SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C.

Docket No. EP 714

INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING

INTERCHANGE COMMITMENTS

COMMENTS OF

THE AMERICAN SHORT LINE AND REGIONAL

RAILROAD ASSOCIATION

Keith T. Borman
Vice President & General Counsel
American Short Line and Regional Railroad Association
Suite 7020
50 F Street N.W.
Washington, D.C. 20001-1564
Telephone 202-628-4500
Fax: 202-628-6430
Email: kborman@aslrra.org

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THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION

The American Short Line and Regional Railroad Association ("ASLRRA") respectfully submits the following comments on the Surface Transportation Board's ("Board") November 1, 2012, Notice of Proposed Rulemaking ("NPR") that would require railroads to develop and include additional information in notices of or petitions for exemption ("Exemption Proceedings") for transactions to acquire, lease or operate rail lines subject to interchange commitments. In the NPR, the Board (i) defines interchange commitments as "contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad"[1] and (ii) proposes significant revisions, including eight new disclosure obligations, to the Board's rules at 49 C.F.R. §§ 1121.3(d), 1150.33(h), 1150.43(h) and 1180.4(g)(4) (the "Proposed Rules").

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[1] NPR at 2 (citing *Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League*, EP 575, slip op. at 1 (STB served Oct. 30, 2007)).

For the reasons set forth below, the ASLRRA submits the Proposed Rules will have a significant and disproportionate impact on the approximately 560 Class II and Class III railroads[2] and the non-carriers seeking to become railroads[3] that comprise the short line industry, which industry provides a critical service to the shipping community. The impact of what appears to be procedural rule changes will have a chilling effect on line sales and leases that is contrary to the public interest and inconsistent with the Board's objectives in establishing rules for Exemption Proceedings in the first instance. The end result will mean additional abandonments and discontinuances by Class I carriers that will hurt rail customers and rural communities that depend on continued rail service. Moreover, both the existing Board rules and the Railroad Industry Agreement ("RIA") already provide sufficient means to address the Board's concerns regarding disclosure of interchange commitments. The Proposed Rules request disclosure of information that would be frequently unavailable, difficult to calculate and competitively sensitive, without a clear explanation of how such information will be used by the Board or other parties. Finally, the burdens of the Proposed Rules have been vastly underestimated by the Board. Consequently, the ASLRRA submits the Board should not adopt the Proposed Rules.

I. Background on the Short Line Industry and Emergence of Interchange Commitments

Today, short line railroads operate approximately 50,000 miles of track[4] and in many instances have emerged as the competitive solution in the face of the consolidation of the Class I

[2] Source: American Short Line and Regional Railroad Association, *Short Line Facts and Figures,* 2012 Edition, p. 10.

[3] For purposes of these Comments, the term "short lines" includes Class II and Class III railroads and non-carriers who are parties to Exemption Proceedings.

[4] Source: American Short Line and Regional Railroad Association, *Short Line Facts and Figures,* 2012 Edition, p. 12.

railroad industry over the course of the last several decades. The small railroad segment of the railroad industry has been a growing success story ever since the 1980 passage of the Staggers Act, although the climb to successful levels of operation has been a steep and difficult one.

Short lines have been a part of the national transportation infrastructure as long as the railroad industry has existed in the United States, but it was only deregulation begun by *Staggers* that triggered the explosive growth of short lines seen in the last thirty years. Since 1980 most small railroads have been formed from Class I spin-offs of light-density lines that were headed for abandonment or discontinuance. The small railroads are operating over rail lines that the Class I's did not want, and the short lining of such lines avoided abandonments and discontinuances that would have occurred otherwise. As these rail lines transitioned from the Class I's to short lines through lease or acquisition, interchange commitments emerged as a mechanism to address the reality that short line purchasers and lessees had limited capital to finance these transactions and the ongoing operations and line rehabilitation frequently necessary. Further, the limited capital that did exist was necessary to run these small, entrepreneurial operations and fund years of deferred maintenance. The interchange commitments were a solution that permitted the transactions to take place on financial terms acceptable to the Class I railroads and offered the shippers an ongoing rail transportation option that would have otherwise been eliminated.

