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Industry Issue Paper: The Disappearing Diagrams

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## The Disappearing Diagrams

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*Railroads are ignoring the statutory and regulatory requirement that they file current system diagram maps with the Surface Transportation Board. As a result shippers and communities are denied advance notice of lines likely to be shut down or abandoned. Moreover, potential operators qualified to purchase and render service on such lines are unable to force their sales contemplated by the law without having to prove the inordinate service deficiencies of the railroads, nearly an impossible burden.*

by **Fritz R. Kahn**

The requirement that railroads publish and file system diagram maps, identifying the lines which are candidates or potential candidates for discontinuance of service or abandonment stems from the 4R Act, the Railroad Revitalization and Regulatory Reform Act of 1976.<sup>1</sup> The mandate survived the enactment of the Staggers Rail Act of 1980<sup>2</sup> and the ICC Termination Act of 1995,<sup>3</sup> albeit in a somewhat abbreviated form, and currently appears at Section 10903(c) of Title 49 of the United States Code, 49 U.S.C. 10903(c).<sup>4</sup>

The statute left much to be filled in by the implementing regulations of the Interstate Commerce Commission. Those regulations were promulgated in *Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 252, 255 (1976), codified at the time at Section 1121.20, *et seq.*, of Title 49 of the Code of Federal Regulations, 49 C.F.R. 1121.20, *et seq.* Category 1 railroad lines were defined as “All lines or portions of lines which the carrier anticipates will be the subject of an abandonment or discontinuance application to be filed within the 3-year period following the date upon which the diagram, or any amended diagram, is filed with the Commission.” Category 2 railroad lines were defined as “All lines or portions of lines potentially subject to abandonment which the carrier has under study and believes may be the subject of future

abandonment application because of either anticipated operating losses or excessive rehabilitation costs, as compared to potential revenues.” And category 3 railroad lines were defined as “All lines or portions of lines for which an abandonment or discontinuance application is pending before the Commission on the date upon which the diagram, or any amended diagram, is filed with the Commission.”

Initial color-coded system diagram maps had to be filed with the ICC within 180 days’ time. Black and white versions of the maps or portions of them containing railroad lines in categories 1, 2 or 3 needed to be published in newspapers of general circulation in each county in which the lines were located and copies of the newspaper notices were to be posted in each of the stations on the affected lines. Revisions to keep the system diagram maps current were to be filed, published and posted at any time but no less frequently than annually in the case of any system diagram maps including lines in category 2. No abandonment or discontinuance application opposed by a significant user, a State or a political subdivision of a State could be approved by the ICC unless the line had been in category 1 of the railroad’s system diagram map for at least four months prior to the date of the application’s filing.

Following the enactment of the ICC Termination Act of 1995, the Surface Transportation Board, in its Decision in *Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903*, 1 S.T.B. 894 (1996), sought to lighten the burden of compliance borne by the railroads. In several respects, however, the Board imposed even more stringent requirements upon the carriers. To be sure, by its revised regulations, codified at 49 C.F.R. 1152.10, *et seq.*, the Board relieved all of the railroads of the requirement that they file annual updates of their system diagram maps including lines in category 2 and Class III railroads of the need to file, publish and post pictorial versions of their system diagram maps. All of the railroads, however, were required to file, publish and post revised and updated system diagram maps no later than March 24, 1997, and thereafter to file, publish and post amendments as line designations changed. The Board left the definitions of lines in categories 1, 2 and 3 virtually unchanged, but the narrative description of any line falling within categories 1, 2 or 3 had to include “(a) [the c]arrier’s designation for each line (for example, the Zanesville Secondary Track); (b) [the s]tate or state in which each line is located; (c) [the c]ounty or counties in which each line is located; (d) [the m]ileposts delineating each line or portion of line; and (e) [the a]gency or terminal stations located on each line or portion of line with milepost designations.” 1 S.T.B. at 919; 49 C.F.R. 1152.11. Ominously, the Board threatened that it “will reject an abandonment or discontinuance application filed by a rail carrier if any part of the application includes a line that has not been identified and described, by amendment or otherwise, on the carrier’s system diagram map or narrative, as appropriate, as a line in category 1 . . . for at least 60 days.” 1 S.T.B. at 920; 49 C.F.R. 1152.13(c).

Most railroads have paid little or no attention to the requirement that they keep their system diagram maps current. The Union Pacific Railroad Company and The Burlington Northern and Santa Fe Railway Company updated their system diagram maps in 2002, but the other Class I railroads and all but a handful of the Class II and Class III railroads,

such as the Bessemer and Lake Erie Railroad Company and Union Railroad Company, haven’t bothered to do so in years. Moreover, few, if any, abandonment or discontinuance applications have been rejected by the Board for their failure to observe the statute or regulations’ provisions.

