

SURFACE TRANSPORTATION BOARD

231642

Docket No. EP 712

IMPROVING REGULATION AND REGULATORY REVIEW

ENTERED
Office of Proceedings

JAN 10 2012

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COMMENTS
OF
TRANSPORTATION ARBITRATION AND MEDIATION

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TRANSPORTATION ARBITRATION AND MEDIATION

Due and dated: January 10, 2012

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I.
INTRODUCTION

Transportation Arbitration and Mediation, P.L.L.C. ("TAM") is an organization which provides Board and Interstate Commerce Commission experienced and industry knowledgeable professionals for the arbitration or mediation of a wide variety of disputes between shippers and carriers.

TAM was established to manage the arbitration of appeals from decisions revising classification ratings by the National Classification Committee of the National Motor Freight Association, as mandated by the Board.¹ Following the Board's revocation of the antitrust immunity of the Committee,² a successor agency was established, the Commodity Classification Standards Board, the procedures of which provide that any party of record may set for arbitration the disposition of a docketed proposal. TAM has been designated as the organization from whose roster of qualified personnel an arbitrator may be selected.

¹ See, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee--Agreement, served March 27, 2003.

² See, STB Ex Parte No. 656 (Sub-No. 1), Investigation into the Practices of the National Classification Committee, served May 7, 2007

TAM also has been chosen by the Transportation Intermediaries Association to provide arbitration and mediation services under its Platinum Performance Program.

TAM commends the Board for undertaking an examination of its regulations and endeavoring to eliminate those that it finds to be outmoded, ineffective, insufficient or excessively burdensome. The following comments are offered for the Board's consideration in response to the invitation extended by the Decision, served October 12, 2011.

II.

ADVERSE ABANDONMENTS

Background

Since the enactment of 402 of the Transportation Act, 1920, which added subsection 18 to section 1 of the Interstate Commerce Act, "no carrier by railroad subject to this Act 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 [Interstate Commerce] Commission a certificate that the present or future public convenience and necessity permit of such abandonment." See, Smith v. Hoboken R.R. Warehouse & S. S. Connecting Co., 328 U.S. 123, 130 (1946).

The requirement has survived the intervening statutory revisions and agency restructuring. Indeed, only recently, in Docket No. AB 1053 (Sub-No. 2X), Michigan Air-Line Railway Co. -- Abandonment Exemption -- in Oakland County, Mich., served October 19, 2011, the Board confirmed that, "[u]nder 49 U.S.C. §10903, a rail line may not be abandoned without prior approval from the Board."

In order to receive a certificate from the ICC authorizing the abandonment or discontinuance of service of a line of railroad, one needed to file an application with the agency. See, Certificate for Pere Marquette Ry., 65 I.C.C. 410 (1920); Certificate to Atchison, Topeka & Santa Fe Ry., 65 I.C.C. 386 (1920). The seeking of permission to abandon the operation of a line could not exist by implication. Illinois Central R. Co. Operation, 247 I.C.C. 415, 420 (1941). A railroad could not lawfully abandon its line without first obtaining a certificate from the ICC, and to obtain it an application had to be filed. Central Pac. Ry. Co. Acquisition, 244 I.C.C. 213, 219 (1941).

It mattered not whether the abandonment or discontinuance application was filed by the operating rail carrier or another person. As the Supreme Court noted in Thompson v. Texas-Mexican Ry. Co., 328 U.S. 134, 145 (1946), “[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 have a proper interest in the subject-matter’ may take the initiative [citation omitted].” The Supreme Court’s holding echoed what had been the prior position of the ICC. Nezperce & I. R. Co. Abandonment, 257 I.C.C. 81, 82 (1944) (“The Federal statute does not prescribe the party or parties by whom application for a certificate permitting abandonment is to be made . . .”); Chicago, S. & St. L. Ry. Co. Receiver Abandonment, 236 I.C.C. 765, 771 (1940) (“The statute does not prescribe the party or parties by whom application for the certificate is to be made . . .”). Accord, Chelsea Property Owners—Aban.—The Consol. R. Corp., 8 I.C.C.2d 773, 778 (1992), aff’d sub nom., Consolidated Rail Corp. v. I.C.C., 29 F.3d 706 (D.C. Cir. 1994); Fore River RR. Corp—Discon. Exempt.—Norfolk County, MA, 8

I.C.C.2d 307. 310 (1992); Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969, 971 (1981); Baltimore and Annapolis R. Co. Abandonment, 348 I.C.C. 678, 704 (1976).

The need for filing an application to secure the ICC's abandonment or discontinuance authority was diminished, if not wholly obviated, by the enactment of the exemption provision in the Regional Rail Reorganization and Regulatory Reform Act of 1976. Section 207 of the Act added a new subsection to section 12(1) of the Interstate Commerce Act, which, in part, provided, "Whenever the [Interstate Commerce] Commission determines, upon petition by the Secretary or an interested party or upon its own initiative, in matters relating to a common carrier by railroad subject to this part, after notice and reasonable opportunity for a hearing, that the application of the provisions of this part (i) to any person or class of persons, or (ii) to any services or transactions by reason of the limited scope of such services or transactions, is not necessary to effectuate the national transportation policy declared in this Act, would be an undue burden on such person or class of persons or on interstate and foreign commerce, and would serve little or no useful public purpose, it shall by order, exempt such person, class of persons, services, or transactions from such provisions to the extent and for such period of time as may be specified in such order."

The Report of the Senate Commerce Committee, S. Rep. 94-499 (1975), reprinted in 1976 U.S. Code Cong. & Ad. News 14, 67, in speaking of the new exemption subsection, said:

The Committee believes that an exemption power in the Commission is very desirable, and the Commission itself has recommended for several years that it be given such power. . . the power to exempt from regulation in whole or in part will enable the Commission to commit its limited resources in areas where they are most needed, by enabling it to deregulate those areas which have no significant bearing on the overall regulatory

scheme.

In Simmons v. I.C.C., 697 F.2d 326, 333 (D.C. Cir. 1982), the court declared:

The express purpose of Congress in enacting this section was to grant the Commission authority to review its regulations and withdraw any such regulations found to be unnecessary to effect the goals of national transportation policy or regulation that served little or no public purpose. As noted in the conference report on the 4-R Act, the Commission would be able "to exempt any person or services or transportation performed under this Act *from all or part* of the regulations under the Interstate Commerce Act . . ." [footnotes omitted].

The railroads were slow in availing themselves of the exemption provision in seeking the ICC's authority to abandon or discontinue rendering service on any of their lines. Some petitions for exemption, however, were filed by the operating rail carriers and granted by the ICC. See, e.g., Finance Docket No. 30079, Wyndotte Terminal Railroad Company—Abandonment Exemption—Wyndotte, MI, served December 10, 1982; Finance Docket No. 29924, Union Pacific Railroad Company and Oregon Short Line Railroad Company—Abandonment and Discontinuance at Malad, ID—Exemption, served June 8, 1982; Finance Docket No. 29892, Burlington Northern Railroad Company Extension—Abandonment Between Orting and Lake Kapowison, WA, served April 29, 1982; Finance Docket No. 29868, Burlington Northern Railroad Company—Exemption—Abandonment In West Duluth, MN, served March 26, 1982; Finance Docket No. 29818, Illinois Central Gulf Railroad Company—Abandonment In Addison, DuPage County, IL—Exemption Under 49 U.S.C. 10505 from 49 U.S.C. 10903, served February 22, 1982. The ICC, however, refused to grant petitions for exemption seeking the agency's authorization for the abandonment or discontinuance of service on a line of railroad when filed by another person. See, e.g., Finance Docket No. 32103, Milford-Bennington Railroad Company, Inc—Trackage Rights Exemption—Boston and Maine

Corporation and Springfield Terminal Railway Company, served September 3, 1993; Finance Docket No. 31303, Wisconsin Department of Transportation—Abandonment Exemption, served December 5, 1988.

The exemption provision has continued through intervening statutory revisions and agency restructuring, as has the inexplicable dichotomy in the granting of discontinuance and abandonment petitions for exemption. When filed by the operating rail carrier, the Board only recently acknowledged in Docket No. AB 1053 (Sub-No. 2X), Michigan Air-Line Railway Co.--Abandonment Exemption--in Oakland County, Mich., served October 19, 2011, "Under 49 U.S.C. §10502 . . . we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power." Not so, however, when a petition for exemption to abandon or discontinue service on a line of railroad is filed by another person. The Board in STB Docket No. AB-12 (Sub-No. 190X), Southern Pacific Rail Corporation—Abandonment Exemption—In Garfield, Eagle and Pitkin Counties, CO, served June 10, 1996, declared that a "person other than a railroad seeking a determination by the Board that the public convenience and necessity requires or permits the abandonment or discontinuance of a line of railroad must file a formal application . . ."

Adverse applications

In footnote 1 of its Decision in Docket No. AB 32 (Sub-No. 100), Boston and Maine Corporation and Springfield Terminal Railway Company—Adverse

Discontinuance—New England Southern Railroad Co., Inc., served April 30, 2010, the

Board sought to explain its disparate treatment of abandonment filings:

An adverse discontinuance application seeks a Board finding that the [public convenience and necessity] requires or permits the discontinuance of service by a carrier over a line of railroad, when that application is filed by someone other than that carrier. Such filings are also known as third party applications and are termed adverse because they are often, though not always, opposed by the carrier holding the authority to operate.