As a result, interchange commitments created transactions in which all parties involved were satisfied. Short line railroads were able to acquire or lease a line that they could not otherwise afford, and to operate it profitably, and shippers were able to receive improved and locally-focused rail service on lines that would have otherwise been abandoned, discontinued or allowed to gradually deteriorate, rendering them impossible to operate over safely and efficiently. Class I railroads were able to transfer lines that were not economic for them to operate. Countless small communities in rural areas have maintained their connection to the national rail transportation network because short lines committed to continue rail service. Continued short line operation on low density lines has kept employment in regions desperate for economic activity, and small volume shippers in all areas have discovered that short lines are eager for their business, providing them an economical and dependable transportation alternative to higher cost trucks. Despite interchange commitments, these small, local railroads keep huge areas of the country connected to the national rail network, particularly in rural areas and small towns. For instance, in 36 states these short lines operate more than 25% of the state's rail network.[5] Absent this locally based service, thousands of shippers would have to move their products by truck or relocate their facilities. These same short lines account for approximately 12,000 jobs on the short lines and tens of thousands of jobs with the shippers and receivers that they serve. The existing statutory and regulatory structure, including specifically the existing regulations for Exemption Proceedings has facilitated the ability of these small businesses to acquire and operate hundreds of small, light-density, line segments throughout the United States that otherwise would have been abandoned or discontinued.

The continued viability of this segment of the rail industry is, however, not guaranteed in the face of the Proposed Rules. The ASLRRA is concerned that the Proposed Rules would thwart the growth of the short line industry with the expiration of leases that have interchange commitments. In addition, the Proposed Rules would also create a huge disincentive for Class I railroads to consider spinning off segments in the future that would make more sense economically to be operated and/or owned by a short line. Either scenario would be

[5] Id., pp. 45-46.

unquestionably detrimental to the short line industry and to shippers and communities served by short lines over the near and long-term. It is the ASLRRA's view that the STB should retain the existing regulatory structure that has promoted and facilitated the development of a viable and sustainable national rail network, in general, and the small railroads in particular, and should not adopt the Proposed Rules.

II. The Proposed Rules Are Inconsistent with the Historic Premise for Exemption Proceedings

The existing regulations regarding acquisitions under 49 USC §10901 were originally adopted by the Board's predecessor, the Interstate Commerce Commission ("ICC"), to provide an inexpensive and expeditious mechanism for short lines to be formed or to acquire rail lines. The Board later adopted similar regulations for acquisitions by existing carriers under 49 USC §10902. When adopting the exemption for Section 10902 transactions, the Board noted:

> In explaining the House provision introducing section 10902, the provision adopted by Congress, the Conference Report on the ICCTA states:
>
> * * * [T]his new provision * * * establishes a clear statutory division between transactions involving large Class I railroads on the one hand and smaller railroads on the other. This should promote clearer and more expeditious handling of the affected transactions and avoid imposing additional and sometimes potentially fatal costs on start-up operations of smaller railroads who often can keep rail lines in service, even if not viable as part of a larger carrier's system.

Class Exemption for Acquisition or Operation of Rail Lines by Class III Rail Carriers Under 49 U.S.C. 10902, 1 STB 95, 101 (1996) (citing *H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 179-80 (1995)*). In adopting the new exemption, the Board pointed out that Congress specifically directed, through 49 USC §10502, that the Board continue to use its exemption power to expand existing statutory deregulation. *Id.* at 102-103. The Board went on to note how the new exemption under Section 10902 (which mirrored the exemption under Section 10901) was consistent with the exemption requirements:

> By limiting the level of regulatory review of such transactions and by relying upon the more expeditious notice of exemption procedure, the Board's regulation of Class III acquisitions will be facilitated and reduced. …
>
> … Major changes in rail operations or competitive relationships between railroads are not likely to occur because, under the exemption, the purchasing carrier's operation will merely supplant the selling carrier's operation. …
>
> Regulation of Class III acquisitions is not necessary to protect shippers from the abuse of market power under 49 USC § 10502(a)(2)(B). Competition or transportation options for the shipping public typically will not be lessened. Rather, continued rail operations made possible by such acquisitions should improve service for shippers and decrease the cost of its provision.

