

BEFORE THE SURFACE TRANSPORTATION BOARD

EX PARTE NO. 647

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

COMMENTS OF THE RAIL CONFERENCE,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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The Rail Conference of the International Brotherhood of Teamsters¹ ("RC" or "Rail Conference") respectfully submits the following brief comments on the Board's Advanced Notice of Proposed Rulemaking, served on January 19, 2006. These Comments should be construed to incorporate by reference all earlier comments and testimony offered by the BMWED, BLET and the Rail Labor Division of the Transportation Trades Department of the AFL-CIO.²

¹ The Rail Conference consists of the Brotherhood of Maintenance of Way Employes Division ("BMWED") and the Brotherhood of Locomotive Engineers and Trainmen ("BLET"), two autonomous Divisions within the International Brotherhood of Teamsters. Both BMWED and BLET previously filed notices of appearance in this proceeding and they are consolidating their comments under the umbrella of the Rail Conference.

² At earlier points in this proceeding, both BMWED and BLET were members of the Transportation Trades Department of the AFL-CIO.

The Rail Conference notes that both the initial petition and the regulations proposed in the APNR attempt to sidestep the fundamental nature of rail carrier operations in the United States; rail carriers are public utilities with obligations and responsibilities to groups beyond their shareholders. In an era of crude oil prices in excess of \$60 a barrel, the need for an integrated, energy-efficient transportation system is a matter of national security. Any procedures that ease the permanent elimination of rail lines from this nation's transportation net should be looked upon by the Board with disfavor.

Moreover, the tone of both the petition and the APNR is the ideological proposition that regulation makes our life difficult for the regulated industry, life for the regulated shouldn't be difficult, therefore regulations should be eliminated. The point, however, is that despite the Staggers Act and the Interstate Commerce Commission Termination Act, rail carriers remain a regulated public utility in the United States. Those regulations require that a rail carrier make a compelling case to abandon a line that remains in service carrying both local and overhead traffic. Instead, the APNR would treat the provision of rail carrier service like that of a sandwich shop, something that could close up at any time with little advance notice to its customers. While patrons of a sandwich shop usually can find a

suitable replacement nearby, a customer or community that relies on rail service for its economic livelihood typically has no such easy alternative.

The Board notes a number of policy considerations that allegedly motivated the Petitioners to seek this new Rule: 1) that Class II and Class III carriers do not keep financial records consistent with the Board's Uniform System of Accounts; 2) the use of a petition for exemption creates uncertainty for the petitioner; and, 3) that existing procedures cause Class II and Class III carriers to downgrade service on a line until it has no value for rail carrier operations. APNR at 3-4. Each of the concerns either is irrelevant or can be addressed by a far less dramatic remedy than the one proposed in the APNR.

First, if the Class II and Class III carriers have financial records that do not correspond to the Uniform System of Accounts, then they should petition the Board for a rulemaking on that issue. Obviously these carriers must comply with generally accepted accounting procedures in keeping their books, so it should not be difficult for them to propose a rule that would substitute a different accounting system for Class II and Class III abandonment applications.

Second, the fact that seeking an exemption by petition creates uncertainty, while true, is not grounds for changing the

procedure. A petitioner, by definition, carries a burden of convincing the petitioned party. In other words, there is no "certainty" that any petition will be approved. If "uncertainty" were a reason for creating class exemptions from regulation, perhaps the Board should issue a blanket class exemption on all proceedings to eliminate this baneful "uncertainty." That course of action, obviously, is risible; so is the Petitioners' argument here.

Finally, the Petitioners contend the existing system compels them to downgrade service on marginal lines so that they eventually will become eligible for the out-of-service exemption for abandonments. However, that argument presupposes that the Petitioners have tried to reform the abandonment application processes, yet they haven't. The argument also presupposes that the "uncertainty" surrounding petitions for exemption are a basis for a wholesale change to the rules and creation of an expansive class exemption for abandonment of in service rail lines. However, "uncertainty" is part of the human condition and certainly not a sound legal or policy basis for the Board to permit the easy wholesale abandonment of in service rail lines throughout the country.

Although the Rail Conference submits the Board should withdraw the APNR in its entirety, we also submit the following specific exceptions and comments to the proposed Rules.

I. THE USE OF A CLASS EXEMPTION FOR THE ABANDONMENT OF ACTIVE RAIL LINES VIOLATES THE ICCTA

The APNR acknowledges this fundamental problem, APNR at 5, when the Board notes that "Congress considered eliminating the [Public Convenience and Necessity] PC&N test for all carrier abandonments during the consideration of the [ICCTA], **but ultimately did not do so.** (emphasis added)" As the Board notes, Congress expressly rejected the argument that elimination of the Public Convenience and Necessity (PC&N) test would "maximize the opportunity for the line to be acquired for continued operation by a smaller railroad." Essentially, that is the same policy argument advanced by the Petitioners in this proceeding.

