

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 647

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

REPLY STATEMENT OF
NATIONAL GRAIN AND FEED ASSOCIATION

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I. PREFACE

This Reply Statement is filed on behalf of National Grain and Feed Association ("NGFA") in response to the Board's Advance Notice of Proposed Rulemaking ("ANPR") served January 19, 2006 and in response to comments filed by certain other parties.

NGFA is a national trade organization representing the agricultural community in the United States. NGFA has over 900 members, ranging from large companies to small country elevators, engaged in the sale, distribution, storage, processing, and exportation of grain and grain products, and in various allied industries such as milling, animal and poultry production, and feedlot operations. NGFA members and their customers make extensive use of rail service, including service provided by Class II and Class III railroads. Where NGFA member facilities are served by railroad, or where customers of NGFA members are served by railroad, it overwhelmingly is the case that rail service is provided by only a single railroad. Almost without exception, the movements involve bulk commodities that cannot feasibly or economically move by truck, and the result is an extremely high degree of economic captivity by NGFA members and their customers to the rail carriers upon which they must rely for bulk service, whether such carriers are Class I, Class II, or Class III railroads.

The ANPR notices a proposal by a number of Class II and Class III railroads to make it unnecessary for them to pursue either formal abandonment procedures or any type of exemption procedure when they wish to terminate rail service, although certain notice requirements would remain in place, as would financial assistance provisions including those allowing for offers to purchase the rail properties involved.

When the ANPR first was noticed, members of NGFA had a degree of ambivalence regarding the proposal and decided to await and read railroad filings in support of the proposal before attempting to reach a consensus. Having reviewed the filings in support of the proposal, but most notably the comments of the proponent carriers, Allegheny & Eastern Railroad, Inc., et al. ("Proponents") and those of the Association of American Railroads ("AAR"), and after having considered the Board's own comments in the ANPR in light of the comments of the Proponents and AAR, NGFA has been able to achieve a consensus of views regarding the ANPR, and sets those views forth below. NGFA notes, however, that, while the views it expresses here reflect the views of a strong majority of the members of the NGFA Rail Shipper-Receiver Committee, there are those on the Committee who harbor differing views and who may choose to express those differing views.

II. REPLY COMMENTS

NGFA believes that the proposed exemption is unwarranted and that there are alternatives, as the Board suggests, that can relieve the abandonment burdens claimed by the Proponents. Should the Board determine to grant the exemption, then NGFA believes that additional safeguards are required beyond those offered by the Proponents.

As explained in more detail below, NGFA does not believe that the Proponents satisfactorily have met the standard required in 49 U.S.C. § 10502(a) for issuance of a class exemption. But, beyond that, NGFA believes that the proposal rests on inconsistent and faulty propositions.

The Proponents state (Comments of Petitioners, p. 3) that the "proposed rule ... would permit Class II and Class III carriers to abandon lines promptly after the carrier

determines it can no longer profitably operate the lines. This rule would thereby allow the abandonment to occur before traffic on those lines has dried up and before the infrastructure on those lines has deteriorated beyond repair." The Proponents also maintain, however, that "[small] carriers are unlikely to abandon any line that has even the faintest potential for profitable operation." *Ibid.*

Thus emerges the unaddressed, unanswered inconsistency in the Proponents' presentation. If a small carrier has no need to abandon a line when it is profitable, why would that carrier want to let such a line become rundown and "dried up"? Conversely, if the owner of a profitable line elects to sell it in the expectation that the line is on the verge of becoming unprofitable, isn't it reasonable to expect potential buyers to recognize that fact? Would not the buyer of such a line have to take the same steps as the seller upon experiencing a decline in profitability of the line and let the line become run down and "dried up," just as the seller allegedly would have? What, then, do the proposed rules really accomplish in the way of "saving" rail lines?

The Proponents endeavor to answer none of these questions, even though they plainly must be answered if the Proponents' rationale for the proposed rules is to be understood. NGFA frankly has come to the conclusion that the proposed rules are highly unlikely to preserve and save small railroad lines that otherwise would fail. Sound management and the marketplace are far more likely to preserve such lines. There is nothing to stop the owner of any small rail line from seeking out a willing buyer at any time, and a class abandonment exemption accordingly is unnecessary to further line sales by small carriers.

NGFA finds the proposed exemption not only to be lacking in logical foundation, but also to be lacking in statutory justification. Under 49 U.S.C. § 10502(a), the Board is required to "exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part – (1) is not necessary to carry out the transportation policy of section 10101 of this title; and (2) either – (A) the transportation or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power."