The whole notion that there are two classes of applicants who may seek the Board's authorization to abandon or discontinue service on a line of railroad – the operating rail carriers, on the one hand, and, on the other, all other persons --is altogether contrary to the holding of the Supreme Court in its decision in Thompson v. Texas-Mexican Ry. Co., supra. 328 U.S. at 145, as well as the ICC decisions which preceded and followed the Supreme Court case, discussed above. Indeed, in Chelsea Property Owners—Aban.—The Consol. R. Corp., supra, 8 I.C.C.2d at 778, the ICC observed that “any person may initiate an abandonment proposal, subject to establishing a proper interest in the proceeding . . .”

That a person other than the operating rail carrier seeking the Board's authorization to abandon or discontinue service over a line of railroad is an adverse applicant is denigrating. The very term “adverse” has an abhorrent connotation. Its dictionary definition is “1. acting against, or in a contrary direction; antagonistic; as, *adverse* winds. 2. In hostile opposition to one's interests; unpropitious; calamitous; afflictive; as, *adverse* circumstances. 3. Placed opposite.”³

There, however, is nothing in the ICC Termination Act of 1995 or in the Board's implementing regulations that would support the differentiation between operating

³ Webster's New Collegiate Dictionary, G. & C. Merriam Co., Springfield, MA, 1951.

railroads and other persons when seeking the Board's authorization to abandon or to discontinue serving a line of railroad. The word "adverse" appears in neither the Act nor the regulations.

As already noted, the Board rationalizes that, when filed by other persons, the requests that the Board authorize the abandonment or discontinuance of service on a line of railroad are often, though not always, opposed by the carrier holding the authority to operate. The Board, however, fails to explain why the rail carrier's protest needs to be expressed in the context of an abandonment or discontinuance application proceeding and cannot be articulated as well in opposition to a petition for exempt abandonment or discontinuance. If, for example, the operating railroad's continued service is required to handle the traffic of one or more shippers on the line, the Board would be able to find that regulation is needed to protect the shippers from the abuse of market power and, hence, deny the petition. To be sure, the Board most often has found the opposition filings to be unconvincing and has granted the petitions for exempt abandonment or discontinuance notwithstanding that they have been protested. See, e.g., Docket No. AB 384 (Sub-No. 3X), Delta Southern Railroad, Inc.--Abandonment Exemption--in Desha and Chicot Counties, Ark., served March 25, 2011; Docket No. AB 415 (Sub-No. 2X), Escanaba & Lake Superior Railroad Company—Abandonment Exemption—In Ontonagon and Houghton Counties, Mich., served September 27, 1010; STB Docket No. AB-512X, Sierra Pacific Industries—Abandonment Exemption—in Amador County, CA, filed February 25, 2005; STB Docket No. AB-490 (Sub-No. 1X), Greenville County Economic Development Corporation—Abandonment and Discontinuance Exemption—in Greenville County, SC, served October 12, 2005; STB Docket No. AB-914X,

McCloud Railway Company—Abandonment and Discontinuance of Service Exemption—in Siskiyou, Shasta and Modoc Counties, CA, served October 14, 2005. In sharp contrast, the Board virtually always has denied the applications for abandonment or discontinuance authority when protested by the operating railroad.⁴ See, e.g., STB Docket No. AB-290 (Sub-No. 286), Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, served February 14, 2008, aff'd sub nom., City of South Bend, IN v. Surface Transp. Bd., 566 F.3d 1166 (D.C. Cir. 2009); STB Docket No. AB-878, City of Peoria and the Village of Peoria Heights, IL—Adverse Discontinuance—Pioneer Industrial Railway Company, served August 10, 2005; STB Docket No. AB-600, Yakima Interurban Lines Association—Adverse Abandonment—in Yakima County, WA, served November 19, 2004; STB Docket No. AB-400 (Sub-No. 4), Seminole Gulf Railway Company, L.P.—Adverse Abandonment—in Lee County, FL, served November 4, 2004; STB Docket No. AB-124 (Sub-No. 2), Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostock Railroad Company and Van Buren Bridge Company in Aroostock County, Maine, served May 3, 2004.

What the foregoing decisions demonstrate convincingly is that the Board accords great weight to the protests of the operating railroads when filed in discontinuance or abandonment application proceedings and appears to pay little or no attention to the protests of communities or shippers filed in opposition to petitions for exempt discontinuance or abandonment. Obviously, this distinction is unwarranted and should

⁴ A settlement was reached following service of the decision in Docket No. AB 1036, The City of Chicago, Ill—Adverse Abandonment—Chicago Terminal Railroad in Chicago, Ill., served June 16, 2010, and there was no opposition in STB Docket No. AB-1035, Lake County, Oregon—Adverse Discontinuance of Rail Service—Modoc Railway and Land Company, LLC and Modoc Northern Railroad Company, served November 17, 2009, and STB Docket No. AB-882, Minnesota Commercial Railway Company—Adverse Discontinuance—in Ramsey County, MN, served July 16, 2008.

not be countenanced. The Board should take as seriously a protest or comment when filed in opposition to a petition for exempt discontinuance or abandonment as when filed in a discontinuance or abandonment application proceeding. The one should be considered no less meritorious and deserving of the Board's careful consideration in the one case than in the other.

Applications, however, are inappropriate vehicles for persons other than the rail carriers by which to seek the Board's authorization for the abandonment or discontinuance of service on a line of railroad. The Board's regulations at 49 C.F.R. Part 1152, Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, clearly are worded to be followed by the operating rail carriers seeking the Board's discontinuance or abandonment authorization and not by other persons. In every instance, in advance of filing its application, a person other than a rail carrier needs to petition the Board for waiver of certain of the provisions of 49 C.F.R. §1152.22, for the person simply does not have the information that the application calls for.⁵ The applicant's waiver request is considered by the Board and usually is granted in part and denied in part by decision of the Board.⁶ Only thereafter can the person seeking the

⁵ See, e.g., STB Docket No. AB-290 (Sub-No. 286), Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, petition for waiver served September 13, 2006; STB Docket No. AB-600, Yakima Interurban Lines Association—Adverse Abandonment—in Yakima County, WA, petition for waiver filed December 23, 2003; STB Docket No. AB-400 (Sub-No. 4), Seminole Gulf Railway, L.P.—Adverse Abandonment—in Lee County, FL, petition for waiver filed May 3, 2004; STB Docket No. AB-124 (Sub-No. 2), Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, petition for waiver filed September 30, 2002; STB Docket No. AB-33 (Sub-No. 183), Salt Lake City Corporation—Adverse Abandonment—in Salt Lake City, UT, petition for waiver filed September 14, 2001.

⁶ See, e.g., STB Docket No. AB-290 (Sub-No. 286), Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, served October 26, 2006; STB Docket No. AB-600, Yakima Interurban Lines Association—Adverse Abandonment—in Yakima County, WA, served February 6, 2004; STB Docket No. AB-400 (Sub-No. 4), Seminole Gulf Railway, L.P.—Adverse Abandonment—in Lee County, FL, served June 9, 2004; STB Docket No. AB-124 (Sub-No. 2), Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge

Board's discontinuance or abandonment authorization file its application.⁷ The application almost always is protested by the operating rail carrier and possibly others and most usually is denied by decision of the entire Board.⁸

Petitions for exempt discontinuances or abandonments are decided by the Board in relatively quick order and without the need for the petitioners having to pay exorbitant filing fees. From the time the petitions for exempt discontinuances or abandonments are filed with the Board and the time the Board renders its decisions averages about three and a half months, and the Board's filing fee is \$6,300.00.

Application proceedings on the other hand, are prolonged and expensive. From the time the requests for waiver of the filing requirements are filed until the time the Board serves its decisions on the merits of the proposed discontinuance or abandonment averages well over a year's time. The filing fee for the request for waiver of the filing requirements is \$1,800, and the filing fee for filing the discontinuance or abandonment application is \$22,100, for a total of \$23,900.00.

Company in Aroostook County, Maine, served October 23, 2002; STB Docket No. AB-33 (Sub-No. 183), Salt Lake City Corporation—Adverse Abandonment—in Salt Lake City, UT, served October 5, 2001.

⁷ See, e.g., STB Docket No. AB-290 (Sub-No. 286), Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, application filed November 21, 2006; STB Docket No. AB-600, Yakima Interurban Lines Association—Adverse Abandonment—in Yakima County, WA, application filed January 27, 2004, application filed January 27, 2004; STB Docket No. AB-400 (Sub-No. 4), Seminole Gulf Railway, L.P.—Adverse Abandonment—in Lee County, FL, application filed June 16, 2004; STB Docket No. AB-124 (Sub-No. 2), Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, application filed October 7, 2003; STB Docket No. AB-33 (Sub-No. 183), Salt Lake City Corporation—Adverse Abandonment—in Salt Lake City, UT, application filed November 13, 2001.

⁸ See, e.g., STB Docket No. AB-290 (Sub-No. 286), Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, served February 14, 2008; STB Docket No. AB-600, Yakima Interurban Lines Association—Adverse Abandonment—in Yakima County, WA, served November 19, 2004; STB Docket No. AB-400 (Sub-No. 4), Seminole Gulf Railway, L.P.—Adverse Abandonment—in Lee County, FL, served November 18-2004; STB Docket No. AB-124 (Sub-No. 2), Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, served May 3, 2004; STB Docket No. AB-33 (Sub-No. 183), Salt Lake City Corporation—Adverse Abandonment—in Salt Lake City, UT, served March 8, 2002.

The change in the Board's present practice of distinguishing between discontinuance or abandonment filings by the operating rail carrier and other persons can be effected with little effort. By rulemaking, pursuant to 5 U.S.C. §553 and 49 C.F.R. §1110.1, et seq., the Board can revise 49 C.F.R. §1121.1 by placing an "(a)" at the beginning of the existing paragraph and adding a new paragraph to read, "(b) Petitions for exemption to abandon or discontinue service on a line of railroad may be filed pursuant to these procedures whether filed by a rail carrier or other interested person."

