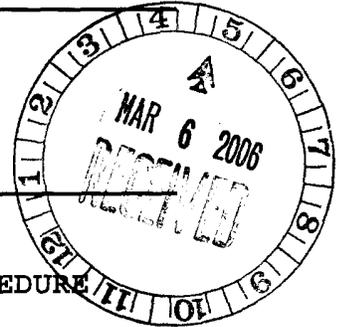


BEFORE THE
SURFACE TRANSPORTATION BOARD

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ORIGINAL

PETITION FOR RULEMAKING

STB EX PARTE NO. 647



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

COMMENTS OF

Delta Southern Railroad Inc.
Housatonic Railroad Company, Inc.
New York Cross Harbor Railroad Term. Corp.
Permian Basin Railways
San Pedro Rail Operating Co.
Wisconsin & Southern Railroad Co.

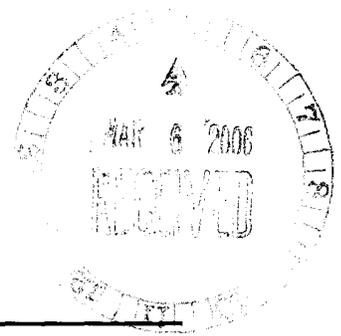
ORIGINAL

Respectfully submitted,

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Dated: March 6, 2006

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SURFACE TRANSPORTATION BOARD



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INTRODUCTION

On January 19, 2006, in response to a petition filed by a group of short line and regional railroads ("the Petitioners"),¹ the Board instituted a rulemaking proceeding addressing abandonment procedures for class II and III railroads with initial comments due March 6 and any replies due April 4, 2006. The parties submitting comments here (hereafter "the Parties") are six unrelated short line and

¹ Petitioners include the Allegheny & Eastern Railroad, Inc., and 46 other class II regional and class III short line railroad carriers. Petitioners originally filed their rulemaking petition on May 15, 2003.

regional railroad owners² who are jointly submitting these comments. The Parties support the overall thrust of Petitioners' position as contained in their May 15, 2003, submission but want to add some additional comments based upon their own experiences or experiences of other carriers with which they are acquainted.

SPECIFIC COMMENTS

The Parties comments address the following concerns about the current Board abandonment process. They are:

1. Procedure
2. Protests
3. Evidence
4. Filing fees
5. Offers of financial assistance
6. Environmental and historic compliance

Abandonment procedures. Currently a railroad seeking to abandon a line has three potential procedures available to it: (1) "class exemption" by verified notice for an "out of service" rail line abandonment (or discontinuance)³ under 49 CFR 1152.50; (2) an individual petition for exemption under 49 U.S.C. 10502; and (3) a formal abandonment application. Common to each is the somewhat laborious preparation and public distribution of a draft

² The Parties include Delta Southern Railroad Inc., Housatonic Railroad Company, Inc., New York Cross Harbor Railroad Term. Corp., Permian Basin Railways, San Pedro Rail Operating Co., and Wisconsin & Southern Railroad Co. The parties are described in Exhibit A.

³ Hereafter the term "abandonment" shall include both abandonment and discontinuance of service.

environmental and historic report along with appropriate transmittal letters.⁴ Similarly common to each is the preparation, posting, and publication in a general circulation local newspaper of a public notice of the abandonment. At that point the similarity ends.

Assuming the line has been out of service for at least two years,⁵ it will be eligible for expedited abandonment by means of a "class exemption" notice under 49 CFR 1152.50, effective 50 days later. If the line is currently handling traffic, no matter how minimal, it is not eligible for that expedited procedure. Instead, the railroad is faced with the Hobsons' choice of filing an individual petition for exemption or a formal application. Filing a petition carries the risk that it may be denied or rejected in the face of significant shipper or political opposition requiring the petitioner to reapply all over again. Filing an application not only requires the applicant to review the Board's arcane and intimidating Standards for Determining Costs, Revenues, and Return on Value⁶ and

⁴ The applicant must revise and file the environmental and historic report with its abandonment request.

⁵ The Board's regulations interpret the term "out of service" to mean that no local traffic has moved over the line for at least two years, any overhead traffic can be rerouted over other lines, and there are no formal complaints by an on-line shipper for cessation of service that is either pending at the Board or in federal court or has been decided against the applicant within the past two years.

