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SERVICE DATE – JANUARY 19, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 647

CLASS EXEMPTION FOR EXPEDITED ABANDONMENT PROCEDURE  
FOR CLASS II AND CLASS III RAILROADS

AGENCY: Surface Transportation Board.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (Board) has received a proposal to create a class exemption under 49 U.S.C. 10502 for Class II and Class III railroads<sup>1</sup> from the prior approval requirements for abandonments under 49 U.S.C. 10903. A public hearing was held on August 31, 2004, to discuss the proposal. Before deciding whether to issue a Notice of Proposed Rulemaking (NPR), the Board seeks comments from interested persons on this proposal and possible alternatives to it, as detailed below.

DATES: Notices of intent to participate are due on February 2, 2006. Comments are due on March 6, 2006. Replies are due on April 4, 2006.

ADDRESSES: All notices of intent to participate and comments may be submitted **either** via the Board's e-filing format **or** in the traditional paper format. Any person using e-filing should comply with the instructions found on the Board's "www.stb.dot.gov" website, at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (referring to STB Ex Parte No. 647) to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION, CONTACT: Joseph Dettmar, (202) 565-1609. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

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<sup>1</sup> The Board's regulations divide railroads into three classes based on annual carrier operating revenues. Class I railroads are those with annual carrier operating revenues of \$250 million or more (in 1991 dollars); Class II railroads are those with annual carrier operating revenues of more than \$20 million but less than \$250 million (in 1991 dollars); and Class III railroads are those with annual carrier operating revenues of \$20 million or less (in 1991 dollars). See 49 CFR part 1201, General Instruction 1-1(a).

SUPPLEMENTARY INFORMATION: On May 15, 2003, sixty-five short-line and regional carriers (petitioners)<sup>2</sup> filed a petition to institute a proceeding under 49 U.S.C. 10502 to exempt a class of small carriers from the prior approval requirements for abandonments under 49 U.S.C. 10903. Petitioners included a detailed proposal, including revised rules for 49 CFR 1152.50 (exempt abandonments) and 1152.27 (offers of financial assistance). The Board issued a decision on August 13, 2003, to institute a proceeding and held a public hearing on August 31, 2004, to discuss the issues raised in petitioners' filing.

The Board has exclusive and plenary jurisdiction over the abandonment of rail lines. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319-21 (1981) (Kalo Brick); Phillips Co. v. Denver & Rio Grande Western R. Co., 97 F.3d 1375, 1376-78 (10th Cir. 1996), cert. denied, 521 U.S. 1104 (1997). Under 49 U.S.C. 10903, the Board may authorize abandonment if it finds that the present or future public convenience and necessity (PC&N) require or permit the abandonment. In making this public interest determination, the Board weighs the burden on shippers and communities from the loss of rail service against the burden on the carrier and interstate commerce from continued operation of the line at issue. Colorado v. United States, 271 U.S. 153 (1926). The Board considers all relevant factors, including profits or losses incurred from operating the line, costs avoidable by abandonment (such as maintenance

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<sup>2</sup> The sixty-five carriers are: Allegheny & Eastern Railroad, Inc.; Bradford Industrial Rail, Inc.; Buffalo & Pittsburgh Railroad, Inc.; Carolina Coastal Railway, Inc.; Commonwealth Railway, Inc.; Chicago SouthShore & South Bend Railroad; Chattahoochee & Gulf Railroad Co., Inc.; Connecuh Valley Railroad Co., Inc.; Corpus Christi Terminal Railroad, Inc.; The Dansville & Mount Morris Railroad Company; Eastern Idaho Railroad, Inc.; Genesee & Wyoming Railroad Company; Golden Isles Terminal Railroad, Inc.; H&S Railroad Co., Inc.; Illinois Indiana Development Company, LLC; Illinois & Midland Railroad Company, Inc.; Kansas & Oklahoma Railroad, Inc.; Knoxville & Holston River Railroad Co., Inc.; Lancaster and Chester Railway Company; Laurinburg & Southern Railroad Co., Inc.; Louisiana & Delta Railroad, Inc.; Louisville & Indiana Railroad Company; Minnesota Prairie Line, Inc.; Montana Rail Link, Inc.; New York & Atlantic Railway Company; Pacific Harbor Line, Inc.; Palouse River & Coulee City Railroad, Inc.; Pennsylvania Southwestern Railroad, Inc.; Piedmont & Atlantic Railroad Inc.; Pittsburg & Shawmut Railroad, Inc.; Portland & Western Railroad, Inc.; Rochester & Southern Railroad, Inc.; Rocky Mount & Western Railroad Co., Inc.; St. Lawrence & Atlantic Railroad Company; Salt Lake City Southern Railroad Company; Savannah Port Terminal Railroad, Inc.; South Buffalo Railway Company; South Kansas & Oklahoma Railroad Company; Stillwater Central Railroad; Talleyrand Terminal Railroad, Inc.; Three Notch Railroad Co., Inc.; Timber Rock Railroad, Inc.; Twin Cities & Western Railroad Company; Utah Railway Company; Willamette & Pacific Railroad, Inc.; Wiregrass Central Railroad Company, Inc.; York Railway Company; AN Railway, LLC; Atlantic and Western Railway, Limited Partnership; Bay Line Railroad, LLC; Central Midland Railway; Copper Basin Railway, Inc.; East Tennessee Railway, L.P.; Galveston Railroad, L.P.; Georgia Central Railway, L.P.; The Indiana Rail Road Company; KWT Railway, Inc.; Little Rock & Western Railway, L.P.; M & B Railroad, L.L.C.; Tomahawk Railway, Limited Partnership; Valdosta Railway, L.P.; Western Kentucky Railway, LLC; Wheeling & Lake Erie Railway Company; Wilmington Terminal Railroad, L.P.; and Yolo Shortline Railroad Company.

and rehabilitation costs) and the opportunity costs incurred by forgoing more profitable use of the carrier's assets elsewhere. Kalo Brick, 450 U.S.C. 311, 321 (1981). See also 49 CFR part 1152. The statute directs the Board also to consider whether the abandonment will have a serious, adverse impact on rural and community development. 49 U.S.C. 10903(d).

