's determination of what was "public convenience and necessity" and the Board's precedent of not granting adverse abandonment where a rail carrier was operating on the line.<sup>181</sup>

The D.C. Circuit suggested that the STB may only grant an adverse abandonment application where the railroad line in question has been unused for over a decade. The court quoted *Modern Handcraft*, where the line was "de facto abandon[ed]" and "there ha[d] been no rail operations for over 12 years and no attempt to provide rail service."<sup>182</sup> The court cited

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174. 49 U.S.C. § 10101(4).

175. § 10903(d).

176. *Id.*

177. 374 F.3d 1177 (D.C. Cir. 2004).

178. *Id.* at 1182–83.

179. *Id.* at 1182 (citing *Salt Lake City—Adverse Abandonment*, STB No. AB-33, 2002 WL 368014, at \*5 (Mar. 6, 2002)).

180. *Id.* at 1183 (quoting *Salt Lake City Corp.—Adverse Abandonment*, STB No. AB-33, 2002 WL 368014, (Mar. 8, 2002) (prelim. order)).

181. *Id.* at 1182, 1185, 1188.

182. *Id.* at 1182 (quoting *Mod. Handcraft, Inc.—Abandonment*, 363 I.C.C. 969, 972 (1981)).

another case granting abandonment where the “tracks had ‘been out of service for at least 10 years’ and there was ‘essentially no possibility of restoring service.’”<sup>183</sup>

Even where a rail line has not been used for a long time, the prospect of continued rail service is almost always enough for the STB to deny an adverse abandonment application.<sup>184</sup> The STB “[g]enerally . . . denies an adverse abandonment application if there is potential for future operation on the line and the carrier has taken reasonable steps to attract traffic.”<sup>185</sup> In *City of South Bend* itself, the D.C. Circuit upheld the STB’s decision to deny the third-party petitioners’ application for adverse abandonment because the STB found “that there is a potential for renewed rail operations.”<sup>186</sup> The rail carrier “neither maintained nor used” the two lines in question.<sup>187</sup> The third parties (a city and a church) were seeking to “construct a sewer system” and “exercise their reversionary interests” respectively, presented evidence that abandonment would reduce their costs of construction and that no party along the line would “be interested in renewed rail service.”<sup>188</sup>

The *City of South Bend* petitioners’ compelling interest did not outweigh the public convenience and necessity standard, simply because “a start-up short branch railroad[] opposed the application. [It] hope[d] to buy the lines . . . and persuade [the customer] to resume accepting coal by rail.”<sup>189</sup> This wholly speculative prospect of continued rail service was enough to overcome the petitioners’ interest in cost reduction and reversionary interest.<sup>190</sup>

The upshot of this extremely high public convenience and necessity standard is that adverse abandonment poses no real risk to a rail carrier or to the general development and continuation of a sound rail transportation system. In short, the STB need only catch a whiff of the prospect of continued rail service on a railroad line to deny an adverse abandonment application. There is no substantiated fear that adverse abandonment would negatively affect the health of the interstate rail system, because the burden is so high for third-party petitioners. So long as this feature of § 10903 remains, and the STB and reviewing courts continue to apply it

183. *Id.* (citing *Chelsea Prop. Owners—Abandonment*, No. AB-167 (Sub-No. 1094), 1992 WL 233599, at \*12 (S.T.B. Aug. 28, 1992)).

184. *City of South Bend v. Surface Transp. Bd.*, 566 F.3d 1166, 1171 (D.C. Cir. 2009).

185. *Consol. Rail Corp. v. Interstate Com. Comm’n*, 29 F.3d 706, 711 (D.C. Cir. 1994).

186. *City of South Bend*, 566 F.3d at 1169 (quoting *Norfolk S. Ry. Co.—Adverse Abandonment*, STB No. AB-290 (Sub-No. 286), 2008 WL 391303, at \*3 (Feb. 14, 2008)).

187. *Id.* at 1168.

188. *Id.*

189. *Id.*

190. *Id.* at 1168–70.

faithfully as they always have, parties with a “proper interest” should be able to petition for adverse abandonment in the slim set of cases where third parties can prove that the public convenience and necessity require it.

#### CONCLUSION

Congress did not silently remove an incredibly important feature of American railroad law that the ICC, the STB, and reviewing courts developed for over a century. Congress did not intend to strike the sole remedy for landowners to exercise reversionary interests in property encumbered by defunct railroad lines.<sup>191</sup> Adverse abandonment is a vital tool to prevent the STB from protecting rail carriers’ unused property interests where doing so does not promote the STB’s stated purpose to promote the development and continuation of a sound rail transportation system. The ICC stated as much in *Modern Handcraft* nearly fourteen years before the ICCTA: “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.”<sup>192</sup> This idea lived on well past the ICCTA: The STB cited this proposition as recently as 2012.<sup>193</sup>

Adverse abandonment survived the ICCTA. Though the plain meaning of the abandonment statute suggests that the ICCTA extinguished the STB’s adverse abandonment authority, the abandonment statute’s context, the statute’s legislative history, and the STB’s and reviewing courts’ treatment of adverse abandonment prove that the ICCTA did not do so. Because adverse abandonment is the only way for the STB to act on its statutory purpose in the rare situations where adverse abandonment applies,<sup>194</sup> the words “[a] rail carrier . . . must”<sup>195</sup> in § 10903 seem like a drafting misstep in the ICCTA.<sup>196</sup> Congress should amend the statute to

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191. See *La. & Ark. Ry. Co. v. Bickham*, 602 F. Supp. 383, 384 (M.D. La. 1985).

192. *Mod. Handcraft, Inc.—Abandonment*, 363 I.C.C. 969, 972 (1981).

193. *Norfolk So. Ry. Co.—Adverse Abandonment*, STB No. AB 290 (Sub-No. 286), 2012 WL 1339070, at \*3 (Apr. 17, 2012).

194. One group of landowners attempted an abandonment exemption through § 10502 to remove a railroad line from STB jurisdiction. *Landowners—Motion for Declaratory and Injunctive Relief*, STB No. AB 1065 (Sub-No. IX), 2020 WL 468384, at \*2, \*4 (Jan. 27, 2020). Because, as the STB held, this form of abandonment authority is “permissive,” abandonment under Section 10502 only works if the rail carrier “consummates” it. *Id.* at \*4 (citing *Honey Creek R.R.—Petition for Declaratory Ord.*, STB Docket No. AB-865X, slip op. at 4, (June 4, 2008)). Unlike adverse abandonment under § 10903, § 10502 does not allow third parties to force rail carriers to abandon railways against the rail carrier’s opposition. *Id.*

195. 49 U.S.C. § 10903(a)(1).

196. Justice Kavanaugh agrees. See *City of South Bend v. Surface Transp. Bd.*, 566 F.3d 1166, 1172 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (“Congress and the

make clear that adverse abandonment is available. Where a plain-meaning reading of this statute threatens what is such an important feature of American railroad law, § 10903 begs revision to better protect adverse abandonment for the good of private landowners, state and local governments, rail carriers, and the continuation of a sound rail transportation system.

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Executive Branch would be well-advised to promptly clear up the statutory uncertainty created, perhaps inadvertently, by the 1995 Act.”).