⁶ 49 CFR 1152 Subpart D.

analyze and assemble complex economic, engineering, and appraisal data required by those regulations but to pay the Board a large filing fee to process its case.⁷

Additionally, the application process typically takes another couple of months because of the need for the applicant to file (or have filed) a System Diagram Map or Narrative and a Notice of Intent.⁸

Petitioners' proposal would change that process by inverting the steps the applicant must currently follow. Instead of first preparing and distributing the draft environmental and historic report followed by revising and resubmitting the same document along with its notice, petition, or application, Petitioners' proposal would allow the railroad to begin the abandonment process by first sending a letter notice to each shipper that has used the line during the past 36 months advising about the abandonment and offering to provide upon request a "packet" of Supporting Data (information about the line) to assist persons desiring to acquire (or preserve service over) the line through the offer of financial assistance ("OFA") process. 40 days later the railroad would then file a verified notice of exemption with the Board, would serve

⁷ The newspaper notice requirements for an application are more substantial than those required for an abandonment petition.

⁸ 49 CFR 1152.10-13, especially 49 CFR 1152.13(c); 49 CFR 1152.20.

copies of the notice on shippers, and would publish information describing the line in a general circulation newspaper covering the counties served by the line and a national railroad industry trade publication. Should the line be acquired or service preserved through the OFA process, applicant would then be spared the necessity of complying with the environmental and historic procedures, a very good step.

Protests. Under current procedures a party can challenge an abandonment by filing a protest to either a petition for exemption or an application.⁹ If the protestant carries sufficient "clout" with the Board, it can defeat a petition for exemption under Board precedent holding that individual petitions for exemption are not suitable for protested abandonments. See, e.g., Central Railroad Company of Indiana - Abandonment Exemption - In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X, served May 4, 1998). While there is precedent at the Board stating that the petition procedure is available for lines that are "clearly unprofitable" despite the filing of protests, the Board has

⁹ A protestant cannot effectively challenge an "out of service" abandonment except by showing that the abandonment is ineligible for using this procedure because the line has not been out of service for two years, there are shipper complaints that are either pending or decided against the applicant, or that overhead traffic cannot be rerouted.

not followed this precedent consistently. In fact, there are cases where the Board has approved abandonment petitions with minimal evidence over substantial shipper or government agency opposition and cases where the Board has denied petitions for lines where the economics were clearly marginal although the evidentiary showing was far less than that required for an application. Compare Sierra Pacific Industries-Abandonment Exemption-in Amador County, CA. STB Docket No. AB-512X (served February 25, 2005) with San Pedro Railroad Operating Company, LLC-Abandonment Exemption-in Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 4X), served September 15, 2005. Thus, a short line railroad seeking abandonment authority is faced with the prospect that if it seeks that authority by an individual petition for exemption and the exemption is denied, it must - to use the board game *Monopoly* analogy of "go directly to jail, not pass 'Go', and do not collect \$200" - start all over again.

Moreover, under exemption procedures (unlike those for a formal application) the abandoning railroad lacks the right to respond to a reply. That is significant because the Board could rely on a protestant's evidence that is clearly wrong or inaccurate without providing the railroad to correct the record.

Evidence. The volume of evidence required to support an abandonment request varies greatly depending upon whether the applicant believes that its request will be opposed. Should the applicant expect little or no opposition to its request, it can submit a "bare bones" description of the line, the traffic handled, the customers served, the economics of the line, and the alternative transportation available and used. Should the applicant anticipate substantial opposition, it can (and would be advised to) file either a formal application or submit the evidence required for a formal application in a petition for exemption. As Petitioners have shown, the problem with the application approach is that short line and regional railroads do not routinely keep the sort of data required for an application for the simple reason that the Board's regulations do not require that sort of record keeping.¹⁰ Because short lines typically don't have any personnel schooled in preparing that data, the preparation of a formal application necessarily requires the hiring of one or more outside consultants at a substantial cost.¹¹

¹⁰ Class I railroads develop much of this data for filing their R-1 annual reports with the Board.

¹¹ Typically, the railroad would hire both a consultant to analyze the revenues and costs and prepare a verified statement with supporting exhibits and one or more additional consultants to appraise the track and right of way and prepare a verified statement with supporting exhibits.

Although the Board's abandonment rules allow applicants to obtain waivers of certain abandonment regulations, there is no guaranty that the requested waiver would be granted. In any event, the process of seeking and obtaining a waiver potentially adds another month to the application process. By contrast, many class I railroads historically had departments whose sole function it was to keep the sort of data required for abandonment applications so that application preparation was (and may still be) a very routine event.