Over the years, Congress has taken steps to minimize needless burdens and delay in the regulatory process. See Railroad Ventures, Inc. v. STB, 299 F.3d 523, 529 n.1, 530-31 (6th Cir. 2002). Since 1980 it has encouraged the agency to streamline the regulatory process where appropriate. Under 49 U.S.C. 10502, the Board must exempt a transaction, person, or service, in whole or in part, from otherwise applicable statutory provisions when the Board finds 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 is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The Board has used this exemption power to simplify and expedite abandonment cases where it believes that closer regulatory scrutiny is unnecessary, and most requests for abandonment authority are now handled through the exemption process. A carrier seeking abandonment authority may petition the Board for an exemption for a particular line on a case-by-case basis. See 49 CFR 1152.60. Or, if no local traffic has moved over the line in at least 2 years, any overhead traffic can be rerouted, and no formal complaint filed by a user regarding cessation of service over the line is pending or has been decided against the railroad during the 2-year period, a carrier may utilize a class exemption for "out-of-service lines." See 49 CFR 1152.50(b); Exemption of Out of Service Rail Lines, 2 I.C.C.2d 146, 157-58 (1986), aff'd sub nom. Illinois Commerce Comm'n v. ICC, 848 F.2d 1246 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989) (Out-of-Service Exemption).

Petitioners claim that the existing procedures do not work well for small carriers. Petitioners argue that the data needed to support a full application under 49 U.S.C. 10903, i.e., base and forecast year statistics, come from the Board's Uniform System of Accounts, which only Class I carriers are required to use and report to the Board. Petitioners assert that small carriers typically lack the necessary data. They can try to compile the necessary information or ask the Board for a waiver, but neither option is attractive to small carriers. Petitioners maintain that the first option is too expensive. The second also involves expense, coupled with delay and uncertainty as to whether the waiver will be granted.

Petitioners also claim that filing a petition for exemption for an individual line under 49 U.S.C. 10502(a) poses challenges for small carriers. Although less data are required and filing expenses are lower, petitioners claim that the individual exemption process is too uncertain. Petitioners cite a Board decision that states that petitions for exemption are appropriate only where there is no opposition or operation of the line is clearly unprofitable. Central Railroad Company of Indiana – Abandonment Exemption – In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X) (STB served May 4, 1998). Petitioners argue that this standard discourages use of the petition for exemption process in all but the most routine cases. They also point out that a carrier must make its entire presentation in its initial filing, with no right to respond to comments and protests.

Petitioners claim that these deficiencies force carriers to forgo seeking abandonment authority until a line is eligible for the Out-of-Service Exemption. Petitioners assert that the result is that when a prudent small carrier makes the subjective business decision that a particular line is no longer viable, it will increase rates on the line and divert resources away from the line to other more productive parts of its system. This, in turn, forces any remaining traffic to find more economical alternatives. When the line becomes eligible, the carrier would then invoke the class exemption for out-of-service lines. Petitioners argue that this process wastes resources and deters potential offers of financial assistance (OFAs) to continue rail service under 49 U.S.C. 10904, because shippers will already have found alternative transportation and the physical assets will have deteriorated for at least 2 years.

To alleviate these perceived shortcomings in the Board's current procedures, petitioners have proposed a new class exemption for Class II and Class III carriers seeking abandonment authority. Under petitioners' proposal, Class II and Class III carriers would be eligible to abandon their lines by invoking a notice procedure. The carrier would publish relevant commercial and engineering information about the line in local newspapers and national railroad industry publications, in addition to filing with the Board a notice to be published in the Federal Register. Such a notice would contain: 3 years of aggregate carload and revenue data; a statement of physical condition of the line; an estimate of the rehabilitation, if any, that would be needed to bring the line up to Federal Railroad Administration class 1 standards; the net liquidation value (NLV) of the line; and information concerning connecting carriers, interchange locations, and any operating rights of third parties over the line. Other data would be made available upon request to an OFA offeror. Petitioners' proposed changes to the Board's abandonment rules are contained in the Appendix.

Under Petitioners' proposal, carriers that availed themselves of this class exemption procedure would waive any claim for the value of the line in excess of NLV. Also, if an OFA sale were consummated and the subject line connected only to the abandoning carrier, the abandoning carrier would be required to provide the purchaser with either haulage or trackage rights (at the abandoning carrier's choice), at commercially reasonable rates, to move any traffic to and from any connecting carrier with which traffic has moved during the 24 preceding months. The proposal would create a longer OFA filing period of 90 days and would, at the abandoning carrier's option, delay the need to file the historic and environmental reports required under the Board's environmental rules at 49 CFR 1105.7 and 1105.8 until after the OFA process. Under the proposal, carriers that elected to defer such reports would obtain only discontinuance authority and would not be able to remove track structure until such reports were completed.

In order to adopt a class exemption for small carrier abandonments, we would first have to find that, as a class, regulation of these transactions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. See 49 U.S.C. 10502. This analysis would require that we determine whether, on balance, those sometimes conflicting policies would be promoted or hindered by exemption from regulatory requirements that otherwise would apply. See Out-of-Service Exemption, citing Baggett Transportation Co. v. U.S., 666 F.2d 524, 530-31 (11th Cir. 1982). If regulation is not necessary, we would also have to find that either (a) the transactions are of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Petitioners argue that their proposal would meet this statutory test and should be issued for public review and comment and adopted. At the same time, petitioners acknowledged at the public hearing that some technical difficulties could exist with their rules as proposed and expressed a willingness to work with the Board in perfecting and improving them. Therefore, the Board is now issuing this Advance Notice of Proposed Rulemaking to request public comment on whether the proposed class exemption could meet the statutory criteria and allow the Board to meet its environmental responsibilities. Also, the Board seeks comment as to whether and how to improve the proposed rules. Finally, the Board is also seeking comment as to whether other changes to the Board's processes could alleviate the alleged deficiencies with the current abandonment process that petitioners have identified for Class II and Class III carriers. After reviewing the comments, the Board will decide whether to issue an NPR in this proceeding.

While we welcome comments on all aspects of petitioners' proposal, and any alternatives, we will briefly outline below initial concerns we have with the class exemption, as proposed by petitioners. First, section 10903 requires the Board to balance competing interests in determining whether the PC&N require or permit abandonment. Petitioners' proposed class exemption would require a finding that the balancing analysis under section 10903 is unnecessary for some classes of carriers based only on their annual revenue. Petitioners' proposal does not appear to contain sufficient data to support such a finding. To decide whether to issue an NPR proposing specific changes for Class II and Class III carriers, it would be useful to know the average length of lines abandoned by such carriers and the average number of shippers affected by such abandonments. In addition, some measure of the typical effect on local communities by such abandonments and the effects of deferred maintenance and increased rates on continued service on low volume lines would be helpful.