Id., at 103. Significantly, the Board determined not only would the reduction in regulatory barriers advance the growth of short line carriers but that it would also allow them "to preserve rail service and rail employment on lines that might otherwise be lost through abandonment." *Id.*, at 105. This finding mirrored what the ICC found when it first adopted the regulations for Section 10901 exemptions, that in most instances the transactions will serve to preserve service to shippers:

> Transfer of a line to a new carrier that can operate the line more economically or more effectively than the existing carrier serves shipper and community interests by continuing rail service, and allows the selling railroad to eliminate lines it cannot operate economically. Transfer before a financial crisis (with attendant plans for abandonment) helps assure continued viable service.

Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901, 1 ICC 2d 810, 813 (1985).

The Proposed Rules will unnecessarily negate the intended goals of the exemption regulations by imposing additional unwarranted costs and delays on the applicant short lines.

Further, to the extent the regulations will, as further discussed below, inhibit transactions that include any interchange commitment, they will either cause additional acquisition or lease costs to be borne by the short line (taking away funds that could be used for rehabilitation of the line or investment in new facilities or causing the need for higher rates) or cause service over the lines to be abandoned or discontinued.

The current Exemption Proceedings have always provided additional notice and information requirements when the transaction is "bigger" (where a Class I or Class II carrier will be created) where the risk of competitive harms has been determined to be higher. 49 CFR §§ 1150.35, 1150.45. Accordingly, in such transactions, advance notice to shippers and governmental officials is required that includes a general statement of service intentions and of labor impacts. In addition, the periods before the notice becomes effective are longer. Since the Section 10901 exemption was originally adopted, additional time and information requirements have been added to the exemption process in all Exemption Proceedings, already making the process longer and more expensive – the effective date is now thirty days after filing instead of the original seven (for larger transactions, forty-five days instead of thirty); if the projected revenues of the carrier after the transaction will be in excess of $5,000,000, additional advance notice to labor must be provided; and there are additional requirements that already have been adopted requiring the disclosure of interchange commitments. These additional requirements have already caused delays and added expense to the exemption process, and have served to undercut the original purposes and intent of the rules adopted by the ICC and the Board. Adopting the Proposed Rules would further undercut such purposes and intent as they are inconsistent with the following goals of rail transportation policy as set forth in 49 USC §10101:

> (2) The regulations will increase regulatory control over these Exemption Proceedings and will potentially encourage challenges to such proceedings making them less expeditious;
> (3) By making sales to short lines less likely, and abandonments more likely, the likelihood of preserving effective competition between rail carriers and other modes will decrease;
> (5) If higher purchase prices result (as a consequence of the elimination of the interchange commitments), short line purchasers will have less funds available for investment into their facilities, and will seek higher rates; favorable economic conditions in transportation will not be fostered; and
> (7) The new regulations raise, rather than reduce, regulatory barriers to entry into the industry.

In addition, the exemption statute (49 USC § 10502) provides, and the premise of these exemptions in particular is, that the exemptions should be granted where there is little likelihood of harm and where any concerns can be remedied "after-the-fact," including through revocation. *Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 ICC 2d 810, 811 (1985). The Board has considered (and denied) petitions to revoke in several of the proceedings cited in the NPR at 4, n.17. *See Middletown & NJRR – Lease and Operation Exemption – Norfolk Southern Ry*, FD 35412 (STB served September 23, 2011); *Adrian & Blissfield Rail Road Company – Continuance in Control Exemption – Jackson & Lansing Railroad Company*, FD 35410 (STB served September 27, 2011)(decided jointly with FD 35411 and FD 35418). The Board has provided no justification in the NPR as to why it no longer considers after-the-fact remedies to be adequate in Exemption Proceedings involving interchange commitments.