Filing fees. The Board's current super sized abandonment fee structure presents another obstacle for a short line abandonment applicant. According to the Board's filing fee regulations, class exemptions carry a \$3,000 price tag, individual petitions go for \$5,200, and formal applications fetch \$18,100, more than the price of a Toyota Corolla automobile. In addition, should the applicant require a regulation waiver, that request will add another \$1,100 to its tab. Some short lines feel those fees are so high that they merely retain short segments of inactive track to avoid the fees associated with abandonment.

The Parties realize that the Board's filing fees are the product of a federal policy that seeks to raise money through user fees. However, the Parties seriously doubt

that someone in the Office of Management and Budget is carefully analyzing the cost of the formal application or some other filing) to determine whether the proper fee for an application should be \$18,400 (instead of \$18,000 or \$18,500). Assuming that the average salary of a government attorney or economist analyzing an abandonment filing is \$80,000 per year (\$40 per hour assuming 2000 working hours per year) and that the overhead associated with that person is another \$40 per hour, the time required to process a class exemption, an individual petition for exemption, and a formal abandonment would be 37.5 hours, 65 hours, and 230 hours, respectively. These fees equal or substantially exceed the fees charged by private lawyers and consultants for preparing the filings in the first place! To use a popular expression, "what's wrong with this picture?" The Parties suggest the solution is for the Board to either adopt a fee schedule that reflects the more modest economics of a short line or regional railroad or move to some sort of class exemption or notice process with a more modest filing fee.

Offers of financial assistance. Under the Board's present rules the due date for an offer of financial assistance ("OFA") varies depending upon the specific abandonment procedure utilized. In addition, "a formal

expression of intent" is required for an out of service abandonment. These disparate procedures must be very confusing to all but those few versed in the intricacies and folklore of STB abandonment practice and procedure. In addition, the minimal amount of time provided under 49 CFR 1152.27 to prepare an OFA and secure the requisite financial commitments can present a problem for some potential offerors, possibly discouraging some otherwise legitimate parties from making OFA's.¹²

Petitioners' proposal would correct this problem by providing that the OFA would be due 90 days after the Federal Register publication of the abandonment notice. Petitioners' proposal would require a railroad seeking to abandon to provide certain types of information in its public notice and would require more detailed information to be put in an information "packet" available upon

¹² While Board precedent provides that "offers need not be detailed" and that there are numerous ways to establish financial responsibility, the short timeframes contained in the current rules have a chilling effect on the ability of makes some political subdivisions, shipper groups, and economic development agencies to submit offers. Where a state's ability to fund an acquisition is dependent upon legislation or legislative appropriations, the current short time frames make such efforts difficult or impossible. One solution might be for the Board to recommend to the Congress legislation and short term funding to be administered by the United States Department of Transportation to allow states to preserve lines with "strategic significance" until states (or other public agencies) could act to acquire them. Similarly, most lending institutions will not provide a loan commitment until they have had sufficient time to analyze the transaction and collateral and obtained appropriate approvals.

request.¹³ Regarding the line's valuation, the Petitioners would have the notice contain a statement as to the line's net liquidation value. However, due to the high cost of preparing an appraisal and the small likelihood of an OFA actually being submitted, the Parties submit that the railroad should not be required to provide a formal appraisal until actually requested. Upon receipt of an offer, the parties could either engage their own appraisers with the results due in a month (or some other mutually agreed upon amount of time) or could jointly select an appraiser and accept his/her/its findings as to value.

Another problem with the current OFA regulations is the receipt of either a "bogus" OFA (for a purpose outside those allowed under the statute) or where the offeror really does not have and cannot get the funds needed to purchase the line (although it was found financially responsible). This problem is more serious than the Board realizes. Unlike their class I railroad counterparts, short line and regional railroads are generally highly leveraged companies. They have borrowed heavily and at higher than normal interest rates to finance their acquisitions. The receipt of an OFA from a party that does

¹³ Conceivably, detailed traffic and revenue data should only be provided upon execution of a confidentiality statement by the requesting party.

not intend to or cannot close its purchase offer is financially harmful to the abandoning railroad. The railroad is asked to postpone for months its ability to liquidate its investment and pay down its loan balance. The results of such OFA-induced delays could be several additional months of loan carrying charges and real estate taxes on the track to be abandoned and even possibly the expiration or termination of a good salvage contract.