Second, Congress considered eliminating the PC&N test for all carrier abandonments during the consideration of the ICC Termination Act of 1995 (ICCTA), but ultimately did not do so. The House bill contained a proposed section 10703 that would have replaced section 10903 and 10904 and converted all applications for abandonment or discontinuance authority from the current PC&N standard into a notification process to "maximize the opportunity for the line to be acquired for continued operation by a smaller railroad, even though the line is revenue deficient for a large trunk carrier." H.R. Rep. No. 104-422, at 180-81(1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 865-66. The Senate amendment instead removed outdated provisions from the abandonment statute. The conference substitute passed by Congress retained the PC&N standard as formulated in the Senate amendment. The Board requests comments on how the Board could justify going beyond the action Congress took in ICCTA.

Third, under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4331-4335, the Board is required to examine the potential environmental impacts of proposed licensing actions subject to the Board's jurisdiction, including abandonments. The Section of Environmental Analysis (SEA) is the office responsible for ensuring compliance with NEPA and the National Historic Preservation Act, 16 U.S.C. 470 (NHPA). Under 49 CFR 1105.6(b)(2), SEA prepares Environmental Assessments (EAs) in most rail abandonment cases, analyzing the potential environmental and historic issues, and recommending appropriate mitigation. SEA

bases its analysis on information submitted by the carrier in the form of an environmental and historic report that sets forth the details of the proposed action, potential environmental impacts, and summarizes consultations conducted with relevant federal, state, and local entities. Petitioners' proposal would allow carriers the option of delaying the environmental and historic reports until after the OFA period has expired. This, they argue, would eliminate waste and expense by preventing the preparation of unnecessary reports in cases where an OFA results in the continued operation of the line. If a carrier elects to delay its reporting, under petitioners' proposed rules the carrier would have discontinuance authority until the environmental and historic reporting requirements are completed.

Discontinuance authority, however, also generally triggers the need for completion of an EA prior to the time the discontinuance of service is authorized. See 49 CFR 1105.6(b)(3). Petitioners acknowledge this by providing in their proposal that a carrier that utilizes this process would certify that the discontinuance would not result in operational changes exceeding the thresholds set forth at 49 CFR 1105.7(e)(4) and (5), and that the carrier had no plans to alter or remove any historic properties. Petitioners also compare their suggested discontinuance authority process to what takes place under a lawful embargo, i.e., a temporary cessation of rail service. The Board requests comments regarding whether the proposal put forth by petitioners would allow the Board to meet its responsibilities under NEPA and NHPA.

At the hearing, the Association of American Railroads (AAR) urged the Board to seek to expedite and improve its current historic review process, which, it believes, can significantly delay railroad abandonments. AAR stated that it was eager to work with the Board outside this proceeding to explore options to streamline the Board's historic reviews. AAR also indicated its support of the former Chairman's suggestion of meetings with representatives of the rail industry, the historic preservation community, and SEA. Since the hearing, SEA has consulted with representatives from AAR and the American Short Line and Regional Railroad Association (ASLRA) to determine the scope of the carriers' concerns. SEA has also provided extensive background information on the nature of these concerns to the Advisory Council on Historic Preservation (ACHP) and has apprised ACHP that the Board would like its assistance in developing appropriate streamlining options. In addition, SEA has met with the Executive Director of the National Conference of State Historic Preservation Officers (NCSHPO). With the assistance of an ASLRA representative, SEA is currently completing work on a White Paper, as requested by the NCSHPO. Furthermore, SEA has developed, at the carriers' suggestion, a guidance document (available on the Board's website under the "Environmental" button) to assist carriers in complying with NHPA in Board proceedings and thereby avoid unnecessary delay. SEA will continue working with the carriers and the historic preservation community on the streamlining initiative.

Finally, at the public hearing and in written testimony, the representatives of organized labor raised an additional concern regarding the class exemption as originally proposed. The unions expressed concern that it would be possible to create small carriers with few or no employees to act as a way to avoid labor protection. For example, they stated, a Class I railroad could spin off a failing line to a small-carrier shell with no or few employees under the class exemption for sales to Class III carriers, see 49 CFR 1150 subpart E, thus avoiding labor protection. The "small carrier" could then use petitioners' proposed class exemption to abandon

the line. Petitioners have acknowledged that such a practice would be a concern and expressed a willingness to explore ways to protect against such possibilities, such as including a holding period before the abandonment class exemption could be utilized. The Board requests public comment on whether to propose such a holding period, and if so, what the holding period should be and how it would work.

Given our initial concerns about some aspects of petitioners' class exemption, as proposed, and the perceived shortcomings petitioners see in the current abandonment regulations for smaller carriers, the Board also requests public comments on other possible ways to improve the abandonment process, and address the kinds of concerns petitioners have raised. For example, the 2-year out-of-service exemption has reportedly worked well since it has been adopted. Would a 1-year out-of-service exemption alleviate some of the frustrations with the current process evidently experienced by small carriers? Also, prior to ICCTA, 49 U.S.C. 10904(b) directed the agency to grant an abandonment application if no protest had been received within 30 days of filing. Would a similar, "no-protest" abandonment process for a petition for exemption improve upon the current process for small carriers? The Board seeks comments on these and any other proposals interested persons might submit.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: January 9, 2006

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams  
Secretary

## Appendix

**Subpart F—Exempt Abandonments and Discontinuances of Service and Trackage Rights  
§1152.50 Exempt abandonments and discontinuances of service and trackage rights.**

(a)(1) A proposed abandonment or discontinuance of service or trackage rights over a railroad line is exempt from the provisions of 49 U.S.C. 10903 if the criteria in this section are satisfied.

(2) Whenever the Board determines a proposed abandonment to be exempt from the requirements of 49 U.S.C. 10903, whether under this section or on the basis of the merits of an individual petition, the provisions of §§1152.27, 1152.28, and 1152.29 as they relate to exemption proceedings shall be applicable.

(b)(1) An abandonment or discontinuance of service or trackage rights is exempt under the out-of-service exemption if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending), or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

(2) An abandonment by a Class II or III carrier (Small Carrier) of a railroad line that has had traffic during the preceding 2 years shall be exempt if the abandoning Small Carrier complies with the applicable requirements of this section and with the environmental and historic report provisions of part 1105 of this title as applicable to abandonments (Small Carrier Exemption). Provided, however, the carrier may opt to commence the environmental and historic report process after the later of:

(i) The deadline for filing offers of financial assistance (OFAs), if no OFAs have been filed;

(ii) The date on which the Board issues a decision finding that no financially responsible person has submitted an OFA, in the event one or more OFAs are filed; and

(iii) The date on which the Board vacates its decision postponing the effective date of the exemption because one or more OFAs have been filed but no agreement for continued rail service has been entered. If an OFA results in continued rail service, the environmental and historic reporting requirements, as applicable to abandonments, will not apply. In no case shall this section be construed to permit a carrier to consummate an abandonment prior to completing the applicable environmental and historic process.