The ICC and Board have previously found that the original Exemption Proceedings were not likely to change the competitive landscape. Nothing has changed since these determinations. Indeed, existing shippers and existing traffic will suffer no reduction in the number of serving carriers even with the presence of an interchange commitment. Moreover, existing shippers are already advised of the interchange commitments under the existing rules in Exemption Proceedings, and new shippers and new traffic are already protected from potential harm resulting from interchange commitments through the Railroad Industry Agreement, a private sector solution that allows for short lines to obtain waivers of interchange commitments. In sum, the Proposed Rules are inconsistent with the Congressional mandate to encourage exemptions and avoid unnecessary regulation and will have a chilling effect on transactions involving short lines that is contrary to the public interest.

III. Current Rules and Processes Exist for Interchange Commitments

a. Existing Rules Address the Disclosure Needs of Shippers

In Ex Parte No. 575 (Sub-No.1) the Board amended its regulations for Exemption Proceedings to introduce the first interchange commitment disclosure requirements.[6] Filers must disclose the existence of any interchange commitments contained in the proposed transaction as well as the location of affected interchange points. Importantly, filers must also submit confidential copies of all transaction documents that relate or refer to the interchange commitment. Based on the existing disclosures, interested shippers may upon a motion obtain copies of those confidential commercial documents to analyze and evaluate their impact and decide whether to oppose the requested exemption.

Armed with the transaction documents, shippers have all the information they need to make a preliminary decision: will the interchange commitments create a potentially adverse effect on service? If the shipper concludes it will, it can ask the Board to deny the Exemption Proceeding and require a more substantial proceeding to review the proposed transaction in

[6] See 49 CFR §§ 1121.3(d), 1150.43(h) and 1180.4(g)(4).

detail. In that subsequent examination, the shipper may discover any necessary information it feels it needs to support or oppose the transaction.

As the Board has noted in the NPR, since the existing interchange commitment disclosure rules were implemented, there have been ten proceedings that have involved interchange commitment disclosures. In those proceedings, no shipper filed a motion to review the interchange commitments and in no cases did any shipper file to oppose or reject the requested exemption. In fact the only challenges were filed by labor interests and shippers supported the transactions. *Middletown & NJ, supra; Adrian & Blissfield, supra.* The Board allowed the exemptions in each of the ten proceedings, except for one that was rejected without prejudice for failure to file all of the relevant documents.

With the interchange commitment language already available to shippers in any Exemption Proceeding, there is no new need to require railroads to file, *ab initio,* in all future Exemption Proceedings the additional information required by the Proposed Rules. None of the additional information required by the Proposed Rules enhances an individual shipper's analysis of how a proposed interchange commitment might affect its own rail service. For example, it is hard to believe that a shipper to be served by a short line does not already know or cannot easily determine the identity of the third-party railroads that physically interchange with the line sought to be acquired without the assistance of a new regulatory mandate. Similarly, the shipper does not need a list of the other shippers that currently use or have used the line within the last two years or the number of carloads handled by such other shippers to make an initial determination if an interchange commitment might have an adverse effect on its own service. Further, price differential and discounted annual value (both of which are required in the Proposed Rules) have not been referenced by the Board in any of its decisions in the interchange commitment proceedings it cites in the NPR.

Since the proposed new disclosure information, assuming it were relevant, can be obtained if necessary at a later stage of any proceeding before the Board, requiring such information at the outset places an unnecessary burden on the subject commercial transactions in general and the small railroad participants in particular. It is also not clear that the filer in the Exemption Proceeding will have access to or be able to calculate the valuations that the Proposed Rules would require. Even if it could, collecting the new data would impose additional time requirements on the filer to obtain the data, require expertise the filer would not necessarily have, and add costs to every transaction involving interchange commitments. Experience with the current interchange commitment disclosure regulations suggests that in the vast majority of Exemption Proceedings involving interchange commitments no protest or objection will be forthcoming, so the imposition of the cost of even more disclosures on all such transactions is not justified.

