MR. SIDMAN: Thank you. Chairman Nober, Vice Chairman Mulvey, my name is Mark Sidman. I’m appearing in this proceeding today on behalf of 65 small railroads that have petitioned the Board to commence a rule-making to adopt a class exemption for
expedited abandonment of rail lines. The proposed exemption would apply to Class II and Class III carriers.

The Petitioners are hopeful that following today’s hearing the Board will initiate a formal rule-making procedure to amend its regulations as we have proposed. As indicated in the Board’s scheduling order, I will make my presentation this morning and reserve any unused portion of the 30 minutes allotted to Petitioners for rebuttal.

When the Petitioners talk in terms of expedited abandonment, they are not referring to the period from the commencement of an abandonment proceeding at the Board to the date that abandonment authority is finally issued. That period would not significantly change under the proposed exemption. Instead the Petitioner’s use of the term “expedited abandonment” refers to a different and far more critical period; the time between the day on which a small railroad decides that the prospects of a line segment are hopeless on the one hand, and the day on which the railroad begins the abandonment process at
the Board on the other.

This period, which I’ll refer to as the pre-filing period, is the one that the Petitioners seek to shorten. During the pre-file period which can last for several years, a small railroad, in order to stem losses on an unproductive line typically will raise rates to fully compensatory levels, defer maintenance, cut back on capital spending and reduce service levels. This is not an evil course of action. It is nothing more or less than a rational business behavior in the face of little or no demand for service, mounting losses and dim prospects and there is nothing in the ICC Termination Act or elsewhere that prohibits it.

A small railroad takes these steps because to do otherwise would jeopardize its ongoing viability. It cannot and should not continue providing service at a loss and hope to make it up in volume. The Staggers Act (phonetic) freed railroads from that syndrome almost 25 years ago.

The natural consequence of raising rates and cutting costs is a degradation of traffic and
infrastructure on the line in question. Only after the traffic base has largely disappeared and the physical condition of the line has deteriorated will the small railroad commence an abandonment proceeding. More often than not, a railroad delays its filing until there has been no local traffic handled on the line for a two-year period which enables it to utilize the existing notice of exemption procedure for out of service lines. Why would a small railroad wait several years to seek regulatory authority to abandon a line that it had written off long ago as a losing proposition? Why would it allow the financial drain of keeping unproductive assets in place go on any longer than necessary?

The unfortunate answer is that to avoid the expense and uncertain result of a contested abandonment proceeding, a small carrier is now best served to file for the abandonment only after the traffic is gone and the cost of rehabilitating the line is prohibitive. Then and only then, can the small carrier be confident that regulatory authority will be forthcoming. No one benefits from a multi-
year prefiling period in which service levels plummet, traffic dries up and rail infrastructure deteriorates beyond repair. Less and less traffic moves over the line and soon the presence of the railroad doesn’t even serve as an effective stalking horse to keep truck or barge rates honest.

Moreover, the low level of activity on the line contributes little in the way of employment opportunities as the jobs were eliminated or transferred early in the prefiling period. In the meantime, the railroad has tens of thousands of dollars of unproductive assets tied up in a barely operating branch line. And at the end of the day, having gone through this incredibly wasteful exercise, the railroad almost always obtains the requested abandonment authority.

Between 1996 and 2001 the Board granted abandonment authority in 521 cases and denied authority in 18 cases which is a denial rate of less than three and a half percent. And in those few cases in which abandonment authority was denied, the railroad likely could have achieved the opposite
result had it just put off filing a little longer. A small railroad rarely makes that mistake a second time.

Once abandonment authority is obtained the offer of financial assistance or OFA procedures kick in. These well-intended procedures were designed to preserve rail service by compelling an abandoning carrier to sell a line for constitutional minimum value to a third party willing to continue rail service. But by the time the OFA triggers -- OFA procedures are triggered, it’s simply too late. There are no buyers for a line that has little or no traffic and that requires the expenditure of vast amounts of money for rehabilitation.

Although the line might have been attracted to potential buyers on the day the railroad decided it couldn’t be operated profitably, that’s rarely the case after several years of reduced maintenance and capital spending. It should come as no surprise that between 1996 and 2001 offers of financial assistance were made in just four percent of proceedings in which abandonment authority was
obtained.

The Petitioners’ proposal would address this broken system and eliminate the death spiral of a line slated for abandonment during the prefiling period. The essential features of the proposed class exemption are as follows. First, a Class II or Class III railroad that utilizes the exemption can abandon the line in question by use of a notice of exemption filing. The abandoning railroad need not make a showing that the subject line cannot be operated profitably. Small railroads will no longer have an incentive to delay the abandonment and OFA process until there is so little traffic on the line that its profitability assessment is beyond challenge.

The class exemption shifts the focus from second guessing a small railroad’s profitability analysis to saving preservable lines and redeploying unproductive assets. The second essential feature of the proposed exemption is that it provides shippers, local governments and the railroad industry at large with more time to consider and evaluate an OFA. Under the proposed class exemption, the carrier must provide
all active shippers on the line during the past three years with at least 40 days notice prior to its filing the abandonment exemption which is significantly more than the current application process requires which can be as little as 15 days.