The revision could save noncarrier parties appreciable time and expense in having the Board determine whether their proposed abandonment or discontinuance of service on a line of railroad falls within the scope of the exemption contemplated by 49 U.S.C. §10502(a). That was the intent in conferring upon the agency the authority to exempt transactions, and interested persons should not be denied the opportunity to avail themselves of right to obtain a determination from the Board of the appropriateness of their discontinuance or abandonment proposals by filing petitions for exemption.

III.

ABANDONMENT NOTICES

Abandonment Applications

The form of notice to be published once a week for three consecutive weeks in the legal notices section of the classified ads of a newspaper of general circulation in each of the counties traversed by the line proposed for abandonment or on which service is proposed to be discontinued not less than 30 days in advance of the filing the application, copies of which additionally must be served by first-class mail on a number of designated

persons and served by certified letter on the Board as a notice of intent to initiate an action, according to 49 C.F.R. §1152.21, must worded, as follows:

STB No. AB _____ (Sub-No. _____)
Notice of Intent to Abandon or to Discontinue Service

(Name of Applicant) gives notice that on or about (insert date application will be filed with the Board) it intends to file with the Surface Transportation Board, Washington, DC 20423, an application for permission for the abandonment of (the discontinuance of service on), a line of railroad known as _____ extending from railroad milepost _____ near (station name) to (the end of line or rail milepost _____) near (station name), which traverses through United States Postal Service ZIP Codes _____ (Zip Codes), a distance of _____ miles, in [County(ies), State(s)]. The line includes the stations of (list all stations on the line in order of milepost number, indicating milepost location).

The reason(s) for the proposed abandonment (or discontinuance) is (are) _____ (explain briefly and clearly why the proposed action is being undertaken by the applicant). Based on information in our possession, the line (does)(does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.

This line of railroad has appeared on the system diagram map or included in the narrative in category 1 since (insert date).

The interest of railroad employees will be protected by (specify the appropriate conditions).

The application will include the applicant's entire case for abandonment (or discontinuance)(case in chief). Any interested person, after the application is filed on (insert date), may file with the Surface Transportation Board written comments concerning the proposed abandonment (or discontinuance) or protest to it. These filings are due 45 days from the date of filing of the application. All interested persons should be aware that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 U.S.C. 10905 (§1152.28 of the Board's rules) must also be filed within 45 days from the date of filing of the application. Persons who may oppose the abandonment or discontinuance but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence, should file comments. Persons interested only in seeking public use or trail use conditions should also file comments. Persons opposing the proposed abandonment or discontinuance that do wish to participate actively and fully in the process should file a protest.

Protests must contain that party's entire case in opposition (case in chief) including the following:

(1) Protestant's name, address and business.

(2) A statement describing protestant's interest in the proceeding including:

(i) A description of protestant's use of the line;

(ii) If protestant does not use the line, information concerning the group or public interest it represents; and

(iii) If protestant's interest is limited to the retention of service over a portion of the line, a description of the portion of the line subject to protestant's interest (with milepost designations if available) and evidence showing that the applicant can operate the portion of the line profitably, including an appropriate return on its investment for those operations.

(3) Specific reasons why protestant opposes the application including information regarding protestant's reliance on the involved service (this information must be supported by affidavits of persons with personal knowledge of the fact(s)).

(4) Any rebuttal of material submitted by applicant.

In addition, a commenting party or protestant may provide a statement of position and evidence regarding:

(i) Intent to offer financial assistance pursuant to 49 U.S.C. 10904;

(ii) Environmental impact;

(iii) Impact on rural and community development;

(iv) Recommended provisions for protection of the interests of employees;

(v) Suitability of the properties for other public purposes pursuant to 49 U.S.C. 10905; and

(vi) Prospective use of the right-of-way for interim trail use and rail banking under 16 U.S.C. 1247(d) and §1152.29.

A protest may demonstrate that: (1) the protestant filed a feeder line application under 49 U.S.C. 10907; (2) the feeder line application involves any portion of the rail line involved in the abandonment or discontinuance application; (3) the feeder line application was filed prior to the date the abandonment or discontinuance application was filed; and (4) the feeder line application is pending before the Board.

Written comments and protests will be considered by the Board in determining what disposition to make of the application. The commenting party or protestant may participate in the proceeding as its interests may appear.

If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after the application is filled.

Those parties filing protests to the proposed abandonment (or discontinuance) should be prepared to participate actively either in an oral hearing or through the submission of their entire opposition case in the form of verified statements and arguments at the time they file a protest. Parties seeking information concerning the filing of protests should refer to §1152.25.

Written comments and protests, including all requests for public use and trail use conditions, should indicate the proceeding designation STB No. AB _____ (Sub-No. _____) and must be filed with the Secretary [sic], Surface Transportation Board, Washington, DC 20423, no later than (insert the date 45 days after the date applicant intends to file its application). Interested persons may file written comment or protest with the Board to become a party to this abandonment (or discontinuance) proceeding. A copy of each written comment or protest shall be served upon the representative of the applicant (insert name, address, and phone number). The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, each document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

The line sought to be abandoned (or discontinued) will be available for subsidy or sale for continued rail use, if the Board decides to permit the abandonment (or discontinuance), in accordance with applicable laws and regulations (49 U.S.C. 10904 and 49 CFR 1152.27). No subsidy arrangement approved under 49 U.S.C. 10904 shall remain in effect for more than 1 year unless otherwise mutually agreed by the parties (49 U.S.C. 10904(f)(4)(B)). Applicant will promptly provide upon request to each interested party an estimate of the subsidy and minimum purchase price required to keep the line in operation. The carrier's representative to whom inquiries may be made concerning sale or subsidy terms is (insert name and business address).

Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section [sic] of Environmental Analysis.

A copy of the application will be available for public inspection or or after (insert date abandonment application is to be filed with Board) at each agency station or terminal on the line proposed to be abandoned or discontinued [if there is no agency station on the line, the application shall be deposited at any agency station through which business for

the line is received or forwarded (insert name, address, location, and business hours)]. The carrier shall furnish a copy of the application to any interested person proposing to file a protest or comment, upon request.

An environmental assessment (EA) (or environmental impact statement (EIS) if necessary) prepared by the Section [sic] of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section [sic] of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.

The applicant must submit a draft Federal Register notice with the application for abandonment or discontinuance authorization, and 49 C.F.R. §1152.22(h)(i) requires that it be worded, as follows:

STB No. AB _____ (Sub-No. _____)
Notice of Intent to Abandon or to Discontinue Service

On (insert date application was filed with the Board) (name of applicant) filed with the Surface Transportation Board, Washington, DC 20423, an application for permission for the abandonment of (the discontinuance of service on), a line of railroad known as _____ extending from railroad milepost _____ near (station name) to (the end of line or rail milepost _____) near (station name), a distance of _____ miles, in [County(ies), State(s)]. The line includes the stations of (list all stations on the line in order of milepost number, indicating milepost location) and traverses through _____ (Zip Codes) United States Postal Service Zip Codes.

The line (does)(does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it. The applicant's entire case for abandonment (or discontinuance) (case in chief) was filed with the application.

This line of railroad has appeared on the system diagram map or included in the narrative in category 1 since (insert date).

The interest of railroad employees will be protected by (specify the appropriate conditions).

Any interested person may file with the Surface Transportation Board written comments concerning the proposed abandonment (or discontinuance) or protests (including the protestant's entire opposition case) within 45 days after the application is

filed. All interested persons should be aware that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 U.S.C. 10905 (§1152.28 of the Board's rules) must also be filed within 45 days after the application is filed. Persons who may oppose the abandonment or discontinuance but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence, should file comments. Persons interested only in seeking public use or trail use conditions should also file comments. Persons opposing the proposed abandonment or discontinuance that do wish to participate actively and fully in the process should file a protest.

In addition, a commenting party or protestant may provide:

(i) An offer financial assistance pursuant to 49 U.S.C. 10904 (due 120 days after the application is filed or 10 days after the application is granted by the Board, whichever occurs sooner);

(ii) Recommended provisions for protection of the interests of employees;

(iii) A request for a public use condition under 49 U.S.C. 10905; and

(iv) A statement pertaining to prospective use of the right-of-way for interim trail use and rail banking under 16 U.S.C. 1247(d) and §1152.29.

Parties seeking information concerning the filing of protests should refer to §1152.25

Written comments and protests, including all requests for public use and trail use conditions, should indicate the proceeding designation STB No. AB _____ (Sub-No. _____) and must be filed with the Secretary [sic], Surface Transportation Board, Washington, DC 20423, no later than (insert the date 45 days after the date applicant intends to file its application). Interested persons may file written comment or protest with the Board to become a party to this abandonment (or discontinuance) proceeding. A copy of each written comment or protest shall be served upon the representative of the applicant (insert name, address, and phone number). The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, each document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

The line sought to be abandoned (or discontinued) will be available for subsidy or sale for continued rail use, if the Board decides to permit the abandonment (or discontinuance), in accordance with applicable laws and regulations (49 U.S.C. 10904 and 49 CFR 1152.27). No subsidy arrangement approved under 49 U.S.C. 10904 shall remain in effect for more than 1 year unless otherwise mutually agreed by the parties (49 U.S.C. 10904(f)(4)(B)). Applicant will promptly provide upon request to each interested party an estimate of the subsidy and minimum purchase price required to keep the line in

operation. The carrier's representative to whom inquiries may be made concerning sale or subsidy terms is (insert name and business address).

Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section [sic] of Environmental Analysis.