The point obscured by the Petitioners' ideological points is that their proposal contemplates the permanent elimination of active rail lines upon filing of a notice that **assumes** that the PC&N test is met. While one could argue that the use of a class exemption in line acquisitions under Section 10901 also contains the same fundamental flaw, at least those transactions involve continued operation of the rail line in question and indeed that was the major policy argument used to support the class

exemption's creation. The use of a class exemption for abandonment of active rail lines is the antithesis of the Section 10901 class exemption. In this proceeding, the Petitioners have adduced no empirical evidence that a class exemption can meet the PC&N for abandonment of an active rail line and the Board certainly has engaged in no investigation of the problem other than this proceeding. While Section 10502 may indicate a Congressional preference for the use of exempt proceedings when possible, nothing in that Section indicates a Congressional intent to ignore other Sections of the Act or permit the creation of class exemptions on the basis of ideological arguments unsupported by empirical evidence. The Rail Conference submits that the Board's adoption of the Petitioners' proposed rule without that empirical underpinning would be contrary to the clear language of Section 10903.

II. THE APNR DOES NOT PROTECT THE INTERESTS OF EMPLOYEES AFFECTED BY THE ABANDONMENTS PERMITTED BY THE PROPOSED CLASS EXEMPTION

A. The *Oregon Short Line* Employee Protective Conditions Are Mandatory In Any Partial Abandonment, Whether Exempt Or Not

The APNR contains a very confusing provision regarding an employee protective issue that states: "To address whether the standard labor protective conditions set forth in *Oregon Short Line R. 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.”³ This provision implies that employee protective conditions would not be automatically imposed as a condition of the use of the class exemption in the event of partial line abandonments. If so, the proposed exemption violates the ICCTA.

Section 10903(b)(2) expressly provides that employees affected by an abandonment subject to that section will receive protections “at least as beneficial to those interests as the provisions established under sections 11326 (a) and 24706 (c) [1] of this title.” Those provisions are the *Oregon Short Line* conditions. Further, Section 10502(g), the statutory grant by Congress to the Board to exempt certain transactions, expressly states “[t]he Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.” Therefore, the minimum level of employee protection available to employees in an exempt abandonment proceeding must be the *Oregon Short Line* conditions. Therefore, to the extent the confused and confusing language in the proposed rule conflicts with that explicit statutory obligation, it must be removed and replaced with a

³49 C.F.R. §1152.50 (d)(2)(ii)(C)(6). The layout of the proposed regulation also is obscure and confusing.

clear statement that employees affected by an exempt proceeding under the Rule will receive, at minimum, the *Oregon Short Line* protective conditions.

- B. The Board Must Require Any Class II Or Class III Carrier Seeking To Use The Class Exemption To Have Owned And Operated The Line In Question For 36 Months

The Board correctly notes that Rail Labor earlier expressed a concern that the proposed class exemption could be used by a Class I carrier to evade its employee protective obligations under the Act. APNR at 6. Essentially, a scenario could develop where a Class I carrier disposes of a line of railroad to a "non-carrier" that acquires the line under the class exemption contained at 49 C.F.R. §1150. That "noncarrier" would become a rail carrier on the date of acquisition and nothing in the APNR prohibits that new carrier from turning around immediately and using the proposed class exemption to the abandon the recently acquired line. Therefore, any employee protective conditions attaching to the abandonment would apply to the very few, if any, employees of the new abandoning carrier.⁴

The solution to this situation is simple. The Board should impose a 36-month period following acquisition of the line before

⁴The employees of the Class I carrier affected by the earlier line sale cannot obtain Board imposed employee protective conditions on that transaction pursuant to Section 10901.

the owning carrier can attempt to utilize the abandonment exemption. This period of time is substantial enough that the owning carrier must make a *bona fide* attempt to provide rail common carrier service on the line.

The other alternative to a blanket 36-month waiting period could be the following. If an acquiring carrier uses the abandonment exemption anytime within 36 months of acquiring the line from another carrier, then the employees who performed service on the line of the transferring carrier in the 12 months preceding the transfer will be deemed "displaced employees" under the *Oregon Short Line* conditions. The test period averages for those employees would be based on their work histories in the 12 months preceding the original transfer of the line. The protective period, however, would extend for up to 6 years following the effective date of the abandonment by the acquiring carrier.

* * * * *

The Rail Conference submits the Board should discontinue this proceeding and reject the rule proposed by Petitioners. However, in the event the Board proceeds to a formal rulemaking procedure, the proposed rule must contain the employee protective provisions set forth in II above. The Rail Conference makes this recommendation while reserving all rights to submit any

additional comments and objections and challenge any final rule as contrary to law or an abuse of agency discretion.

Respectfully submitted,

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Certificate of Service

I certify that today I served by first class mail a copy of the above "Comments" upon those parties of record in the database maintained by the Board in this proceeding.

A handwritten signature in cursive script that reads "Donald F. Griffin".

Donald F. Griffin

Date: March 6, 2006