The introduction of a proposed new set of interchange commitment disclosure requirements suggests to the ASLRRA that the Board attributes the absence of an onslaught of Exemption Proceeding objections since the adoption of the current rules to a paucity of data. The Proposed Rules seem to presume that interchange commitments are inherently bad policy and should be challenged, although in Ex Parte 575 (Sub-No. 1), and in the ten proceedings so far under the current rules, the Board has not made such a determination. In other words, the Board seems to imply that if only shippers had enough facts, they would rise up in greater numbers against the interchange commitments. However, the ASLRRA submits that shippers have not objected historically because the shippers recognize that post-transaction they are unlikely to experience any adverse change to the competitive status quo. Further, the shippers understand that they will likely receive improved service from the acquiring short line going forward, and, with respect to new business they understand the protections afforded by the RIA that are described in more detail below. In fact, as noted above, in the challenged exemption proceedings, shippers supported the transactions that were challenged.

b. The RIA Offers a Mechanism to Eliminate Interchange Commitments Where Necessary

First executed by all Class I and most Class II and Class III railroads in 1998, the RIA was created to maximize efficient and non-discriminatory interchange among large and small railroads. As amended in 2004, it strengthens the ability of small railroads to avoid the restrictions of interchange commitments in most cases where new railroad business on the line is at stake. As indicated in the Verified Statement of Reilly McCarren, Co-Chair of the Railroad Industry Working Group ("RIWG"), that the RIWG is filing in this proceeding, over the years dozens and dozens of requests to waive an interchange commitment have been submitted, and the overwhelming majority has been granted, year in and year out. As short lines have taken over more and more deliveries of cars on the "last mile" of rail lines, the volume of successful interchange commitment waivers brought under the RIA has removed any perceived concern that existing interchange commitments will restrict the development of new business.

Rail shippers are not unsophisticated innocents. With the data already available to them they are perfectly capable of making informed decisions concerning the effects of interchange commitments on the transportation of their products. That there have been no objections by shippers arising out of the Board's current disclosure rules, and so many successful waiver requests under the RIA, strongly suggests that requiring more and more irrelevant data disclosure will not increase the number of objections; it will simply impede commerce needlessly.

c. The Specific Disclosure Obligations in the Proposed Rules Are Flawed

Certain of the specific disclosure obligations required as part of the Proposed Rules are fraught with problems for the short lines that will comprise the filing parties. The Proposed Rules are at best ambiguous and require information that may not exist or be available and is not required to determine the potential competitive effects of an interchange commitment. The inability to comply with the Proposed Rules will exacerbate the chilling effect of the rules on *any* future sales or leases involving interchange commitments and/or lead to lease expirations.

Perhaps the most glaring example of problems with the Proposed Rules is the requirement that the short line provide "an estimate of the discounted annual value of the interchange commitment *to the Class I* (or other incumbent carrier) leasing or selling the line." (Emphasis added). If the Class I refuses to supply the information (either because it has not performed the calculation or for proprietary reasons), then it would fall on the shoulders of the short line to try to provide it. Few short lines have the financial staff necessary to dedicate the time and effort to accomplish this task, and retaining an outside expert, even if possible, would likely be costly and time consuming. Additionally, without further specificity, this requirement is extraordinarily ambiguous. It is highly unlikely that the short line would be capable of estimating the valuation period, the terminal value assumptions, growth rates in traffic, marginal costs of incremental traffic, track maintenance expenses, system impacts and other key inputs of the Class I that would be critical to the valuation. With so many unknown variables, any calculations would be highly unreliable, and the results would not be meaningful for any analysis. It is also unclear how the Board intends to use the analysis in a proceeding - whether the Board is reserving the right to comment on such inputs or evaluate the calculations or their effect on the purchase or lease price, and if so, if this is within its statutory mandate. [7]