An environmental assessment (EA) (or environmental impact statement (EIS) if necessary) prepared by the Section [sic] of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section [sic] of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.

Abandonment Petitions

If the applicant elects to seek the abandonment or discontinuance authorization by a petition for exemption, pursuant to 49 U.S.C. §10502(a) and 49 C.F.R. §1121.1, et seq., the text of a sample newspaper notice which must be published in a newspaper of general circulation in each county through which the line proposed to be abandoned or over which service is proposed to be discontinued is prescribed in 49 C.F.R. §1105.12, as follows:

(Name if railroad) gives notices that on or about (insert date petition for abandonment exemption will be filed with the Surface Transportation Board), it intends to file with the Surface Transportation Board, Washington, DC 20423, a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903, *et seq.*, permitting he (abandonment of or discontinuance of service on) a _____ mile line of railroad between railroad milepost _____ near (station name) which traverses through United States Postal Service ZIP Codes (ZIP Codes) and railroad milespost _____ near (station name) which traverses through United States Postal ZIP Codes (ZIP Codes) in _____ County(ies), (State). The proceeding has been docketed as No. AB _____ (Sub-No. _____ X).

The Board's Section [sic] of Environmental Analysis ("SEA") generally will prepare an Environmental Assessment ("EA"), which will normally be available 60 days after the filing of the petition for abandonment exemption. Comments on environmental

and energy matters should be filed no later than 30 days after the EA becomes available to the public and will be addressed in a Board decision. Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to SEA, Surface Transportation Board, Washington, DC 20423 or by calling SEA [sic] at [INSERT TELEPHONE NUMBER].

Appropriate offers of financial assistance to continue rail service can be filed with the Board. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Board. An original and 10 copies of any pleading that raises matters other than environmental issues (such as trails use, public use, and offers of financial assistance) must be filed directly with the Board's Office of the Secretary, 1925 K Street, NW Washington, DC 20423 [sic]. [See 49 C.F.R. 1104.1(a) and 1104.3(a)], and one copy must be served on applicant's representative [See 49 C.F.R. 1104.12(a)]. Questions regarding offers of financial assistance, public use or trails use may be directed to the Board's Office of Congressional and Public Services [sic] at [INSERT TELEPHONE NUMBER]. Copies of any comments or requests for conditions should be served on the applicant's representative (name and address).

The petition for abandonment or discontinuance exemption must have attached to it a Federal Register notice to be published by the Board, the sample text of which is set out at 49 C.F.R. §1152.60, as follows:

On (insert date petition was filed with the Board) (name of petitioner) filed with the Surface Transportation Board, Washington, DC 20423, a petition for exemption for the abandonment of (the discontinuance of service on) a line of railroad known as _____, extending from milepost ____ near (station name) to (the end of the line or rail milepost _____) near (station name), which traverses _____ (Zip Codes) United States Postal Service Zip Codes, a distance of _____ miles, in [County(ies), State(s)]. The line for which the abandonment (or discontinuance) exemption request was filed includes the stations of (list all station on the line in order of milepost numbers, indicating milepost locations).

The line (does) (does not) contain federally granted rights-of-way. Any documentation in railroad's possession will be made available promptly to those requesting it.

The interests of railroad employees will be protected by (specify the appropriate conditions).

Any offer of financial assistance will be due no later than 10 days after service of a decision granting the petition for exemption.

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use.

Any request for a public use condition or for trail use/rail banking will be due no later than 20 days after notice of the filing of the petition for exemption is published in the Federal Register.

Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 C.F.R. part 1152. Questions concerning environmental issues may be directed to the Board's Section [sic] of Environmental Analysis.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Section [sic] of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons who would like to obtain a copy of the EA (or EIS) may contact the Section [sic] of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA generally will be within 30 days of its service.

Abandonment Notices

A rail carrier seeking to avail itself of the two-year out-of-service exemption to secure the Board's authorization to abandon a railroad line or to discontinue rendering service on a railroad line, pursuant to 49 C.F.R. §1152.50(b), must publish a notice of the proposed abandonment or discontinuance in a newspaper of general circulation in each of the counties in which the railroad line proposed to be abandoned or on which service is proposed to be discontinued, a sample of which appears at 49 C.F.R. §1105.11 and reads, as follows:

(Name of railroad) gives notice that on or about (insert date notice of exemption will be filed with the Surface Transportation Board), it intends to file with the Surface Transportation Board, Washington, DC 20423, a notice of exemption under 49 CFR Subpart F -- *Exempt Abandonments*, permitting the (abandonment of or discontinuance of service on) a _____ mile line of railroad between railroad milepost _____ near (station name) which traverses through United States Postal Service ZIP Codes (ZIP Codes) and railroad milepost _____ near (station name) which traverses through United

States Postal ZIP Codes (ZIP Codes) in _____ County(ies), (State). The proceeding has been docketed as No. AB _____ (Sub-No. _____ X).

The Board's Section [sic] of Environmental Analysis ("SEA") generally will prepare an Environmental Assessment ("EA"), which will normally be available 25 days after the filing of the notice of exemption. Comments on environmental and energy matters should be filed no later than 15 days after the EA becomes available to the public and will be addressed in a Board decision. Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to the Section [sic] of Environmental Analysis (SEA), Surface Transportation Board, Washington, DC 20423 or by calling that office at [INSERT TELEPHONE NUMBER].

Appropriate offers of financial assistance to continue rail service can be filed with the Board. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Board. An original and 10 copies of any pleading that raises matters other than environmental issues (such as trails use, public use, and offers of financial assistance) must be filed directly with the Board's Office of the Secretary, 1925 K Street, NW Washington, DC 20423 [sic]. [See 49 C.F.R. 1104.1(a) and 1104.3(a)], and one copy must be served on applicant's representative [See 49 C.F.R. 1104.12(a)]. Questions regarding offers of financial assistance, public use or trails use may be directed to the Board's Office of Congressional and Public Services [sic] at [INSERT TELEPHONE NUMBER]. Copies of any comments or requests for conditions should be served on the applicant's representative (name, address and phone number) .

The Board's regulations do not require that a railroad filing a notice, pursuant to 49 C.F.R. §1152.50(b), must attach a draft Federal Register notice. The Office of Proceedings, however, requires that a draft Federal Register notice be submitted. It does so, because, pursuant to 49 C.F.R. §1152.50(d)(3), the Director of the Office of Proceedings is obliged to publish a notice in the Federal Register within 20 days after the filing of the notice of exemption. An example of how such a proposed Federal Register notice may read is, as follows:

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB _____ (Sub-No. _____ X)]

(Name of railroad) -- Abandonment Exemption -- in [County(ies), State(s)]

(Name of railroad) filed on (date of filing of notice) a verified notice of exemption under 49 C.F.R. part 1152 subpart F -- *Exempt Abandonments and Discontinuances of Service and Trackage Rights* -- to abandon its line of railroad, known as _____, extending between milepost _____ near (insert station) and (end of line or milepost _____) near (insert station), a distance of _____ miles, in [insert County(ies), State(s)]. The line traverses United States Postal Service Zip Codes _____.

(Name of railroad) has certified that: (1) no local traffic has mover over the line for at least 2 years; (2) no overhead traffic has been, or would need to be, rerouted; (3) no formal complaint filed by a user of rail service on the line (or state or local agency acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board(Board) or with any U.S. District Court or has been decided in favor of complainant with the 2-year period. The railroad has further certified that the requirements of 49 C.F.R. §§1105.7(c) & 1105.8(c) (environmental and historic report), 49 C.F.R. §1105.11 (transmittal letter), 49 C.F.R. §1105.12 (newspaper publication) and 49 C.F.R. §1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employees adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad --Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Petitions to stay the effective date of the notice on other than environmental or historic preservation grounds must be filed within 10 days of the notice's Federal Register publication. Petitions to stay the effective date of the notice on environmental or historic preservation grounds may be filed at any time but must be filed sufficiently in advance of the effective date in order to allow the Board to consider and act on of the petition before the notice becomes effective. Petitions for reconsideration, comments regarding environmental, energy and historic preservation matters, and requests for public use conditions under 49 U.S.C. §10905 and 49 C.F.R. §1152.28(a)(2) must be filed within 20 days after publication. Requests for a trail use/rail banking condition must be filed within 10 days after the notice's Federal Register publication.

Provided no offer of financial assistance (OFA) has been received, this exemption will be effective 30 days from the date of the Federal Register publication of the notice, unless stayed by decision of the Board.

A copy of any pleading filed with the Board should be sent to the railroad's representative (insert name, address, telephone number).

If the verified notice contains false or misleading information, the exemption is void *ab initio*, and the Board summarily shall reject the exemption notice.

The railroad has filed a environmental and historic report that addresses the effects, if any, of the abandonment on the environment and historic resources. The Office of Environmental Analysis (OEA) will issue an environmental assessment (EA) within 30 days of the notice's filing with the Board. Interested persons may obtain a copy of the EA by writing OEA, at the Board's address, Surface Transportation Board, 395 E Street, SW (Room 1100), Washington, DC 20423-0001 or by calling OEA at (205) 245-0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at 1- (800) 877-8339. Comments on environmental and historic preservation matters included or omitted from the EA must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision of the Board.

Pursuant to 49 C.F.R. §1152.29(e)(2), the railroad shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by the railroad's filing of a notice of consummation within one year from the date of filing of the notice of exemption with the Board and there are no legal or regulatory barriers to consummation, the authority to abandon will expire automatically.

Board decisions and notices are available on its website at www.stb.dot.gov.

Decided: _____

By the Board, _____, Director, Office of Proceedings.