(c) The Board has found: (1) That its prior review and approval of these abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and

(2) That these transactions are of limited scope and continued regulation is unnecessary to protect shippers from abuse of market power. 49 U.S.C. 10502. A notice must be filed to use class exemptions. The procedures are set out in §1152.50(d). These class exemptions do not relieve a carrier of its statutory obligation to protect the interests of employees. 49 U.S.C. 10502(g) and 10903(b)(2). They also do not preclude a carrier from seeking an exemption of a specific abandonment or discontinuance that does not fall within this class.

(d) *Notices of exemption.* (1) At least 10 days prior to filing a notice of exemption with the Board, the railroad seeking the exemption must notify in writing:

(i) The Public Service Commission (or equivalent agency) in the state(s) where the line will be abandoned or the service or trackage rights discontinued;

(ii) The U.S. Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program);

(iii) The National Park Service, Recreation Resources Assistance Division; and

(iv) The U.S. Department of Agriculture, Chief of the Forest Service.

The notice shall name the railroad, describe the line involved, including United States Postal Service ZIP Codes, indicate that the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Board. The notice shall include the following statement “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.”

(2)(i) In out-of-service rail line exemption proceedings, the railroad must file a verified notice using its appropriate abandonment docket number and subnumber (followed by the letter “X”) with the Board at least 50 days before the abandonment or discontinuance is to be consummated. The notice shall include the proposed consummation date, the certification required in §1152.50(b)(1), the information required in §§1152.22(a)(1) through (4), (7) and (8), and (e)(4), the level of labor protection, and a certificate that the notice requirements of §1152.50(d)(1) and §1105.11 of this title have been complied with.

(ii)(A) *Notice to shippers.* In Small Carrier Exemption proceedings, at least 40 days prior to filing a verified notice of exemption under this section, the abandoning carrier shall serve a letter-notice on each shipper that is located on the line and has tendered or received traffic over the line in the preceding 36-month period. The letter-notice shall state that:

(1) The carrier intends to file a notice of exemption to abandon the line;

(2) Certain traffic and revenue data regarding the shipper will be made part of the Supporting Data packet provided for under §§1152.50(d)(2)(ii)(B) and 1152.27(d); and

(3) The shipper can request that such information not be included in the Supporting Data packet if the shipper serves on the abandoning carrier a written request for exclusion of such information within 5 days after the date of the letter-notice.

(B) *Verified Notice for Small Carrier Exemptions.* To qualify for the Small Carrier class exemption, the carrier must file a verified notice of exemption (Small Carrier Verified Notice) with the Board, using the carrier's appropriate abandonment docket number and subnumber (followed by the letter "X"). At the time of the filing, a copy of the Small Carrier Verified Notice also must be served on each shipper located on the line that has tendered or received traffic over the line during the preceding 36-Month Period. The carrier also shall publish the information from the Small Carrier Verified Notice (except for the map) for 3 weeks, in both a newspaper of general circulation in each county where the line is located, and in a nationally distributed, railroad-related trade publication. The carrier must begin publication within the 30-day period immediately preceding filing of the Small Carrier Verified Notice. The Small Carrier Verified Notice must contain a verified statement by an officer of the carrier providing the information required in §1152.50(d)(2)(i) and also the following additional information:

(1) A general description of the line and its operations, including the counties and states in which it is located, milepost designations of the line (to the extent available), any stations located on the line, the names of all connecting carriers and the points of interchange with such carriers, the names and addresses of all carriers that have operating rights over the line and the locations where such carriers operate;

(2) A description of the current physical condition of the line and, if all or any portion of the line is below FRA class 1 standard, as defined in part 213 of this title, an estimate of the cost to rehabilitate the line to that standard;

(3) The carrier's calculation of the net liquidation value (NLV) for the line, which the carrier will use in any OFA proceeding;

(4) A statement that, in connection with any OFA properly filed with respect to the line (or any part thereof), the constitutional minimum value of the line shall be equal to the line's NLV, and that the carrier waives any right to claim compensation in excess of NLV;

(5) The date the carrier intends to discontinue service over and/or abandon the line;

(6) A statement that any OFA must be received by the STB and the railroad's counsel or representative within 90 days after the date of publication of the notice in the Federal Register, pursuant to §1152.50(d)(3) (Federal Register Notice);

(7) A statement that, if any purchase through an OFA would result in shippers on the acquired line having no access to a third-party carrier (to or from which traffic has flowed within the preceding 24-month period) except via the abandoning carrier, the abandoning carrier will grant the purchaser either trackage or haulage rights at commercially reasonable rates; provided, however, the abandoning carrier shall have the sole discretion to determine which form of access to grant;

(8) A statement that, based on available information in its possession, the line does not contain federally granted rights-of-way, and that any documentation in the carrier's possession in this regard will be made available to requesting persons;

(9) A statement of whether the carrier believes the property to be abandoned is appropriate for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation;

(10) A statement of whether the carrier is willing to negotiate trail use;

(11) A statement, as appropriate, that either:

(i) The carrier already has filed the environmental and/or historic reports required by part 1105 of this title; or

(ii) Cessation of service will not exceed the environmental thresholds described in §§1105.7(e)(4)-1105.7(e)(5) of this title, there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older, and the carrier will file the appropriate environmental and/or historic reports after completion of the OFA process.

(12) A certification that the carrier is in compliance with the notice requirements of this §1152.50(d)(2)(ii)(B); and

(13) A statement that, in accordance with §1152.27(d), Supporting Data (including appropriate traffic and revenue information) will be provided upon request.

The information provided in the Small Carrier Verified Notice must be based on supporting materials containing pertinent data and documentation for three items: traffic and revenue attributable to the line, the physical condition of the line, and the net liquidation value (the Supporting Data). The Supporting Data must include, for the immediately preceding 36-month period (the 36-Month Period), the number and location of the shippers that have used or inquired about rail service over the line, the aggregate number of loaded cars tendered or received by shippers on the line (by month), and the average revenue per carload received for this traffic (by month). Regarding the physical characteristics of the line, the Supporting Data must contain information in the carrier's possession regarding: the general weight and condition (scrap or relay) of the rail and other track material present on the line; the estimated net tonnage of rail and other track material on the line; the date and a description of the most recent rail and tie replacement program (if known); the number and location of any bridges; and copies of the most recent track and bridge inspection reports (if any) in the carrier's possession. To the extent that the carrier claims a net liquidation value of the line that includes a value for real property, the Supporting Data must include documentation in the carrier's possession of: the total acreage held in fee; the average price per acre of such property (denoting differently priced parcels, if any); and a copy of any real estate appraisals performed within the preceding 24-month period. The Supporting Data need not include traffic and revenue data for shippers that timely request

that their data be excluded pursuant to §1152.50(d)(2)(ii)(A), but shall indicate that the shipper has requested exclusion.