The Proponents' Comments focus mainly on the provisions of subsection (a)(1) and barely at all on the express requirements of subsection (a)(2). Indeed, their efforts to meet the subsection (a) (2) requirements appear to be confined to the claim that, because a "typical small railroad operates approximately 87 miles of rail line and has revenues of approximately \$5.5 million" (Comments, p. 5), any abandonment transaction involving a "small" railroad must be of limited scope. That position entirely overlooks the fact that all "small railroads" by definition must connect with larger railroads to provide continuous carriage of freight, so that when an abandonment occurs of "small railroad" property the effect is to interfere with rail service over a far broader scope of both track and marketplace. If one were to adopt the Proponents' view that any transaction involving a relatively small number of track miles is *a priori* of "limited scope" within the meaning of Section 10502(a)(2)(A), the nation's entire rail network would be exempt from abandonment regulation so long as the abandonments take place inch by inch or mile by mile.

The Proponents' effort to satisfy the provisions of Section 10502(a)(2)(B) similarly is unpersuasive. It is reflected in the claim that "[s]mall railroads that are abandon-

ing lines do not have market power, as evidenced by the fact that they are unable to generate sufficient revenues from the traffic moving over the subject line." Comments, p. 11. However, that claim merely begs the question, which is *whether* these carriers are unable to operate the line profitably and whether there are individual shippers on those lines over which the carrier does have market power. As the Board pointed out in the ANPR, Congress apparently did not intend the abandonment of small railroad lines to be an unregulated matter, as indicated by Congress' refusal to eliminate altogether abandonment licensing for such transactions.

The Board should not indulge the Proponents in their assumption that any small railroad proposing to abandon any part of its lines has a revenue shortfall over that line, an assumption which is tantamount to a "Scout's honor" test for abandonments. Moreover, if it is to be assumed that any rail line of a small carrier seen by that carrier as an abandonment candidate is in fact unprofitable, then there can be no validity to the Proponents' assertion, discussed above, that an abandonment exemption will preserve rail lines for future profitable use. Once a line becomes unprofitable, its Class II or Class III owner will see it as an abandonment candidate. Perhaps the proposed rule will merely accelerate the abandonment process and all owners of these lines realize a greater net salvage value than might be recovered if the line's assets are harvested at a later date.

III. ALTERNATIVES

Although not persuaded that a class exemption for abandonment should be available to small railroads, NGFA has no objection to consideration of steps that would ease abandonment under the present regulatory structure. For one thing, shortening the two-year out-of-service exemption to one year would be unobjectionable. For another, a

process allowing abandonment or abandonment exemptions to go forward if not protested within 30 days of filing would be unobjectionable.

Should the Board determine to grant the proposed class exemption, then NFGA would urge the Board to impose additional conditions beyond those suggested by the Proponents. First and foremost, because shippers relying on the targeted lines no longer would have any ability to oppose an exemption petition or abandonment application, the period of notice prior to commencement of any exempt abandonment process should be lengthened, preferably by 90 to 120 days. Where abandonments are contested, at least that much time is consumed in the abandonment process.

Second, the Proponents' offer to make the proposed class exemption unavailable for a period of two years following acquisition of the line from a Class I carrier is a step in the right direction, but does not go far enough. The exclusionary period should be extended for five years.

Finally, the Board should reject the efforts of AAR to broaden the proposed class exemption beyond applicability to Class II and Class III railroads. AAR, noting that there are numerous lines operated by small railroads under lease from larger carriers, suggests that the Board should allow the larger carriers to avail themselves of a class exemption for abandonment whenever a small carrier invokes a class exemption to discontinue service over the same line.

NGFA strenuously opposes that suggestion. Small carrier track leases are prevalent on many large railroads, including Norfolk Southern Railway and CSX Transportation. At present, Class I railroads have a residual common carrier obligation to resume service over leased lines if the lessee succeeds in discontinuing service, and shippers have

refrained from opposing large scale line lease programs by Class I railroads in part because of the expectation that the Class I carrier will be required to resume service if it is discontinued by the small carrier lessee. Thousands of miles of track are covered by these lease programs. The expansion of any class exemption for Class II and Class III abandonment proceedings to include thousands of miles of Class I track is beyond the scope of the exemption proposal, would have harmful consequences for shippers, and is totally unwarranted.

Respectfully submitted,

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Dated: April 4, 2006

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has, this 4th day of April 2006, been served on all parties of record, by first-class mail, postage prepaid.

Andrew P. Goldstein