Criticisms and Recommendations

The notice of the abandonment or discontinuance application to be published three consecutive weeks in the legal notices section of the classified ads of a newspaper of general circulation in each of the counties traversed by the railroad line proposed for abandonment or on which service is proposed to be discontinued is far too long and, hence, too expensive. A classified ad of that size will cost the rail carrier between \$200 and \$400, depending upon the newspaper and the city in which it is published. The three insertions that 49 C.F.R. §1152.20(a)(4) calls for would cost between \$600 and \$1,200 for just one county, and if the railroad line to be abandoned or on which service is to be

discontinued extends through three or four counties, as many do, just having the notices published may come to close to \$5,000.

We do not suggest that the Board do away with the publication of the newspaper notice of a proposed abandonment or discontinuances in advance of the application's filings with the Board, although its usefulness is highly questionable. Just how many of us in the Washington, DC, area, for example, read the legal notices in the classified ads of *The Washington Post*? Not too many we suspect.

It is not that by the time that the notice is published in the newspaper it will not be widely known that the rail carrier will be seeking the Board's authorization to abandon its railroad line. The rail carrier well before will have consulted with no fewer than the ten or so federal or state agencies which the Board's Office of Environmental Analysis ("OEA") requires be consulted by the rail carrier in the preparation of its environmental and historic report, due to served at least 20 days in advance of the filing of the abandonment application. The letter which the rail carrier sends to each of the agencies whose views it solicits on the environmental and historic impact of the proposed abandonment describes the railroad line just as it will appear in the newspaper notice and additionally portrays it on an enclosed map and includes the docket number of the Board's abandonment proceeding.

Sight has been lost of the fact that the rail carrier's newspaper notice, whether it be published in advance of the filing of an application, petition or notice, as well as the *Federal Register* notice arranged to be published by the Board after the application, petition or notice has been filed with it, are intended to advise persons who may be affected by the proposed abandonment or discontinuance of what remedies they may

have and what actions they may take before the Board. Neither the newspaper notice nor the *Federal Register* notice is needed to instruct the rail carrier or its attorney how to secure the Board's abandonment or discontinuance authorization. They are expected to be familiar with 49 U.S.C. §10903 and 49 C.F.R. §1152.50, *et seq.*, and of 49 U.S.C. §10502(a) and 49 C.F.R. §§1152.50 and 1152.60, but, even if they feel unsure of themselves in applying the statutory and regulatory provisions, the rail carrier or its attorney can learn from the filings section of the Board's web page, *www.stb.dot.gov*, how others before them prepared their applications, petitions or notices to secure the Board's abandonment or discontinuance authorization.

The newspaper notice to be published in advance of the filing of the application, accordingly, can do without the rail carrier's reasons for seeking the Board's abandonment or discontinuance authorization. The rail carrier need not be reminded that his filing with the Board must include all of the evidence and arguments upon which it relies to secure the abandonment or discontinuance authorization, its case in chief. Finally, the rail carrier knows full well that, unless the Board orders otherwise, adversely affected employees will need to be protected by the conditions imposed in *Oregon Short Line R. Co.—Abandonment--Goshen*, 360 I.C.C. 91 (1979) (which, incidentally, is the correct manner of citing the decision as it appears in the *Interstate Commerce Commission Reports*).

As it relates to a potential protestant or commenter, the text of the notice of an application to abandon or discontinue service on a railroad line is in need of reorganization and rewriting, as we shall undertake below. In part, as it currently reads, it is repetitive. Thus, the notice twice states that protests or comments are due 45 days after

the application is filed with the Board. Similarly, it twice notes that any request for a public use condition needs to be filed within 45 days of the application's filing. In part, the notice is wholly redundant. A clash between a feeder line application and an abandonment application, as discussed in the notice, hasn't occurred in more than twenty-five years' time and, in any event, is covered by 49 C.F.R. §1152.25(a)(3). In other respects, the notice omits important information. Thus, it fails to advise a potential protestant or commenter that an offer of financial assistance ("OFA") to purchase the railroad line for continued use for freight operations needs to be filed 120 days after the rail carrier filed its application, unless the Board's decision granting the application is served sooner than the 110th day after the application is filed, in which event the OFA is due ten days after service of the Board's decision.

The principal problem with the Board's recommended newspaper notices, as with the *Federal Register* notices, is that they are intended to apply to both proposed abandonments and proposed discontinuances when in actuality the proceedings are handled quite differently by the Board. An application, petition or notice to discontinue rendering service on a line of railroad need not be accompanied by an environmental or historic report. See, Docket No. AB 290 (Sub-No. 333X), *Norfolk Southern Railway Company--Discontinuance of Service Exemption--in Forsyth County, N.C.*, served October 20, 2011; Docket No. AB1075X, *Manufacturers Railway Company--Discontinuance Exemption--in St. Louis County, Mo.*, served July 12, 2011; STB Docket No. AB-1051X, *Gloster Southern Railroad Company LLC--Discontinuance of Service Exemption--in Amite and Wilkinson Counties, MS and East Feliciana Parish, LA*, served December 14, 2009. Accordingly, all of the discussion of OEA's issuance of an

Environmental Assessment and of the ability of interested persons to offer comments has no place in the newspaper notice relating to the filing a proposed discontinuance application, petition for discontinuance exemption or two-year out-of-service discontinuance exemption notice or in the *Federal Register* notice following the filing of the application, petition or notice. Similarly, requests for the imposition of trail use/rail banking or public use conditions or the submission of OFAs, except to subsidize the rail carrier's continued freight operations for one year's time, are inappropriate in discontinuance proceedings. *Id.* Therefore, the several statements that, if they so desire, protestants or commenters should note their interest in seeking trail use/ rail banking or public use conditions or submit their offers of financial assistance, other than one year's subsidy, have no place in the newspaper notice relating to the filing of a proposed discontinuance application, petition for discontinuance exemption or two-year out-of-service discontinuance exemption or in the *Federal Register* notice following the filing of the application, petition or notice.

The Board's recommended newspaper notices for petitions for abandonment or discontinuance exemptions or for two-year out-of-service abandonment or discontinuance exemptions don't belong in 49 C.F.R. Part 1105--Procedures for Implementation of Environmental Law. The sample newspaper notice for petitions for abandonment or discontinuance exemptions should be set out as a sub-section of 49 C.F.R. §1152.60, and the sample newspaper notice for two-year out-of-service abandonment or discontinuance exemptions should appear as a subsection of 49 C.F.R. §1152.50. The last sentence of 49 C.F.R. §1105.12 simply can be revised to read, "Sample newspaper notices are provided in sub-sections of 49 C.F.R. §§1152.50 and 1152.60."

In our view, instead of the six notices as are currently called for -- a newspaper notice for an abandonment or discontinuance application, a *Federal Register* notice for an abandonment or discontinuance application, a newspaper notice for a petition for an abandonment or discontinuance exemption, a *Federal Register* notice for a petition for an abandonment or discontinuance exemption, a newspaper notice for a two-year out-of-service abandonment or discontinuance exemption and a *Federal Register* notice for a two-year out-of-service abandonment or discontinuance exemption -- we believe two will suffice, one for abandonment filings and the other for discontinuance filings. We recommend that the newspaper and *Federal Register* notices of a railroad's request for the Board's authorization to abandon a railroad line be worded, as follows:

(name of railroad) on (date) (anticipates filing) (filed) (an application, a petition for exemption, a two-year out-of-service exemption notice) seeking the authorization of the Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001 ("Board") to abandon its railroad line extending between Milepost (number) at or near (station name and ZIP code) and Milepost (number) at or near (station name and ZIP code), serving the intermediate station(s) (in geographic order, station names and ZIP codes), for a distance of (number) miles in (county(ies), (state(s))). The Board's proceeding has been docketed as AB (number) (sub-number).

Notice of the filing (will be published in the *Federal Register*) (is being given) to advise persons of the filing, the remedies they may have and the actions they may take before the Board. A person actively opposing the proposed abandonment should file a protest which shall include one or more verified statements disclosing the protestant's interest in the freight service rendered on the railroad line and offering evidence and arguments why the Board should deny the requested abandonment authorization. Anyone else opposing the proposed abandonment should file comments noting the commenter's interest in the railroad line and offering reasons why the requested abandonment authorization should be denied by the Board. Both a protestant and a commenter may ask that, if notwithstanding its objections, the Board were to grant the requested abandonment authorization, the Board should impose trail use/rail banking or public use conditions or entertain offers of financial assistance to subsidize one year's continued operation by the rail carrier or to purchase the railroad line for the rendition of freight service upon it. Protests and comments are due 20 days from (the date of the *Federal Register* notice) (today). Offers of financial assistance are due 120 days from the date of the rail carrier's filing with the Board, unless the Board's decision granting the request for the abandonment authorization is served in fewer than 10 days from the date

of the rail carrier's filing, in which event the offers of financial assistance shall be due 10 days after the Board's decision is served. A protestant or commenter shall file an original and ten copies of any document with the Board, together with a certificate of service, and shall serve a copy of any document filed with the Board on the rail carrier's representative, (name, address, telephone number and e-mail address) and on any other party. (If the two-year out-of-service exemption notice contains false or misleading information, the use of the exemption is void *ab initio*, and the Board shall summarily reject the notice.) Assistance in responding to a rail carrier's abandonment proposal may be found by reviewing the Board's abandonment regulations, 49 C.F.R. 1152.1 *et seq.* or by contacting the Board's Officer of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238. Assistance for the hearing impaired is available through Federal Information Relay Service at 1-(800) 877-8339.