Similarly, "an estimate of the difference between the sale or lease price with and without the interchange commitment" is not likely to be calculable by the short line. The short line would be required to analyze the value of new traffic, and the value of some unknown portion of existing traffic, on a hypothetical route that is without precedent. Further, Class I railroads approach these transactions differently and transactions involving interchange commitments are not likely to be structured in the alternative, but rather, the interchange commitment is a critical component of the transaction, which transaction would simply not take place if it were eliminated. Additionally, as interchange commitments continue to exist in secondary acquisitions (*i.e.*, transactions involving the transfer of a rail line from an existing short line owner to a subsequent purchaser or operator), to the extent the Proposed Rules apply, the original Class I contractual counterparties to the interchange commitment are unlikely to be a party to the transaction, and will have no incentive to provide the required disclosure. Consequently, the Proposed Rules will not only chill new spin offs or lease transactions with Class I railroads, but would likely preclude the ability of existing short line owners to sell or otherwise transfer their operations to a new owner/operator, which will eventually decimate the short line industry.

An additional example of the problems facing short line filers under the Proposed Rules involves the ambiguity in the requirement that the filing party provide "a list of third party railroads that <u>could</u> physically interchange with the line sought to be acquired or leased." (Emphasis added). It is unclear how the filing party would determine what third party railroads

[7] See 49 USC 10501.

"could" physically connect with the line. This requirement could be construed to include possible build-ins or build-outs, or other proximate rail connections. While those that actually physically connect will be readily identifiable (and already known to the shipper), determining what railroads could connect would require a determination of what railroads are in some radius of the line and performing an engineering study of each to determine if it were possible for there to be a build-in or build-out between the line and the other railroad. The Proposed Rules seem to require the filing party to do a full analysis of the alternative routes, environmental impacts, real estate acquisition costs and costs of construction that would be necessary if authority for a build-in or build-out were to be considered, and to make a determination about whether such construction would be economically feasible or allowed by the Board. Such requirements would require substantial time and expense to be expended by the filer.

Further, the Proposed Rules are ambiguous as to how the short line filer should address or disclose contractual limitations not related to interchange commitment that may operationally limit physical interchange. For instance, if a short line merely has overhead trackage rights that connect to the line with the interchange commitment, the Proposed Rules are ambiguous as to how hypothetical interchange locations along the trackage rights line should be disclosed.

Furthermore, "the percentage of the purchasing/leasing railroad's revenue projected to be derived from operations on the line with the interchange commitment" is also required. In many cases, short lines establish new carriers or legal entities to handle the traffic resulting from a spin off. Consequently, the answer to this disclosure obligation would likely be 100% of the revenue and likely be meaningless to the Board. To the extent the interchange commitment applies to only specific shippers or specific commodities handled on the line, the percentage will not be relevant to a determination by the shipper of whether it will be affected by the interchange commitment. Or, in other situations, by providing the percentage of revenue from the new line compared to revenue from an existing line, the short line could be indirectly disclosing valuable and confidential information about an existing rail segment that they operate that is not related to the Exemption Proceeding. A shipper, if determining whether to challenge an interchange commitment, will be concerned only whether its traffic will be affected by the commitment and not what percentage of traffic will be affected. Thus, it is not clear how the provision of such revenue information would further the analysis of an interchange commitment.

Additionally, the Proposed Rules add notice requirements that go beyond what is necessary. In addition to the public notice provided by the Board's publication of all filings, the filing short line would be required to provide notice to all shippers that have used the line in the last two years before the proposed transaction with the interchange commitment becomes effective, regardless of whether those shippers have stopped shipping by rail, have moved off of the line or have closed. By comparison, under the current regulations, in Exemption Proceedings involving the creation of a Class II or Class I carrier, only those customers shipping more than 50% of the total carloads on a line during the previous 12 months need to be notified of the proposed transaction. 49 CFR §§1150.35(b)(4); 1150.45(b)(4). It makes little sense for there to be more extensive and burdensome shipper notification requirements in a smaller Exemption Proceeding just because an interchange commitment is involved.

All of these problems with the Proposed Rules will make it difficult, if not impossible, for the filing short line to be able to assemble the information necessary to satisfy the new disclosure requirements, and therefore will frustrate their ability to undertake any transactions that involve an interchange commitment, which will have a detrimental impact on the rail industry and a chilling effect on the transactions that are critical to short lines.