(3) The Board, through the Director of the Office of Proceedings, shall publish a notice in the Federal Register within 20 days after the filing of the notice of exemption. The notice shall include a statement to alert the public 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. 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 publication. In out-of-service exemption proceedings, 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 the petition before the notice becomes effective. In Small Carrier Exemptions, petitions to stay the effective date of the notice on environmental or historic preservation grounds must be filed within 30 days after the date the environmental and historic reports are served on the appropriate agencies identified in §§1105.7(b) and 1105.8(c) of this title, and comments regarding environmental, energy or historic preservation matters also must be filed by this date. Petitions for reconsideration, comments regarding environmental, energy and historic preservation matters (except for such comments in Small Carrier Exemption proceedings), and requests for public use conditions under 49 U.S.C. 10905 and §1152.28(a)(2) must be filed within 20 days after publication. Requests for a trail use condition under 16 U.S.C. 1247(d) and §1152.29 must be filed within 10 days after publication. If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Board shall summarily reject the exemption notice.

(4) In out-of-service and Small Carrier rail line exemption proceedings under §1152.50, the Board, on its own motion, will stay the effective date of individual notices of exemption when an informed decision on pending environmental and historic preservation issues cannot be made prior to the date that the exemption authority would otherwise become effective.

(5) A notice or decision to all parties will be issued if use of the exemption is made subject to environmental, energy, historic preservation, public use and/or interim trail use and rail banking conditions.

(6) To address whether the standard labor protective conditions set forth in Oregon Short LineR. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), adequately protect affected employees, a petition for partial revocation of the exemption under 49 U.S.C. 10502(d) must be filed.

(7) *Effective date of exemption.* (i) In out-of-service exemption proceedings, the exemption will be effective 30 days after publication, unless stayed.

(ii) In Small Carrier Exemptions, absent a stay, if the carrier already has complied with the applicable provisions of part 1105 of this title, the exemption shall be effective 91 days after the date of the Federal Register Notice. If the carrier has not yet complied with the applicable provisions of part 1105 of this title, but has made the certification regarding environmental and historic matters provided for in §1152.50(d)(2)(ii)(B), then the carrier shall have the authority to

discontinue service beginning on the 91st day after the date of the Federal Register Notice. The authority to abandon shall become effective 30 days after the carrier has complied with the applicable provisions of part 1105 of this title, subject to any conditions imposed by the Board.

(e) *Consummation notice.* As provided in §1152.29(e)(2), rail carriers that receive authority to abandon a line under §1152.50 must file with the Board a notice that abandonment has been consummated.

## **Proposed 49 CFR 1152.27**

### **§1152.27 Financial assistance procedures.**

(a) *Provision of information.* An applicant in proceedings other than the Small Carrier Exemption must provide promptly upon request to a party considering an offer of financial assistance to continue existing rail service, and concurrently to the Board, the following:

(1)(i) In an application or petition for exemption proceeding, an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(ii) In a class exemption proceeding, either an estimate of the annual subsidy or the minimum purchase price, depending upon the type of financial assistance indicated in the potential offeror's formal expression of intent submitted under paragraph (c)(2)(i) of this section;

(2) Its most recent reports on the physical condition of the involved line; and

(3) Traffic, revenue, and other data necessary to determine the amount of annual financial assistance that would be required to continue rail transportation over that part of the railroad line. In an exemption proceeding, the data to be provided must at a minimum include the carrier's estimate of the net liquidation value of the line, with supporting data reflecting available real estate appraisals, assessments of the quality and quantity of track materials in a line, and removal cost estimates (including the cost of transporting removed materials to point of sale or point of storage for relay use), and, if an offer of subsidy is contemplated, an estimate of the cost of rehabilitating the line to Federal Railroad Administration class 1 Safety Standards (part 213 of this title).

(4) In Small Carrier Exemption proceedings, the carrier shall provide to any requesting person the Supporting Data described in §1152.50(d)(2)(ii)(B) within five days after receipt of a request. The deadline for requests for the Supporting Data shall be 65 days after the date the Board publishes notice of the exemption in the Federal Register under §1152.27(b)

(b) *Federal Register notice.* (1) *Abandonment and discontinuance applications.* The Federal Register publication, which gives notice of the filing of the application 20 days after the application is filed, will serve as notice to persons intending to offer financial assistance to assure continued rail service under 49 U.S.C. 10904 and these regulations as they relate to abandonment and discontinuance applications. Offers of financial assistance will be due 120 days after the

application is filed or 10 days after a decision granting the application is served, whichever occurs sooner.

(2) *Exemption proceedings.* (i) If a petition for individual exemption from the prior approval requirements of 49 U.S.C. 10903 is filed with the Board for abandonment or discontinuance of a line of railroad, the Board will publish notice of the petition in the Federal Register within 20 days of the filing of the petition. The Federal Register publication will serve as notice to persons with a potential interest in providing financial assistance to assure continued rail service on the line under 49 U.S.C. 10904 and these regulations as they relate to exempt abandonments and discontinuances. Offers of financial assistance will be due 120 days after the filing of the petition for exemption or 10 days after service of a Board decision granting the exemption, whichever occurs sooner.

(ii) If a notice of exemption is filed under one of the class exemption proceedings, the Board will publish notice of the exemption in the Federal Register within 20 days of filing. The Federal Register publication will serve as notice to persons with a potential interest in providing financial assistance to assure continued rail service on the line under 49 U.S.C. 10904 and these regulations as they relate to exempt abandonments and discontinuances. Offers of financial assistance will be due no later than 30 days after the date of the Federal Register publication giving notice of the exemption in out-of-service exemption proceedings. In Small Carrier Exemption proceedings, offers of financial assistance will be due no later than 90 days after Federal Register publication.

(c) *Submission of financial assistance offer.* (1) *Abandonment and discontinuance applications and petitions for exemption.* (i) *Service and filing.* An offeror must serve its offer of assistance on the carrier owning and operating the line and all parties to the abandonment or discontinuance application or exemption proceeding. The offer must be filed concurrently with the Secretary, Surface Transportation Board, Washington, DC 20423.

(A) An offer may be filed and served at any time after the filing of the abandonment or discontinuance application or petition for exemption. Once a decision is served granting an application or petition for exemption, however, the Board must be notified that an offer has previously been submitted.

(B) An offer, or notification of a previously filed offer, must be filed and served no later than 10 days after service of the Board decision granting the application or petition for exemption. This filing and service is subject to the requirements of §1152.25(d)(1), (d)(2) and (d)(4).