The rail carrier (will file) (has filed) an environmental and historic report that addresses the effects, if any, of the proposed abandonment on the environment and historic resources. The Board's Office of Environmental Analysis ("OEA") ordinarily will issue an environmental assessment (EA) within 30 days of the rail carrier's filing with the Board. Interested persons can obtain a copy of the EA by retrieving it from among the decisions available on the Board's web page, *www.stb.dot.gov*, by writing OEA, at the Board's address, Surface Transportation Board, 395 E Street, SW (Room 1100), Washington, DC 20423-0001 or by calling OEA at (205) 245-0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at 1-(800) 877-8339. An original and two copies of any comments on environmental and historic preservation matters included or omitted from the EA, together with a certificate of service, need to be filed with the Board within (30 days) (15 days in case of a two-year out-of-service exemption notice filing) after the EA becomes available to the public. A copy of the comments shall be served on the rail carrier's representative, (name, address, telephone number and e-mail address) and on any other party.

The newspaper and *Federal Register* notices pertaining to a rail carrier's request for the Board's authorization to discontinue rendering service on a railroad line should read, as follows:

(name of railroad) on (date) (anticipates filing) (filed) (an application, a petition for exemption, a two-year out-of-service exemption notice) seeking the authorization of the Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001 ("Board") to discontinue rendering service on its railroad line extending between Milepost (number) at or near (station name and ZIP code) and Milepost (number) at or near (station name and ZIP code), serving the intermediate station(s) (in geographic order, station names and ZIP codes), for a distance of (number) miles in (county(ies), (state(s))). The Board's proceeding has been docketed as AB (number) (sub-number).

Notice of the filing (will be published in the *Federal Register*) (is being given) to advise persons of the filing, the remedies they may have and the actions they may take

before the Board. A person actively opposing the proposed discontinuance should file a protest which shall include one or more verified statements disclosing the protestant's interest in the freight service rendered on the railroad line and offering evidence and arguments why the Board should deny the requested discontinuance authorization. Anyone else opposing the proposed discontinuance should file comments noting the commenter's interest in the railroad line and offering reasons why the requested discontinuance authorization should be denied by the Board. Both a protestant and a commenter may ask that, if notwithstanding its objections, the Board were to grant the requested discontinuance authorization, the Board should entertain offers of financial assistance to subsidize one year's continued operation by the rail carrier. Protests and comments are due 20 days from (the date of the *Federal Register* notice) (today). Offers of financial assistance are due 120 days from the date of the rail carrier's filing with the Board, unless the Board's decision granting the request for the discontinuance authorization is served in fewer than 10 days from the date of the rail carrier's filing, in which event the offers of financial assistance shall be due 10 days after the Board's decision is served. A protestant or commenter shall file an original and ten copies of any document with the Board, together with a certificate of service, and shall serve a copy of any document filed with the Board on the rail carrier's representative, (name, address, telephone number and e-mail address) and on any other party. (If the two-year out-of-service exemption notice contains false or misleading information, the use of the exemption is void *ab initio*, and the Board shall summarily reject the notice.) Assistance in responding to a rail carrier's discontinuance proposal may be found by reviewing the Board's abandonment regulations, 49 C.F.R. 1152.1 *et seq.* or by contacting the Board's Officer of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238. Assistance for the hearing impaired is available through Federal Information Relay Service at 1-(800) 877-8339.

The recommended revisions in the newspaper and *Federal Register* notices should result in monetary savings and eased regulatory burdens. They are another way in which the Board's regulation of the railroad industry might be rendered more efficient and effective.

IV.

BOARD PROCEDURES

Digests

We believe that the Digests established by the Board's Decision in Docket No. 696, *Policy Statement on Plain Language Digests in Decision*, served September 2, 2010, should be eliminated in the interest of rendering the Board's regulation more efficient and

economical. That the Digests occasion some confusion is confirmed by the evident need for noting in a footnote that the Digest constitutes no part of the Decision of the Board.

Attached as Attachment A are the first pages of six relatively recent decisions of the United States Court of Appeals for the District of Columbia Circuit. The opening paragraph of each briefly sets forth the nature of the issues raised by the parties and the conclusion reached by the Court. The need for a summary or digest of the Court's action, accordingly, is obviated.

We suggest that the Board may wish to follow the Court's example. The time and effort of the Board's limited resources can be utilized to greater advantage in fashioning clear and concise opening paragraphs for the Board's Decisions than in the wasteful drafting of separate paragraphs which are no part of the Board's Decisions and which simply serve to capsule the Board's findings and conclusions.

Tickler File

Sometimes it seems that the Board does not know what proceedings remain before it and certainly not how long they have been pending. Perhaps the most egregious example of that is Finance Docket No. 35175, Roseburg Forest Products Co.; Timber Products Company, L.P., Suburban Propane, L.P., Cowley D&L Inc., Sousa Ag Service and Yreka Western Railroad Company -- Alternative Rail Service -- Central Oregon & Pacific Railroad, Inc., a request for immediate action to cope with an emergency situation, pursuant to 49 U.S.C. §11123(a). It was filed August 26, 2008, and the Board has yet to render its decision in the proceeding.

Such inordinate delay may be avoided if the Board were to maintain a tickler file so that it would know what proceedings are pending before it and when they were initiated.

Consummation of Acquisitions

The Board's authorization to provide transportation over an extended or additional railroad line, pursuant to 49 U.S.C. §§10901 & 10902, is permissive no less than the Board's authorization to abandon a railroad line, pursuant to 49 U.S.C §10903. A rail carrier is no more required to acquire a railroad line, the acquisition of which had been approved by the Board, than it is required to abandon a railroad line, the abandonment of which had been approved by the Board. Section 1(21) of the Interstate Commerce Act which had allowed the Interstate Commerce Commission to compel a rail carrier to extend its line or lines was not carried forward in the ICC Termination Act of 1995.

The Board, pursuant to 49 C.F.R. §§ 1152.50(e) & 1152.29(e)(2), requires a rail carrier having been authorized to abandon a line of railroad to notify it that the abandonment has been consummated. No such notification, however, is expected of rail carriers having been authorized to operate an extended or additional line of railroad.

Attached as Attachment B are the first pages of six Board notices of railroad line acquisitions which appear never to have been consummated. The acquiring railroad is not shown in *The Official Railway Guide*, has no web page and is not listed as a line haul railroad deemed to be an employer by the U.S. Railroad Retirement Board.

We suggest that a Subpart F be added to 49 C.F.R. Part 1150 to read, as follows:

A railroad that received authority from the Board to extend or add a line (in a regulated proceeding under 49 U.S.C. §10901 or by exemption issued under 49 U.S.C. §10902) shall file a notice of consummation with the Board, with copies to all parties, to signify that it has exercised the authority and it or another rail carrier has commenced

operations on the subject line of railroad. The notice shall provide the docket number and name of the Board proceeding, a brief description of the line, and a statement that the railroad or another rail carrier has commenced operations on a certain date. The notice shall be filed within one year of the service date of the decision permitting the extension or addition (assuming the railroad intends to consummate the transaction). If after one year from the date of service of a decision permitting the extension or addition, consummation has not been effected by the railroad's filing of a notice of consummation and there are no legal or regulatory barriers to consummation, the authority to extend or add the line will expire automatically. In that event, a new proceeding would have to be instituted if the railroad wants to extend or add the line. For good cause shown, including the existence of a legal or regulatory barrier to consummation, a railroad may file a request for an extension of the time to file the consummation notice so long as it does so no fewer than ten days in advance of the due date for filing the consummation notice.

Such a requirement for the filing of a notice of consummation of the Board's authorization to extend or add a line of railroad will enable to Board to know whether the subject line actually has changed hands as was contemplated by the railroad's filing of its application or exemption notice or whether it remains available to be acquired by another railroad. The Board will have a much clearer picture of the system of railroad lines and, accordingly, will be able to regulate the industry with greater accuracy and efficiency.

Respectfully submitted,

TRANSPORTATION ARBITRATION AND MEDIATION

By its attorney,



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Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036
Tel.: (202) 263-4152

Dated: January 10, 2012

ATAHMENT A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 22, 2011 Decided December 23, 2011

No. 10-1103

**PSEG ENERGY RESOURCES & TRADE LLC AND PSEG POWER
CONNECTICUT LLC,
PETITIONERS**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT**

**ISO NEW ENGLAND INC., ET AL.,
INTERVENORS**

**On Petition for Review of Orders of
the Federal Energy Regulatory Commission**

John Lee Shepherd, Jr. argued the cause for petitioner. With him on the briefs were *Kenneth R. Carretta* and *Sally Brown Richardson*.

Jennifer S. Amerkhail, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief was *Robert H. Solomon*, Solicitor.

Kerim P. May and *Sherry A. Quirk* were on the brief for intervenor ISO New England Inc.

John S. Wright and Michael C. Wertheimer, Assistant Attorneys General, Office of the Attorney General for the State of Connecticut, and *Joseph A. Rosenthal and Randall L. Speck* were on the brief for intervenors George C. Jepsen, Attorney General, et al.

Before: GARLAND and KAVANAUGH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: In this petition for review, PSEG Energy Resources & Trade LLC and PSEG Power Connecticut LLC (collectively, PSEG) challenge orders of the Federal Energy Regulatory Commission (FERC) accepting the results of an auction for electric generation capacity conducted by ISO New England Inc. In those orders, FERC approved ISO New England's determination that, unlike other resources in the region, PSEG's resources in Connecticut could not reduce their capacity supply obligation because doing so would endanger the system's reliability. Importantly, it also held that ISO New England could reduce the per unit price paid to PSEG for that capacity. Because the latter holding was based on tariff provisions that the Commission thought were clear but now concedes are ambiguous, and because in the course of construing those provisions it failed to respond to PSEG's facially legitimate objections, we grant the petition and remand the orders for further consideration.