IV. The Burdens Are Vastly Underestimated

As noted in the NPR, the Board is required under the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, to assess accurately the effect of the Proposed Rules on "small entities" and to determine whether the collection of information required by the Proposed Rules is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. NPR at 6-7. As discussed above, the ASLRRA does not believe that the additional information required by the Proposed Rules is necessary or appropriate for the Board to consider in Exemption Proceedings, irrespective of any interchange commitment. Accordingly, any additional burden imposed by the Proposed Rules is unwarranted. Moreover, the ASLRRA submits that the Board has substantially underestimated the burden that the Proposed Rules would have on short lines and small businesses.[8] The Board's determination that only four transactions per year would be subject to the Proposed Rules for all rail carriers is understated. The Board does not seem to recognize that in upcoming years there will be an increased number of leases with interchange commitments coming up for renewal as many of the early spinoff leases begin to expire.

As described in Section III. C. above, the Proposed Rules overestimate the ability of short lines to obtain and provide the information required, and understate the time and expense that would be necessary to prepare the information even if it were available. The requirement to notify any shipper that may have used the line within the previous two years (even if that shipper

[8] No Class III carriers have over 500 employees. In fact, the typical short line has only 18 employees. Accordingly, all Class III carriers, and non-carriers seeking to become Class III carriers, should qualify as small business entities. *See* NPR at 7, n.22. Also note that in support of its conclusion that there will not be any adverse effects on small businesses, the Board uses the definition of small businesses used by the Small Business Administration instead of its own definition. Using the Board's own definition of Class II and III carriers, which limits Class III to those with $34.7 million or less in revenue and Class II railroads to those with revenues between $34.7 million and $433.2 million would add hundreds of employers to the list of potentially adversely affected parties and would show that the Board's conclusion that only a small number of railroads would be affected by the Proposed Rule is incorrect and that in fact, a substantial number of small businesses could be affected.

has stopped shipping by rail, has moved away or has closed) will involve costs and a significant time commitment. In order to establish that service has been made, the acquirer will likely have to send the notices by certified mail or other means by which it can prove that notice was in fact made. The cost of preparing and sending the notices will of course vary by the number of current or former shippers that the Class I railroad identifies, and could be substantial.

It is unclear how the filing party will determine what third party railroads "could" physically connect with the line. Determining what railroads could connect would take a considerable amount of outside study, time, and expense.

Because lines are generally offered for sale or lease by a Class I carrier at a certain price based on the interchange commitment that the Class I has decided to require as part of the transaction, the filing party will in most cases not have any way of estimating the difference between the sale or lease price without the interchange commitment.

Similarly, there is no way for the filing party to know if the Class I has calculated the discounted annual value of the interchange commitment and even if it has, the Class I will not likely share that calculation with the filing party. Again, it would be difficult if not impossible for a filing party to make the determination on its own.

In addition to not properly considering the burdens its requirements would have on the filing parties, the Board has not examined the potential burden of the Proposed Rules on entities other than the successful purchaser/lessee that becomes the filer. The Proposed Rules will affect not only the successful purchaser/lessee but also all other entities that might also be seeking to purchase or lease the same line from the divesting Class I who will have to seek or calculate the information as part of its due diligence on the acquisition or lease of the line. Also, there could be potential economic impacts and burdens on shippers[9] whose carload data must be submitted with the filing and who may not want other shippers on the line or competitors to know information about their shipments. The Board clearly has not considered these burdens or implications or the time associated with preparing the required additional information that it assumes will be readily available in its determination of the burden associated with the Proposed Rules. None of these analyses would be easy or inexpensive to prepare, and the eight hour estimated burden of complying with the Proposed Rules is a gross understatement of the time needed to gather, calculate and produce the information. Further, as the Board has not relied on the requested information previously in performing its analyses, it is not clear that the Proposed Rules and associated disclosures are necessary for the Board to perform its functions.