(C) If, after a bona fide request, applicant or petitioner has failed to provide a potential offeror promptly with the information required under paragraph (a) of this section and if that information is not contained in the application or petition, the Board will entertain petitions to toll the 10-day period for submitting offers of financial assistance under paragraph (c)(1) of this section. Petitions must be filed with the Board within 5 days after service of the decision granting the application or petition for exemption. Petitions should include copies of the prior written request for information or an accurate outline of the specific information that was orally

requested. Replies to these petitions must be filed within 10 days after service of the decision granting the application or petition for exemption. These petitions and replies must be filed on or before their actual due date under §1152.25(d)(4). The Board will issue a decision on petitions within 15 days after service of the decision granting the application or petition for exemption.

(ii) *Contents of offer.* The offeror shall set forth its offer in detail. The offer must:

(A) Identify the line, or the portion of the line, in question;

(B) Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations; governmental entities will be presumed to be financially responsible; and

(C) Explain the disparity between the offeror's purchase price or subsidy if it is less than the carrier's estimate under paragraph (a)(1) of this section, and explain how the offer of subsidy or purchase is calculated.

(2) *Class exemption proceedings.* (i) *Expression of intent to file offer.* Persons with a potential interest in providing financial assistance must, no later than 10 days after the Federal Register publication described in paragraph (b)(2)(ii) of this section in out-of-service exemption proceedings, and no later than 90 days after such date in Small Carrier Exemption proceedings, submit to the carrier and the Board a formal expression of their intent to file an offer of financial assistance, indicating the type of financial assistance they wish to provide (i.e., subsidy or purchase). Such submissions are subject to the filing requirements of §1152.25(d)(1) through (d)(3). Submission of a formal expression of intent under this subsection will automatically stay the effective date of the notice of exemption under the out-of-service class exemption for 40 days (normally, this will be 10 days beyond the date stated in the Federal Register publication), and will stay such effective date under the Small Carrier Exemption until the date the Board issues its decision regarding whether a financially responsible person has offered assistance pursuant to §1152.27(e)(2).

(ii) *Service and filing.* An offeror must serve its offer of assistance on the carrier that instituted the exempt filing as well as all other parties to the proceeding. The offer must be filed concurrently with the Secretary, Surface Transportation Board, Washington, DC 20423.

(A) An offer may be filed and served at any time after the filing of the notice of exemption. Once a notice of exemption is published in the Federal Register, however, the Board must be notified that an offer has previously been submitted.

(B) An offer, or notification of a previously filed offer, must be filed and served no later than 30 days after the Federal Register publication described in paragraph (b)(2)(ii) of this section. This filing and service is subject to the requirements of §1152.25 (d)(1), (d)(2), and (d)(4).

(C) If, after a bona fide request, applicant has failed to provide a potential offeror promptly with the information required under paragraph (a) of this section and if that information

is not contained in the notice of exemption, the Board will entertain petitions to toll the 30-day period for submitting offers of financial assistance under paragraph (c)(2) of this section. Petitions must be filed with the Board within 25 days after publication in the Federal Register (described in paragraph (b)(2)(ii) of this section), in out-of-service exemption proceedings, and within 5 days after the date on which the carrier was required to provide the Supporting Data in Small Carrier Exemption proceedings. Petitions should include copies of the prior written request for information or an accurate outline of the specific information that was orally requested. Replies to these petitions must be filed within 30 days after the publication in out-of-service exemptions and within 5 days after receiving the petition in Small Carrier Exemption proceedings. These petitions and replies must be filed on or before their actual due date under §1152.25(d)(4). The Board will issue a decision on petitions to toll the offer period within 35 days after publication in out-of-service proceedings, and within 10 days after the petition is timely filed in Small Carrier Exemption proceedings.

(D) Upon receipt of a formal expression of intent to file an offer under paragraph (c)(2)(i) of this section, the rail carrier applicant may advise the Board and the potential offeror that additional time is needed to develop the information required under paragraph (a) of this section. Applicant shall expressly indicate the amount of time it considers necessary (not to exceed 60 days) to develop and submit the required information to the potential offeror. For the duration of the time period so indicated by the applicant, the period for submitting offers of financial assistance under paragraph (c)(2) of this section shall be tolled without formal Board action.

(iii) *Contents of offer.* The offeror shall set forth its offer in detail. The offer must meet the requirements of paragraph (c)(1)(ii) of this section.

(d) *Access to documents.* Upon receipt by the carrier of a written comment under §1152.25 or a formal expression of intent under paragraph (c)(2)(i) of this section indicating an intent to offer financial assistance, or upon receipt by the carrier of an offer of financial assistance, whichever occurs earlier, the carrier must make available to that party or offeror the records, accounts, appraisals, working papers, and other documents used in preparing Exhibit 1 (§1152.36): if an out-of-service exemption proceeding, those documents that would have been used in preparing Exhibit 1 had an abandonment or discontinuance application been filed, or other records, reports, and data in the possession of the carrier seeking the exemption that provide comparable data; or if a Small Carrier Exemption proceeding, the Supporting Data described in §1152.50(d)(2)(ii)(B). These documents shall be made available during regular business hours at a time and place mutually agreeable to the parties, provided, however, the Supporting Data shall be sent to the requesting persons in Small Carrier Exemption cases. Notwithstanding the foregoing, in Small Carrier Exemption proceedings, the person seeking access to the Supporting Data shall certify to the Board that it seeks such information solely for use in connection with a potential OFA, before the carrier shall be obligated to furnish the Supporting Data.

(e) *Review of offers.* (1) *Abandonment and discontinuance applications.* The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will issue a decision postponing the effective date of the authorization for abandonment or discontinuance. This decision will be issued within 15

days of the service of the decision granting the application (or within 5 days after the offer is filed if the time for filing has been tolled under paragraph (c)(1)(i)(C) of this section, or within 5 days after expiration of the 120-day (4-month) period described in 49 U.S.C. 10904, if that occurs first). Under the delegation of authority at §1011.7 of this title, the Director of the Office of Proceedings will make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations. Appeals of initial decisions determining whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations will be acted upon by the entire Board pursuant to §1011.2(a)(7) of this title.