PSEG is one of many generators that participate in New England's "forward capacity market." In this market, electricity providers purchase from generators options to buy quantities of

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 16, 2011 Decided November 18, 2011

No. 10-1184

VERMONT PUBLIC SERVICE BOARD AND MAINE PUBLIC
UTILITIES COMMISSION,
PETITIONERS .

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA,
RESPONDENTS

QWEST COMMUNICATIONS INTERNATIONAL INC., ET AL.,
INTERVENORS

On Petition for Review of an Order of the Federal
Communications Commission

James Hardwick Lister argued the cause for petitioners. With him on the briefs were *Elisabeth H. Ross*, *David Edward Lampp*, *Andrew Hagler*, *Lisa C. Fink*, and *Paul Stern*, Deputy Attorney General, Office of the Attorney General for the State of Maine. *Joel B. Shifman* entered an appearance.

Maureen K. Flood, Counsel, Federal Communications Commission, argued the cause for respondents. With her on the brief were *Catherine G. O'Sullivan* and *Nancy C. Garrison*, Attorneys.

U.S. Department of Justice, *Austin C. Schlick*, General Counsel, Federal Communications Commission, *Peter Karanjia*, Deputy General Counsel, *Richard K. Welch*, Acting Associate General Counsel, and *James M. Carr*, Counsel. *Daniel M. Armstrong III*, Associate General Counsel, Federal Communications Commission, entered an appearance.

Helgi C. Walker argued the cause for intervenors Verizon and NASUCA. With her on the brief were *Brett A. Shumate*, *Michael E. Glover*, *Edward Shakin*, *Christopher M. Miller*, *John T. Scott III*, and *David Bergmann*. *Christopher J. White* entered an appearance.

Before: HENDERSON, TATEL, and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge TATEL*.

TATEL, *Circuit Judge*: Pursuant to the Telecommunications Act of 1996, the Federal Communications Commission, through its Universal Service Program, provides subsidies to ensure that low-income consumers, schools, health care providers, and libraries have access to advanced telecommunications services and that rates and services in rural areas are “reasonably comparable” to rates and services in urban areas. In this case, we review a Commission order declining to increase subsidies under the rural rates and services component of the Universal Service Program. Because the Commission’s decision is neither arbitrary nor capricious, we deny the petition for review.

I.

The Telecommunications Act of 1996, 47 U.S.C. § 254(b), adopted six basic principles of “universal service.”

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 23, 2011 Decided November 15, 2011

No. 10-1326

KENNETH DON COOPER,
PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD
AND FEDERAL AVIATION ADMINISTRATION,
RESPONDENTS

On Petition for Review of an Order
of the National Transportation Safety Board

Gary Bellair argued the cause and filed the brief for petitioner.

Agnes M. Rodriguez, Senior Attorney, Federal Aviation Administration, argued the cause and filed the brief for respondents.

Before: ROGERS, GARLAND and BROWN, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: Kenneth Cooper seeks review of the National Transportation Safety Board's order affirming the

emergency revocation of his airman and medical certificates, which are required to operate an aircraft, *see* 49 U.S.C. §§ 44703, 44709. The revocation was based on the conclusion that he made an intentionally false statement on his medical certificate application when he failed to disclose an arrest for an alcohol-related motor vehicle incident. Cooper contends that the Administrator of the Federal Aviation Administration ("FAA") failed to prove intent because he had reported the arrest and suspension to the FAA almost two years earlier and hence lacked any motive to falsify his answer on the application. The Board ruled that Cooper's admitted failure to read the question before answering it constituted willful disregard for truth or falsity, and he thus had intentionally made a false statement in his application, in violation of 14 C.F.R. § 67.403(a)(1). Because the willful disregard standard articulated in *Administrator v. Boardman*, NTSB Order No. EA-4515, 1996 WL 748190, at *1 (Dec. 20, 1996), and endorsed by the FAA is a reasonable interpretation of the regulation, the Board's deference to the FAA's interpretation of its regulation was not arbitrary or capricious, an abuse of discretion, or contrary to law. Accordingly, we deny the petition for review.

I.

Pursuant to "the split-enforcement regime" of the Federal Aviation Act, 49 U.S.C. §§ 40101 *et seq.*; *Garvey v. NTSB*, 190 F.3d 571, 573 (D.C. Cir. 1999), which divides rulemaking and adjudicatory authority between the FAA and the Board, *see* 49 U.S.C. § 44701(a); *id.* § 1133, the FAA promulgated medical certification procedures for airmen, 14 C.F.R. § 67.403.¹

¹ 49 U.S.C. § 44703 on airman certificates provides:

The [FAA] shall issue an airman certificate to an individual when the [FAA] finds, after investigation, that the individual

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 19, 2011 Decided November 4, 2011

No. 10-1392

**WOLF RUN MINING COMPANY,
PETITIONER**

v.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
AND SECRETARY OF LABOR,
RESPONDENTS**

**On Petition for Review of a Decision of
the Federal Mine Safety and Health Review Commission**

Ralph Henry Moore argued the cause for the petitioner.

Samuel Charles Lord, Attorney, United States Department of Labor, argued the cause for the respondent. *W. Christian Schumann* and *Jerald S. Feingold*, Attorneys, United States Department of Labor, were with him on brief. *John T. Sullivan*, Attorney, entered an appearance.

Before: HENDERSON, TATEL and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Petitioner Wolf Run Mining Company (Wolf Run) seeks review of a decision of the Federal Mine Safety and Health Review Commission (Commission), an agency within the United States Department of Labor (Labor). *Wolf Run Mining Co.*, 32 FMSHRC 1228 (2010). The issue on appeal is whether a Mine Safety and Health Administration (MSHA) inspector is authorized to designate the violation of a safeguard notice issued pursuant to section 314(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (Mine Act), as “significant and substantial” under section 104(d)(1) of the Mine Act, which limits the “significant and substantial” designation to a violation of a “mandatory health or safety standard.” 30 U.S.C. § 814(d). For the reasons set forth below, we agree with the Commission majority that the violation of a safeguard notice issued pursuant to section 314(b) amounts to a violation of section 314(b) and is therefore a violation of a mandatory safety standard which can be designated “significant and substantial.” Accordingly, we deny Wolf Run’s petition.

I. Background

A. Statutory

Section 104(d)(1) of the Mine Act authorizes the Secretary of Labor (Secretary), through her authorized representative,¹ to designate an operator’s violation of a mandatory health or safety standard as “significant and substantial” “if . . . such violation is of such a nature as could significantly and substantially contribute to the cause and

¹ The Secretary’s authorized representative is the MSHA inspector. See 29 U.S.C. § 557a; 30 U.S.C. § 954.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 20, 2011 Decided November 15, 2011

No. 09-3110

UNITED STATES OF AMERICA,
APPELLEE

v.

MELVIN LAWRENCE,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:03-cr-00092-1)

Beverly G. Dyer, Assistant Federal Public Defender, argued the cause for appellant. With her on the briefs was *A. J. Kramer*, Federal Public Defender. *Neil H. Jaffee*, Assistant Federal Public Defender, entered an appearance.

Michelle Parikh Brown, Assistant U.S. Attorney, argued the cause for appellee. On the brief were *Ronald C. Machen Jr.*, U.S. Attorney, and *Roy W. McLeese III*, *John P. Mannarino*, and *Ann K.H. Simon*, Assistant U.S. Attorneys.

Before: SENTELLE, *Chief Judge*, ROGERS and GRIFFITH,
Circuit Judges.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: Upon remand by this court after affirming one of his convictions, *United States v. Lawrence*, 471 F.3d 135 (D.C. Cir. 2006), the district court granted a variance from the U.S. Sentencing Guidelines (“U.S.S.G.”) range for career offenders and re-sentenced Melvin Lawrence to 250 months imprisonment (and five years supervisory release) for unlawfully distributing more than 5 grams of cocaine base. Lawrence challenges his re-sentencing on four grounds. We conclude that none has merit.

First, although Lawrence correctly points out that the amount of cocaine base of which he stands convicted was 21.1 grams, not the 29.6 grams of cocaine base stated in the Presentence Report (“PSR”) and adopted by the district court in re-sentencing him,¹ both amounts fell within the same quantity range under U.S.S.G. § 2D1.1(c)(7) and carried a maximum sentence of 40 years, *see* 21 U.S.C. § 841(b)(1)(B)(iii) (2009), when he was re-sentenced on October 5, 2009. Thus, his Guidelines offense level would have been 34 regardless.

Second, Lawrence contends that the district court likely would have imposed a lower sentence but for its refusal to continue his re-sentencing and to consider the effect of pending legislation to eliminate the disparity between crack and powder cocaine on his career offender sentencing range. Pending legislation is far too removed for this court to compel district courts to consider at sentencing, and that is especially well illustrated here where the legislation was never enacted. So far

¹ Re-sentencing was scheduled before a district court judge who did not preside at Lawrence’s trial for crack cocaine distribution in the amount of 21.1 grams on April 30, 2003. Sent’g Tr., Sept. 3, 2009, at 15–16.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 8, 2011

Decided September 6, 2011

No. 10-5159

AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL
LIBERTIES UNION FOUNDATION,
APPELLANTS/CROSS-APPELLEE

v.

UNITED STATES DEPARTMENT OF JUSTICE,
APPELLEE/CROSS-APPELLANTS

Consolidated with 10-5167

Appeals from the United States District Court
for the District of Columbia
(No. 1:08-cv-01157)

Catherine Crump argued the cause for appellants/cross-appellee. With her on the briefs were *Arthur B. Spitzer* and *David L. Sobel*.