The reason, of course, is that most abandonment authority currently is sought by petitions for exemption, filed with the Board pursuant to 49 U.S.C. 10502 and 49 C.F.R. 1121.1, *et seq.*, seeking relief from the provisions of 49 U.S.C. 10903, governing railroad discontinuances and abandonments, including those requiring the updating of system diagram maps. To be sure, occasional applications continue to be filed, and, when they are, they dutifully recite that the lines sought to be abandoned have appeared in category 1 of the railroads’ system diagram maps for at least 60 days’ time.<sup>5</sup> The great preponderance of filings for abandonment authority, however, are petitions for exemption, and in them no mention is made of the carriers’ compliance with the system diagram map requirements. Since the very purpose of the petitions is to seek relief from all of the regulatory provisions pertaining to discontinuances or abandonments, the petitions regularly are approved by the Board notwithstanding that the applicant railroads’ system diagrams have not been updated and that the subject lines have not appeared in category 1 for at least 60 days’ time.<sup>6</sup>

The avoidance of the system diagram map provisions defeats the very purpose for their promulgation, namely, to give the shippers tendering or receiving traffic and communities situated on the lines advance notice of the railroads’ proposals to discontinue rendering service or to abandon the lines and thereby enabling them to begin planning for alternative transportation. With most of the railroads failing to update their system diagram maps, with the understanding that any discontinuance of service or abandonment authorizations will be sought by petitions for exemption filed with the Board, users of the lines are denied the advance warnings of the railroads’ actions which the statute and regulations were designed to provide.

The avoidance of the system diagram map requirements, however, has even more serious consequences. It has eviscerated the Feeder Railroad Development Program, added by section 401 of the Staggers Rail Act of 1980 and currently codified at 49 U.S.C. 10907. The program was enacted to enable shippers and communities to acquire marginal rail lines which are likely to be downgraded or abandoned.<sup>7</sup> Under its provisions, financially responsible persons may purchase any railroad lines identified as being in category 1 or category 2 of the railroads' system diagram maps. Financially responsible persons are defined as those able to pay the constitutional minimum value of the lines to be acquired and to render adequate transportation services on them for no less than three years' time, and the constitutional minimum value of the lines is defined as the greater of the lines' net liquidation value or their going concern value.

Under the statute and the Board's implementing regulations, 49 C.F.R. 1151.1, *et seq.*, nothing more is required of qualified purchasers of railroad lines shown to be in category 1 or category 2 of the railroads' system diagram maps.<sup>8</sup> If, however, the railroads maintain and have on file with the Board no amended system diagram maps, as currently is the practice of most of the railroads, there is no way that one can avail himself of the statute and regulations' provisions.

The effect is to force potential purchasers under the Feeder Railroad Development Program to pursue the alternative means of securing railroad lines by assuming the burden of proving that the public convenience and necessity require or permit the sale of the particular lines.<sup>9</sup>

Subsection (c) of the statute provides:

For purposes of this section, the Board may determine that the public convenience and necessity require or permit the sale of a railroad line if the Board determines, after a hearing on the record that:

(A) the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line;

(B) the transportation over such line is inadequate for the majority of shippers who transport traffic over such line;

(C) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line;

(D) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line; and

(E) the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.

Given the onerous burden of proof thrust upon potential purchasers, it is not surprising that in the more than two decades since the enactment of the Staggers Rail Act of 1980 there has been only one acquisition based on a Board finding that the public convenience and necessity required or permitted the sale of the particular line. That was STB Finance Docket No. 32479, *Caddo Antoine and Little Missouri Railroad Company—Feeder Line Acquisition—Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR*, served August 8, 1995.

This, then, may be a further reason why the railroads, for the most part, have avoided updating their system diagram maps and designating any of their lines as being in category 1 or category 2. By taking advantage of the Board's failure to enforce the statutory and regulatory provisions, the railroads have managed to deny potential purchasers under the Feeder Railroad Development Program the easier of the alternative means of procuring the lines from the railroads. By failing to

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publish and file current system diagram maps, the railroads effectively have denied qualified purchasers of their lines the ability to acquire and operate them except at such times and upon such terms as suit the railroads' convenience.

The Board need do no more than remind the railroads of their obligation to publish and file system diagram maps which accurately reflect the current status of their lines, by press

release if nothing else. The Board thereby would provide shippers and communities on lines likely to be abandoned with the advance notice of the railroads' proposed actions which the statute and regulations were designed to provide. Moreover, the Board's intervention would minimize the downgrading of railroad lines and their eventual abandonment which the Feeder Railroad Development Program was intended to avoid.

## Endnotes

1. Pub. L. 94-210, 90 Stat. 543, February 5, 1976. Section 802 of the Act added section 1a to the Interstate Commerce Act, 49 U.S.C. 1a, subsection (5) of which provided:

(a) Each carrier by railroad subject to this part shall, within 180 days after the date of promulgation of regulations by [the Interstate Commerce] Commission pursuant to this section, prepare, submit to the Commission, and publish a full and complete diagram of the transportation system operated, directly or indirectly, by such carrier. Each such diagram shall include a detailed description of each line of railroad which is "potentially subject to abandonment", as such term is defined by the Commission. Such terms shall be defined by the Commission by rules and such rules may include standards which vary by region of the Nation and by railroad or group of railroads. Each such diagram shall also identify any line of railroad as to which such carrier plans to submit an application for a certificate of abandonment or discontinuance in accordance with this section. Each such carrier shall submit to the Commission and publish, in accordance with regulations of the Commission, such amendments to such diagram as are necessary to maintain the accuracy of such diagram.