(2) *Exemption proceedings.* The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will postpone the effective date either of the decision granting a petition for individual exemption or the notice of exemption under a class exemption and partially revoke the exemption or (in the case of a class exemption) the notice of exemption to the extent it applies to 49 U.S.C. 10904. The decision to postpone and partially revoke will be issued within 15 days of the service date of a decision granting a petition for exemption, within 35 days of the Federal Register publication described in paragraph (b)(2)(ii) of this section, in out-of-service exemption proceedings, or within 5 days after the offer is filed in Small Carrier Exemptions or if the time for filing has been tolled under paragraph (c)(1)(i)(C) or (c)(2)(ii)(C) or (D) of this section. Under the delegation of authority at §1011.7 of this title, the Director of the Office of Proceedings will make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of partial revocation and institution of negotiations. Appeals of initial decisions determining whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of partial revocation and institution of negotiations will be acted upon by the entire Board pursuant to 49 CFR 1011.2(a)(7).

(f) *Agreement on financial assistance.* (1) If the carrier and a person offering financial assistance enter into a subsidy agreement designed to provide for continued rail service, the Board will postpone the effective date of the abandonment or discontinuance. If a decision granting a petition for individual exemption, or a notice of exemption, has been issued, the Board will postpone the effective date of the decision or notice of exemption. The postponement will be for as long as the subsidy agreement is in effect.

(2) If the carrier and a person offering to purchase a line enter into a purchase agreement which will result in continued rail service, the Board will approve the transaction and dismiss the application for abandonment or discontinuance, or the petition for exemption or notice of exemption. Board approval is not required under 49 U.S.C. 10901, 10902, or 11323 for the parties to consummate the transaction or for the purchaser to institute service and operate as a railroad subject to 49 U.S.C. 10501(a).

(g) *Failure to reach agreement on financial assistance.* (1) If the carrier and a financially responsible person fail to agree on the amount or terms of subsidy or purchase, either party may request the Board to establish the conditions and amount of compensation. This request must be filed with the Board within 30 days after the offer is made and served concurrently by overnight

mail on all parties to the proceeding. The request must be accompanied by the appropriate fee, codified at 49 CFR 1002.2(f)(26). Replies will be due 5 days later.

(2) If no agreement is reached within 30 days after the offer of purchase or subsidy is made, and no request is made to the Board to set the conditions and amount of compensation under paragraph (g)(1) of this section, the Board will serve a decision vacating the prior decision, which postponed the effective date of the decision granting the application, the decision granting the exemption, or the notice of exemption and, which, if applicable, partially revoked either the decision granting the exemption or (in the case of a class exemption) the notice of exemption. The Board will issue the decision to vacate within 10 days of the due date for requesting the Board to set the conditions and amount of compensation, and the Board will make the decision to vacate effective on its date of service.

(h) *Request to establish conditions and compensation for financial assistance.* (1) If the Board is requested to establish conditions and compensation for financial assistance under paragraph (g)(1) of this section, the Board will issue a decision within 30 days after the request is due.

(2) If the applicant receives multiple offers of financial assistance, requests to establish conditions and compensation will not be permitted before the applicant selects the offeror with whom it wishes to transact business. (See paragraph (1)(1) of this section.)

(3) A party requesting the Board to establish conditions and compensation for financial assistance must, within the time period set forth in paragraph (h)(4) of this section, provide its case in chief, including reasons why its estimates are correct and the other negotiating party's estimates are incorrect, points of agreement and points of disagreement between the negotiating parties, and evidence substantiating these allegations. The offeror has the burden of proof as to all issues in dispute. In Small Carrier Exemption proceedings, the carrier's case and evidentiary support must be based on the Supporting Data prepared in accordance with §1152.50(d)(2)(ii)(B) of this title.

(4) The offeror must submit all evidence and information supporting the terms it seeks within 30 days after the offer is made. The carrier's reply to this evidence and support for the terms it seeks are due within 35 days after the offer is made. No rebuttal evidence will be permitted and evidence and information submitted after these dates will be rejected.

(5) If requested, the Board will determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line. In Small Carrier Exemption proceedings, the Board may require the submission of additional information related to subsidies if necessary. Under 49 U.S.C. 10904(f)(4)(B), no subsidy arrangement approved under §10904 shall remain in effect for more than one year unless mutually agreed by the parties.

(6) If requested, the Board will determine the price and other terms of sale. The Board will not set a price below the fair market value of the line (including, unless otherwise agreed upon by the parties, all facilities on the line or portion necessary to provide effective

transportation services). Fair market value equals constitutional minimum value which is the greater of the net liquidation value of the line or the going concern value of the line. The constitutional minimum value is computed without regard to labor protection costs. Notwithstanding the foregoing, in Small Carrier Exemption proceedings, the carrier shall have no claim to an amount in excess of the net liquidation value in acquisitions under this section, as carriers waive any right to such value when using the Small Carrier Exemption proceeding.

(7) Within 10 days of the service date of the Board's decision, the offeror must accept or reject the Board's terms and conditions with a written notification to the Board and all parties to the proceeding. If the offeror accepts the terms and conditions set by the Board, the Board's decision is binding on both parties. If the offeror withdraws its offer or does not accept the terms and conditions set by the Board with a timely written notification, the Board will serve, within 20 days after the service date of the Board decision setting the terms and conditions, a decision vacating the prior decision, which postponed the effective date of either the decision granting the application or exemption or the notice of exemption, and which, if applicable, partially revoked the exemption or (in the case of a class exemption) the notice of exemption (unless other offers are being considered under paragraph (1) of this section). The decision to vacate will be effective on its date of service.

(i) *Substitution of purchasers and disposition after sale.* (1) Prior to the consummation of a purchase under this section, an offeror may substitute its corporate affiliate as the purchaser under an agreement, provided the Board has determined either:

- (i) The original offeror has guaranteed the financial responsibility of its affiliate; or
- (ii) The affiliate has demonstrated financial responsibility in its own right.

(2) Except as provided in paragraph (i)(3) of this section, a purchaser under this section may not:

(i) Transfer the line or discontinue service over the line prior to the end of the second year after consummation of the original sale under these provisions; or

(ii) Transfer the line, except to the carrier from whom the line was purchased, prior to the end of the fifth year after consummation.

(3) Paragraph (i)(2) of this section does not preclude a purchaser under this section from transferring the line to a corporate affiliate following the consummation of the original sale. Prior Board approval of the affiliate's acquisition and operation, however, is required under 49 U.S.C. 10901, 10902, or 11323. A corporate affiliate acquiring a line under this section is prohibited from discontinuing service over the line or transferring the line to a party that is not a corporate affiliate during the time periods prescribed in paragraph (i)(2) of this section.

(4) Notwithstanding anything to the contrary in these regulations, in a Small Carrier Exemption proceeding, no person who acquires a rail line under this section may use the Small

Carrier Exemption procedures to abandon the acquired line prior to the end of the fifth year after consummation.