John S. Koppel, Attorney, U.S. Department of Justice, argued the cause for appellee/cross-appellants. With him on the briefs were *Ronald C. Machen Jr.*, U.S. Attorney, and *Leonard Schaitman*, Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Before: GINSBURG and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: The plaintiffs brought this action against the Department of Justice under the Freedom of Information Act, seeking to obtain documents relating to the government's use of cell phone location data in criminal prosecutions. The district court directed the release of certain specified documents and upheld the Department's decision to withhold others. We affirm the court's order requiring the release of the specified documents. Because there are too many factual uncertainties regarding the remaining documents, we vacate the balance of the court's decision and remand the case for further development of the record.

I

Cell phones generate several types of data that can be used to track their users' past or present locations with various degrees of precision.¹ Concerned by reports that federal law

¹For descriptions of the different kinds of data available, see *In re Application of U.S. for an Order Directing Provider of Elec. Comm'n Serv. to Disclose Records to Gov't*, 534 F. Supp. 2d 585, 589-90 (W.D. Pa. 2008), *vacated*, 620 F.3d 304 (3d Cir. 2010); Kevin McLaughlin, Note, *The Fourth Amendment and Cell Phone Location Tracking: Where Are We?*, 29 HASTINGS COMM. & ENT. L.J. 421, 426-27 (Spring 2007); Recent Development, *Who Knows Where You've Been? Privacy Concerns Regarding the Use of Cellular Phones as Personal Locators*, 18 HARV. J.L. & TECH. 307, 308-10 (Fall 2004); Orin Kerr, *Reader Poll. Do You Know How Cell Phones Work?*, THE VOLOKH CONSPIRACY (Nov. 8, 2010, 1:08 PM), <http://volokh.com/2010/11/08/>.

ATAHMENT B

39234

SERVICE DATE – AUGUST 1, 2008

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35165]

Sierra & Central Pacific Railroad Company, Inc.–Acquisition and Operation Exemption–

Sierra Northern Railway and Sierra Railroad Company

Sierra & Central Pacific Railroad Company, Inc. (SCPRR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire from Sierra Northern Railway (SNR) and Sierra Railroad Company (SRC) and to operate, pursuant to a Letter of Intent dated March 20, 2008,¹ approximately 80.30 miles of track as follows:

- (1) SRC's rail line between Oakdale, CA, milepost 0.0, and Sonora, CA, milepost 49.0;
- (2) SNR's Woodland Branch, between milepost 1.75 and milepost 16.5, with the right of access through the Union Pacific Railroad Company's (UP) Westgate Yard;
- (3) SNR's industrial switching operation over approximately 4.50 miles at the Riverbank Arsenal over property leased from the U.S. Government through its agent NI Industries, Inc.; and
- (4) SNR's operation at the Port of Sacramento over track that is leased from the Port of

¹ A redacted version of the Letter of Intent was included with the notice. The full version of the Letter of Intent was concurrently filed under seal along with a motion for protective order. The motion for protective order is being addressed in a separate decision.

38517

SERVICE DATE – NOVEMBER 9, 2007

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35093]

Montgomery Short Line LLC–Lease and Operation Exemption–Union Pacific Railroad
Company

Montgomery Short Line LLC (MSL), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to lease, pursuant to an agreement to be executed prior to consummation with Union Pacific Railroad Company (UP), and to operate approximately 23.5 miles of rail line known as the Montgomery, Minnesota Subdivision from milepost 38.7 near Merriam, to milepost 62.2 at the end of the track near Montgomery, in Scott and Le Sueur Counties, MN.

As a result of this transaction: (1)MSL will become the exclusive operator of rail freight service over the line; (2) UP and MSL will interchange traffic at Merriam; and (3) UP will retain the right to operate passenger trains over the line.

This transaction is related to the concurrently filed notice of exemption in STB Finance Docket No. 35092, Progressive Rail Inc.–Continuance in Control Exemption–Montgomery Short Line LLC, wherein Progressive Rail Inc. seeks to continue in control of MSL upon its becoming a rail carrier.

37061

SERVICE DATE – AUGUST 22, 2006

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34871]

Wyoming Dakota Railroad Properties, Inc.—Acquisition and Operation Exemption—
Dakota, Minnesota & Eastern Railroad Corporation

Wyoming Dakota Railroad Properties, Inc. (WDR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 and 49 CFR 1150.35 to acquire the authority granted to Dakota, Minnesota & Eastern Railroad Corporation (DM&E) to construct and operate some 280 miles of rail line.¹ Specifically, the lines authorized for construction and operation include: (1) a 262.03-mile rail line extending from a point near Wasta, SD, to connect with 11 coal mines located south of Gillette, WY, in the Powder River Basin; (2) a 13.31-mile rail line in the Mankato, MN area; and (3) a 2.94-mile rail line near Owatonna, MN.²

¹ See Dakota, MN & Eastern R.—Construction—Powder River Basin, 3 S.T.B. 847 (1998), 6 S.T.B. 8 (2002), and Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006).

² WDR notes that once constructed, it or another rail carrier in the DM&E corporate family will operate the new lines. It states that in the latter circumstance, the operator will seek separate and appropriate Board authority prior to the commencement of rail service. WDR explains that, should WDR operate on the newly constructed lines, it and DM&E expect to exchange trains and change crews at Middle West Staging and Marshaling Yard at Wall, SD. The Mankato line and Owatonna line would likely be operated by DM&E pursuant to a separate lease or trackage rights arrangement with WDR.

36168

SERVICE DATE – SEPTEMBER 20, 2005

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34750]

Browns, Grayville & Poseyville Railway Company–Acquisition and Operation
Exemption–Owensville Terminal Company, Inc.

Browns, Grayville & Poseyville Railway Company (BG&P), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire and operate approximately 22.5 miles of rail line owned by Owensville Terminal Company, Inc. (OTC) in Edwards and White Counties, IL, and Gibson and Posey Counties, IN. The line runs between milepost 205.0 at or near Browns, IL, and milepost 227.5 at or near Poseyville, IN.

On February 25, 1998, a decision and notice of interim trail use or abandonment (NITU) was served in Owensville Terminal Company, Inc.–Abandonment Exemption–In Edwards and White Counties, IL and Gibson and Posey Counties, IN. STB Docket No. AB-477 (Sub No. 3X), establishing a 180-day period under the National Trails System Act, 16 U.S.C. 1247(d), for OTC to negotiate an interim trail use/rail banking agreement for the line. Trail negotiations were successful and an agreement was reached between OTC and Indiana Trails Fund, Inc. within the prescribed period. OTC has subsequently entered into an agreement with BG&P whereby, for value, OTC has conveyed its right to

35974

SERVICE DATE – JULY 20, 2005

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34719]

Cornhusker Railways LLC—Acquisition and Operation Exemption—Rail Line of DTE Rail Services, Inc.

Cornhusker Railways LLC (CHR), a noncarrier,¹ has filed a verified notice of exemption under 49 CFR 1150.31 to acquire by purchase from DTE Rail Services, Inc. (DTERS) and operate approximately 5.0 miles of rail line, as well as certain related yard, industry, side and spur tracks, between an interchange with BNSF Rail Company (BNSF) at milepost 103.55 near Ovina, and an interchange with Union Pacific Railroad Company (UP) at milepost 154.5 near Alda, in Hall County, NE.²

CHR certifies that its projected revenues as a result of the transaction will not exceed those that would qualify it as a Class III rail carrier and will not exceed \$5 million.

¹ CHR is controlled by noncarrier DTE Coal Services, which does not control any other carriers.

² DTERS purchased the line along with certain other adjacent rail facilities and associated structures from the U.S. Government in 2004 for use in the construction and operation of a railcar repair facility. The line connects with BNSF and UP, and DTERS has used the line as a private spur for the transfer of railcars between its shops and the two railroads. Under the proposed transaction, CHR will purchase both the track and the underlying right-of-way and will grant a non-exclusive, immediately terminable lease of the line back to DTERS for DTERS' non-common carrier use. CHR will retain the responsibility and the ability to provide common carrier service by means of reserved joint use rights.

36102

SERVICE DATE – SEPTEMBER 7, 2005

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34742]

~~Murray-Calloway Economic Development Corporation—Acquisition Exemption—~~

~~Hardin Southern Railroad, Inc.~~

Murray-Calloway Economic Development Corporation (EDC), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire by purchase from Hardin Southern Railroad, Inc., a rail line between milepost 38.34, near Murray, in Calloway County, KY, and milepost 30, near Hardin, in Marshall County, KY, a total distance of 8.34 miles.¹ EDC states that it does not intend to operate the line or to hold itself out to provide common carrier service.²

¹ This transaction is related to STB Finance Docket No. 34741, KWT Railway, Inc.—Lease and Operate—Murray-Calloway Economic Development Corporation, wherein KWT Railway, Inc. (KWT), has filed a notice of exemption to lease and operate the portion of rail line between milepost 38.34 and approximately milepost 37.34.

² EDC states that, "...[t]o the extent that the line is considered a 'line of railroad' the EDC intends to embargo or discontinue service over the rest of the line." Because EDC is acquiring the 8.34-mile line pursuant to 49 U.S.C. 10901, the entire line is a line of railroad, and EDC is acquiring a common carrier obligation to either provide service over all of it or assure that service is provided by another carrier. Should EDC seek to terminate that obligation in whole or in part in the future, it will need to file for authority to abandon or discontinue service. In connection with any such request, EDC should be aware of the Board's holding in The Land Conservancy of Seattle and King County—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389 (STB served Sept. 25, 1997).