(b) The Commission shall not issue a certificate of abandonment or discontinuance with respect to a line of railroad if such abandonment or discontinuance with respect to a line of railroad of such abandonment or discontinuance is opposed by –

- (i) a shipper or any other person who has made significant use (as determined by the Commission in its discretion) of such line or railroad during the 12-month period preceding the submission or an applicable application under paragraph (1); or
- (ii) a State, or any political subdivision of a State, if such line of railroad is located, in whole or in part, with such State or political subdivision.

Unless such line or railroad as been identified and described in a diagram or in an amended diagram which was submitted to the Commission under subdivision (a) at least 4 months prior to the date of submission of an application for such certificate.

2. Pub. L. 96-418, 94 Stat. 1895, October 14, 1980.
3. Pub. L. 104-88, 109 Stat. 803, December 29, 1995
4. Subsection (2) provides:

Each rail carrier shall maintain a complete diagram of the transportation system operated, directly or indirectly, by the rail carrier. The rail carrier shall submit to the Board and publish amendments to its diagram that are necessary to maintain the accuracy of the diagram. The diagram shall (a) include a detailed description of each of its railroad lines potentially subject

to abandonment; and (b) identify each railroad line for which the rail carrier plans to file an application to abandon or discontinue under subsection (a) of this section.

5. *See, i.e.*, STB Docket No. AB-55 (Sub-No. 618), *CSX Transportation, Inc.—Discontinuance—At Memphis in Shelby County, TN*, served July 30, 2002; STB Docket No. AB-33 (Sub-No. 170), *Union Pacific Railroad Company—Abandonment—In Polk County, IA*, served October 18, 2001; STB Docket No. AB-564, *Camas Prairie Railnet, Inc—Abandonment—In Lewis, Nez Perce and Idaho Counties, ID*, served June 15, 2000; STB Docket No. AB-437 (Sub-No. 1), *Kansas Southwestern Railway, LLC—Abandonment—In Sumner, Harper, Barber, Reno and Kingman Counties, KS*, served March 11, 1999; STB Docket No. 192 (Sub-No.1), *The Birmingham Southern Railroad Company—Abandonment and Discontinuance of Trackage Rights—In Jefferson County, AL*, served January 19, 1998.
6. *See, i.e.*, STB Docket No. AB-33 (Sub-No. 168X), *Union Pacific Railroad Company—Abandonment Exemption—In Hardin County, IA (Eldora Junction Line in Eldora, IA)*, served April 8, 2003; STB Docket No. AB-43 (Sub- No. 173X), *Illinois Central Railroad Company—Abandonment Exemption—In Forrest County, MS*, served March 28, 2003; STB Docket No. 33 (Sub-No. 198X), *Union Pacific Railroad Company—Abandonment Exemption—In Alameda County, CA*, served March 12, 2003; STB Docket No. AB-33 (Sub-No. 197X), *Union Pacific Railroad Company—Abandonment Exemption—In Santa Clara County, CA*, served March 7, 2003; STB Docket No. AB-565 (Sub-No. 11X), *New York Central Lines, LLC—Abandonment Exemption—In Lake County, OH*, served January 31, 2003; STB Docket No. AB-314 (Sub-No. 2X), *Chicago Central & Pacific R. Co.—Abandonment Exemption—In Linn County, IA*, served October 25, 2002; STB Docket No. 597X, *Butte-Silver Bow County—Abandonment Exemption—In Silver Bow County, MT*, served October 4, 2002; STB Docket No. AB-101 (Sub-No. 17X), *Duluth, Missabi and Iron Range Railway Company—Abandonment Exemption—In St. Lois County, MN*, served August 23, 2002.
7. Finance Docket No.32479, *Caddo Antoine and Little Missouri Railroad Company— Feeder Line Acquisition—Arkansas Midland Railroad Line Between Gurdon and Birds Mill, AR*, served August 12, 1999; *Feeder Line Development Program*, 367 I.C.C. 261 (1983).
8. *Sandusky County, et al—Feeder Line Appl.—Conrail*, 6 I.C.C.2d 568 (1990); *Cheney R. Co. Feeder Line Acq.*, 5 I.C.C. 250 (1989), *aff'd, Cheney R. Co., Inc. v. I.C.C.*, 902 F.2d 66 (D.C. Cir. 1990), *cert. den.*, 498 U.S. 985 (1990); *Wyoming Colorado Railroad Line, Inc.—Feeder Line Acquisition—Union Pacific Railroad Company Line Between Ontario and Burns, Oregon*, served April 3, 1989.
9. *PSI Energy, Inc.—Feeder Line—Norfolk Southern Corp.*, 7 I.C.C. 227 (1991).

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