If transactions are chilled and lines are abandoned or discontinued, there will be adverse economic impacts on those short lines that might have acquired the lines and on those shippers that will lose service. To the extent transactions are completed without interchange commitments, the burden of the increased acquisition costs will be passed along to the short line making the acquisition, resulting in either fewer funds to address deferred maintenance of the line and likely higher rates for shippers.

V. Conclusion

The Board may view the Proposed Rules as a modest expansion of its original interchange commitment disclosure requirements, but the Board is tinkering with the simplified

[9] It is likely that many shippers on the light density lines that are often the subject of transactions with interchange commitments will be small business entities as well. The Class I railroads do not tend to divest lines that have substantial shippers located on them.

regulatory review processes that by its own conclusion "led to the rebirth of the short line railroad industry."[10] As the Board has also noted:

> The benefits of this growth in short lines have been substantial… The proliferation of short lines was an integral part of the restoration and improved stability of the rail industry. The role of short line railroads will continue to be important to the national rail network system.[11]

The unintended consequences of the seemingly small disclosure rule changes will stop in its tracks the growth of the short line railroad industry so lauded by the Board. This would also have adverse impacts on shippers, many of whom are also small businesses, as well as on small railroads.

Growth of the short line industry will stop because the transactions that have spurred much of the industry expansion will cease and many existing leases may simply expire. They will cease because the margin of economic advantage created by the streamlined Exemption Proceedings will be overwhelmed. Short line operators do not have the capacity to staff or fund the discovery and analysis of the additional data and economic analysis the Board seeks; the production burden of which will fall on the acquiring short lines.

For large carriers the disincentives for producing the additional proposed data will be even greater. Production of analyses of discounted cash flow predictions will disclose more than just the Class I assumptions of the transaction at hand. It will provide a significant window into the much larger strategic assumptions and plans of the divesting carriers, plans which the Class I railroads justifiably consider highly proprietary and confidential for competitive reasons. The large carriers likely will not trade off the major risk of divulging their strategic roadmap for the

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[10] Decision, *Disclosure of Rail Interchange Commitments,* STB Ex Parte No. 575 (Sub-No. 1), at 2 (STB served Oct 30, 2007).

[11] Id.

relatively minor benefit of spinning off a few miles of underperforming branch lines to a short line.

Thus, the unintended consequences of the Proposed Rules are grave. Not only will the substantial benefit of the growth of short lines be lost to shippers but the divesting Class I railroads will be left to exercise their previous best alternative to dealing with the problem of underperforming lines: abandonment or discontinuance. This is an end-game much worse than the Board's worst case scenario for a short line spin off containing an interchange commitment. With an interchange commitment a shipper on the line is in no worse position than it was before the transaction. Its products may continue to move by the same Class I carrier on the long haul as before but the shipper will gain the additional benefits of improved short line service that it may have lacked when its connection was a Class I afterthought. But in fact the shipper will almost always be better off than the status quo ante because as the ASLRRA and the Verified Statement of Reilly McCarren have demonstrated, the Railroad Industry Agreement has worked to assure that shippers have additional options for new traffic even where interchange commitments are present. This has been borne out by experience; shippers have not protested any of the transactions in which interchange commitments have been disclosed under the current rules.

If Class I railroads see abandonment or discontinuance as a better option in light of the Proposed Rules, shippers and local communities lose rail transportation to abandonment and discontinuance, and short lines lose opportunities to growth their business and rail network. Furthermore, the jobs on the short lines, at shippers and in the local communities in which the short lines and shippers operate would be lost. For these reasons, the ASLRRA strongly urges the Board to recognize the burdens of the Proposed Rules, to leave the current interchange commitment disclosure rules in place as is, and to resist the unintended consequences of hobbling one of the regulatory processes that it is universally acknowledged has spurred the growth of short lines and provided unprecedented vitality to the nation's rail transportation system.

Respectfully submitted,

American Short Line and Regional Railroad Association

Keith T. Borman

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By: **Keith T. Borman**
Vice President & General Counsel