(j) *Discontinuance of subsidy.* A subsidizer may discontinue a subsidy under this section by giving 60 days' notice of the discontinuance to the applicant and all other parties to the proceeding. Unless another financially responsible party enters into a subsidy agreement as beneficial to the carrier as the discontinued subsidy agreement in a situation where the 1-year time limit of 49 U.S.C. 10904(f)(4)(B) has not yet run, the carrier may by filing a request with the Board and serving the request on all parties to the abandonment or exemption proceeding obtain a decision vacating the decision postponing the effective date of either the decision granting the application, or petition for individual exemption, or the notice of exemption. The Board will issue a decision to vacate within 10 days after the filing and service of the request. This decision to vacate will be effective on its service date.

(k) *Default on agreement.* If any party defaults on its obligations under a financial assistance agreement, any other party to the agreement may promptly inform the Board of that default. Upon notification, the Board will take appropriate action.

(l) *Multiple offers of financial assistance.* (1) If an applicant receives more than one offer to purchase or subsidize the line from offerors found to be financially responsible, the applicant must select the offeror from those with whom it wishes to transact business. In abandonment and discontinuance application and petition for exemption proceedings within 25 days after service of the decision granting the application or petition for exemption, in out-of-service class exemption proceedings within 45 days after the Federal Register publication described in paragraph (b)(2)(ii) of this section, and in Small Carrier Exemption proceedings, within 15 days after the deadline for filing OFAs, the railroad must:

- (i) File a written notification of its selection with the Board; and
- (ii) Serve a copy of the notification on all parties to the proceeding.

(2)(i) *Abandonment and discontinuance applications and petitions for exemption.* If the applicant has received multiple offers of financial assistance from persons found to be financially responsible and has selected the offeror with whom it wishes to transact business, the negotiating parties shall complete the sale or subsidy agreement or request the Board to establish the conditions and amount of compensation within 40 days after the service date of the decision granting the application or petition for exemption. A request to the Board to set terms and conditions must be served concurrently on all parties to the proceeding. If no agreement on subsidy or sale is reached within the 40-day period and the Board has not been requested to establish the conditions and amount of compensation, any other financially responsible offeror may request the Board to establish the conditions and amount of compensation. This request must be filed at the Board within 50 days of the service date of the decision granting the application or petition for exemption and served concurrently on all parties to the proceeding. If no other request is filed, the Board will issue a decision authorizing abandonment or discontinuance within 60 days of the service date of the decision granting the application or petition for exemption. This decision will be effective on the date of service.

(ii) *Class exemption proceedings.* If the carrier seeking the exemption has received multiple offers of financial assistance from persons found to be financially responsible and has selected the offeror with whom it wishes to transact business, the negotiating parties shall complete the sale or subsidy agreement or request the Board to establish the conditions and amount of compensation within 60 days after the Federal Register publication described in paragraph (b)(2)(ii) of this section in out-of-service exemption proceedings, or within 45 days after the deadline for filing OFAs in Small Carrier Exemption proceedings. A request to the Board to set terms and conditions must be served concurrently on all parties to the proceeding. If no agreement on subsidy or sale is reached within the applicable period and the Board has not been requested to establish the conditions and amount of compensation, any other financially responsible offeror may request the Board to establish the conditions and amount of compensation. This request must be filed at the Board within 70 days of the Federal Register publication described in paragraph (b)(2)(ii) of this section in out-of-service exemption proceedings, or within 60 days after the deadline for filing OFAs in Small Carrier Exemption proceedings, and served concurrently on all parties to the proceeding. If no other request is filed, the Board will issue a decision vacating the decision postponing the effective date of the notice of exemption within 80 days of the Federal Register publication described in paragraph (b)(2)(ii) of this section in out-of-service exemption proceedings, and within 10 days after the deadline for secondary requests to establish terms in Small Carrier Exemption proceedings. The decision to vacate will be effective on the date of service.

(3) If the Board has established the conditions and amount of compensation, and the original offer is withdrawn under paragraph (h)(7) of this section, any other offeror found to be financially responsible may accept the Board's decision within 20 days after the service date of the Board's decision setting terms and conditions. If the decision is accepted by another such offeror, the Board will require the applicant to accept the terms incorporated in the Board's decision.

(m) *Additional time for filing.* Notwithstanding the deadlines previously set forth in §1152.27 for filing an offer of financial assistance, parties that can show that they would be materially prejudiced by having less than the full 4 months for filing an offer of financial assistance provided in 49 U.S.C. 10904(c) for application proceedings may seek relief under part 1117 of this title.

(n) *Special provisions for summary discontinuance and abandonment of lines not part of the Final System Plan.* (1) Board authorization is not needed for the cessation of service on a line of railroad formerly in reorganization that was not included in the Final System Plan (Plan) under the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 et seq., as amended by the Railroad Revitalization and Regulatory Reform Act of 1976, if the line has been continuously subsidized since the inception of the Plan. To provide an opportunity for rail service continuation through offers of financial assistance, however, the owner of the line must give not less than 60 days' notice of a discontinuance, and beginning 120 days after discontinuance, not less than 30 days' notice of abandonment. Designated operators need only comply with the notice requirements of §1150.11 of this title. In instances of discontinuance by a designated operator, the line owner is not obligated to operate the line. Notice is to be sent by the line owner to the Board, the governor and transportation agencies and the government of each

political subdivision of each state in which such rail properties are located and to each shipper who has used the rail service during the previous 12 months. The Board will generally apply the OFA procedures in this section (49 CFR 1152.27) for class exemptions to summary abandonment and discontinuance notices (except that the Board will not postpone the effective date of a summary discontinuance). For example, notice of summary abandonment or discontinuance will be published by the Board in the Federal Register within 20 days of filing. Paragraph (b)(2)(ii) of this section. Expressions of intent to file an offer must be filed no later than 10 days after the Federal Register publication. Paragraph (c)(2)(i) of this section. An offer must be filed within 30 days of the Federal Register publication. Paragraphs (b)(2)(ii) and (c)(2)(ii)(B) of this section. The Board will review offers to determine if a financially responsible person has offered assistance. If this criterion is met, the Board will postpone the effective date of the summary abandonment (but not the discontinuance) within 35 days of the Federal Register publication. Paragraph (e)(2) of this section. If the carrier and financially responsible person fail to agree on the amount or terms of subsidy or purchase, either party may request the Board to establish the conditions and amount of the compensation. This request must be filed within 30 days after the offer of purchase or subsidy is made, and the Board will issue a decision within 30 days after the request is due. Paragraphs (g)(1) and (h)(1) of this section.

(2) Where a designated operator is being used, it shall be paid a reasonable management fee. If the parties cannot agree on this fee, it shall be four and one-half percent of the total annual revenues attributable to the branch.