Environmental and historic issues. The Parties' concerns here relate primarily to compliance with the post-approval conditions prescribed by the Board. In that regard, the section 106 historic preservation conditions can severely delay the salvaging of a rail line approved for abandonment because salvage cannot begin until the section 106 process is complete. The speed with which the section 106 process proceeds depends a lot upon the cooperation from the State Historic Preservation Officer ("SHPO"), how much information the SHPO desires about the line, and the difficulty of satisfying the SHPO's informational needs (for example does the SHPO require "Habs/Haer" photographs of bridges and structures). Similarly, where the SHPO is being slow, over reaching in its demands, or plain difficult, to what extent will the

Board or the Section of Environmental Assessment ("SEA") use its influence to speed this process along?

Where the line crosses an Indian reservation and consummation of the abandonment requires the approval of the Tribe (specific issues can include trail use, the presence of Indian artifacts and burial sites, and stream impacts), obtaining that approval can delay the Section 106 process for months or even years. A decision by the Board or the SEA to allow prompt track salvage (but not right of way disposition) would be very helpful to the abandoning railroad. Although the Parties could recite additional examples of expensive delays due to environmental and historic conditions, the point is that the Board has considerable leeway to expedite salvage while fulfilling its obligations under these statutes.

RECOMMENDATIONS

In announcing this proceeding, the Board sought public comment on several issues:

1. Whether there should be a "holding period" for acquired rail lines, that is a minimum period of time between acquisition and possible abandonment, what the period should be and how it should work.

2. Should the Board shorten to one year the period of no service for an "out of service" line available for abandonment under the abandonment class exemption of 49 CFR 1152.50.
3. Would shortlines' abandonment needs be met if the Board adopted a procedure allowing a carrier to abandon a line without further delay if no protest was received within 30 days' of filing the abandonment.

The Parties do not have a strong feel concerning the Board's question about a minimum "holding period" before a newly abandoned line can be abandoned. Nevertheless, they are aware of situations where short lines have acquired lines only to have the principal customer go out of business soon thereafter. A short line railroad should not be prevented from seeking abandonment authority under such a situation.

The Parties applaud the Board's suggestion that it might consider expanding the "out of service" abandonment exemption to cover lines over which no service had been provided for one year.

The Parties' final concern involves actively used lines with small amounts of traffic. More specifically, they are concerned about lines that have sufficient traffic

that the Board would require the railroad to make a detailed and expensive showing in its application or petition but where the railroad incurs a significant operating deficit or faces expenses for major track or structure repairs. In these cases the hemorrhage can be so great as to bankrupt a small carrier.

If the Parties understand the Petitioners' proposal correctly, there would be no opportunity for a member of the public to protest a small railroad abandonment. While that would certainly satisfy the Parties' interests, the Parties can understand the Board's reluctance to accept such a draconian change in its way of handling abandonment requests. Accordingly, the Parties would like to suggest another approach for actively used lines consistent with the Board's final suggestion (the railroad could promptly abandon a line if no protest was received within 30 days' of the abandonment filing).

The railroad would begin the abandonment process by sending a letter notice to shippers and affected government agencies as the Petitioners suggest. Requests for more detailed information by members of the public would be due 30 days later. The railroad would file a Verified Notice of Exemption 60 days from the date of the letter notice. Protestants would have 20 days to submit a protest letter.

If none was received, the Board would issue a decision 10 days later permitting abandonment in the absence of an OFA. At that time the railroad would prepare and send out its environmental and historic report. Upon receipt of a protest from a political subdivision or a shipper, the Board at its discretion could initiate an evidentiary proceeding with the railroad's evidence due 30 days later (more time would be available if required), replies due 20 days later, and the railroad's rebuttal due 20 days later. The Board would issue a decision 30 days later (or 70 days after the beginning of the proceeding). The deadline for filing an OFA would be 10 days after issuance of a decision granting the contested abandonment. The railroad would not file its environmental and historic report until the Board approved the abandonment and completion of the OFA process (or the running of the deadline for filing an OFA). In addition, the Board would set firm deadlines for all parties to complete their contributions to the environmental and historic review process. The Parties submit as Exhibit B a schedule depicting these deadlines.

CONCLUSION

The Parties commend the Petitioners for their suggestions and urge the Board to revise small railroad

abandonment procedures to reflect the realities of these carriers including filing fees that are appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Heffner", with a long horizontal flourish extending to the right.

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Dated: March 6, 2006

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the foregoing comments of six short line railroads in STB Proceeding Ex Parte No. 647 were served today, March 7, 2006, upon all parties on the Board's service list.

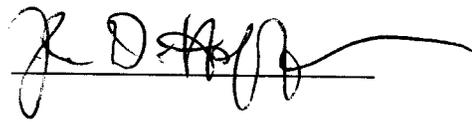
A handwritten signature in black ink, appearing to read "J D Heffner", is written over a horizontal line. The signature is cursive and includes a long, sweeping flourish extending to the right.

EXHIBIT A

Short Line Railroad Parties

Delta Southern Railroad Inc. ("DSR"). DSR is a class III short line railroad headquartered in Tullalaha, LA. Originally established in 1989 and acquired by its present owners in 1999, DSR owns and operates approximately 150 miles of former Missouri Pacific Railroad track in Southeastern Arkansas and adjoining Louisiana. On two occasions DSR has obtained Board (or Interstate Commerce Commission) permission to abandon track segments, utilizing both the notice of exemption and petition for exemption procedures.

Housatonic Railroad Company, Inc. ("HRRRC"). HRRRC is a class III short line railroad with operational headquarters in Canaan, CT. It owns and operates two principal lines totaling about 150 miles (one north-south and one east-west) which cross at Canaan. Those lines serve western Connecticut, western Massachusetts, and an adjoining area in eastern New York. Originally established around 1990, HRRRC operates a series of lines owned by the Connecticut Department of Transportation and Metro North Commuter Railroad Company as well as lines formerly owned by and acquired by HRRRC from Consolidated Rail Corporation. HRRRC has sought and obtained exemptions permitting abandonment or discontinuance on a couple of occasions.

New York Cross Harbor Railroad Term. Corp. ("NYCH"). NYCH is a class III short line railroad with operational headquarters in Jersey City, NJ. Current management acquired majority control of the railroad in 2005. NYCH operates a rail car float across New York Harbor linking Brooklyn and Long Island with both CSX Transportation and Norfolk Southern Railroad in Jersey City, NJ. In addition, NYCH operates track along the Brooklyn waterfront near the Bay Ridge section serving about 8 industries. NYCH also serves several customers at its Jersey City yard. NYCH has yet to utilize the abandonment provisions of the ICC Termination Act although it was the subject of an unsuccessful "adverse" abandonment request by the City of New York.

Permian Basin Railways ("Permian"). Founded in 2002, Permian is a Chicago-based short line railroad holding

company that owns 4 small western class III carriers acquired from RailAmerica, Inc. Those lines include the West Texas & Lubbock Railway, the Texas New Mexico Railroad, the Arizona Eastern Railway, and the San Luis & Rio Grande Railroad. These lines were formerly owned and operated by the BNSF Railway, Inc., and Union Pacific Corporation and their corporate predecessors. Permian has yet to seek any abandonment authority but, as its rail system grows, may have to abandon small segments here and there.

San Pedro Rail Operating Company ("SPROC"). SPROC is a small Arizona-based class III short line railroad. Organized in 2003, SPROC acquired a former Southern Pacific Railroad line that several previous short line companies had operated under the name "San Pedro & Southwestern." SPROC recently sought to abandon an unprofitable segment of this line, first unsuccessfully and then successfully. SPROC continues to provide service over the profitable segment of that railroad.

Wisconsin & Southern Railroad Co. ("WSOR"). WSOR is a Milwaukee-based class II regional railroad which operates a complex network of over 600 miles of track throughout central and southern Wisconsin and into Chicago via trackage rights. Originally established in 1980 from a remnant of the bankrupt Milwaukee Road, WSOR today operates a mixture of track that is state-owned, carrier-owned, and leased from CP Rail and Union Pacific Railroad as well as trackage rights over Canadian National (Wisconsin Central LTD) and Chicago commuter carrier METRA. WSOR has utilized the abandonment procedures several times to eliminate some out of service trackage.

EXHIBIT B

Possible Abandonment schedule

Date	Event
0	Letter notice sent to customers
30	Deadline for customers to request information
60	Railroad files verified notice of exemption at STB
80	Customer protest(s) due at STB
90	Board approves uncontested abandonment;
120	OFA's due; if none, railroad files environmental and historic report any time thereafter
100	STB initiates evidentiary proceeding (if there are significant protests)
130	Railroad evidence due
150	Protestant replies due
170	Railroad rebuttal due
200	Decision on contested abandonment due
210	OFA due on contested abandonment