In addition, at least 30 days prior to the filing of the notice, the carrier must for three weeks publish notice of the abandonment, not only in the local county newspapers, as is required today, but also in a nationally distributed railroad trade publication, thereby widening the pool of potential purchasers.

Most importantly, the published notice must contain detailed information aimed at providing potential purchasers with the data necessary to evaluate an acquisition. The required information includes, among other things, details concerning the line, its mileposts and the like and connecting carriers, the condition of the line and the cost to rehabilitate it to FRA Class I condition, the carrier’s calculation of net liquidation value and a waiver of any right to receive value in excess of NLV,
a statement that the abandoning carrier will provide
access to third party connections by trackage rights
or haulage if the abandoned segment would connect only
to the abandoning carrier and a statement that the
abandoning carrier will supply, upon request the so-
called supporting data which includes three year’s
worth of revenue and carload data as well as an
inventory of rail infrastructure and information
concerning bridge condition and the like.

All of this information is available to
potential purchasers before the carrier even files for
abandonment. All told shippers, communities and the
railroad industry at large will have the necessary
information to assess the line and determine if an OFA
is plausible for as many as 140 days. For comparison
purposes in the existing out-of-service of exemption
procedure, an OFA is due just 30 days after notice of
abandonment is filed -- is published in the Federal
Register and the abandoning carrier is not required to
publish any substantive information on the condition
of the line prior to filing or even in the filing
itself.
Likewise in a petition for exemption, no substantive information is required today to be made available prior to the filing.

The third essential feature of the proposed exemption is that the environmental and historical reporting which now must be done prior to filing for abandonment, may be done after the abandonment is effective. In this way if an offer of financial assistance is made and the line is purchased, neither the abandoning carrier, the Board nor a multitude of state and federal agencies who have needlessly wasted time and money on an exercise that would end up serving no purpose.

The proposed exemption is consistent with the statutory provision that addresses abandonments. Section 10903(D) of the ICC Termination Act provides that a rail carrier may abandon part of its railroad lines, only if the Board finds the present or future public convenience and necessity require or permit the abandonment. The Board and the Courts have interpreted this statutory provision as requiring the Board to engage in a balancing test, to weigh the
burden on the carrier of continuing operation against
the burden on the shippers and communities resulting
from a loss of service.

The balancing of the interest at stake
here favors adoption of the proposed notice of
exemption procedures. The new regulations will
eliminate any incentive for a small railroad to
neglect the line for several years prior to filing for
abandonment authority. By eliminating the death
spiral during the pre-filing period, the proposed
exemption increases the likelihood that a line will be
purchased for continued rail use. The line will have
far more traffic and be in far better condition at the
time the abandoning carrier seeks authority to abandon
its operations under petitioner’s proposal.

The prospects of continued rail use will
be further enhanced by the new OFA procedures.
Comprehensive traffic and revenue data and detailed
information concerning the conditions of the line will
be made available widely and potential offers will
have as many as 140 days to consider the prospects of
the line. In addition, the abandoning carrier must
provide the acquirer with access to third party connections through trackage rights or haulage if the abandoned segment will connect only to the abandoning carrier.

The small railroad, on the other hand, will be able to cut its operating losses and obtain the value of its assets either through the proceeds of an OFA sale or by selling the track and other materials on the line. This will provide the railroad with funds for capital investment, equipment acquisition, reduction of debt and the like. The railroad will be able to use the value of those assets from the abandonment to serve shippers in communities where conditions favor the provision of rail service.

On the other side of the ledger, little is lost as a result of adopting a class exemption for expedited abandonment by Class II and Class III carriers. From the moment a small railroad identifies a segment as an abandonment candidate and take appropriate steps to cut losses, the value of that rail line as a transportation alternative plummets. This is borne out by the fact that from 1996 through
2001 more than half of the abandonments filed at the Board were pursuant to the two-year out of service exemption. Although the rail line may be physically present during the death spiral in the pre-filing period, its presence confers little benefit to shippers in communities located on it. At the same time shippers in communities located on viable lines, end up effectively subsidizing the losing operations on the abandonment candidate.

The pre-filing period doesn’t confer much benefit on employees either. Abandonment candidates are almost always low density lines that get infrequent service. Few, if any, of the employees are still headquartered on those lines. They have long since been transferred to where the traffic is. Because the traffic levels produce insufficient revenues, the lines are characterized by low maintenance levels. Employees who maintain these lines spend most of their time working on the portions of the small railroad system that gives the same service. Abandonment of these lines sooner rather than later rarely will result in a material reduction
in force.

In any event, the proposed exemption would not change the labor protection afforded to employees who are adversely effected by abandonments. As with the shippers, however, employees will benefit from an abandonment process that allows a small railroad to redeploy capital in a rational way. If a carrier can cut losses and obtain the value of rail assets on an unproductive line, the carrier is better able to upgrade maintenance and undertake capital projects on the portion of its system that does support rail service all of which results in higher activity levels and safer working conditions for employees.

The likelihood that small railroads would abuse a notice of exemption procedure is remote. On an average, small railroads operate less than 100 miles. These carriers have extremely limited commercial opportunities and it is highly unlikely that they would walk away from segments that have even a prospect of being operated profitably. A hallmark of short line operations, the Board has frequently noted, is hands-on, highly responsive customer
service. These companies do not walk away from business lightly.

But in the event that a small railroad incorrectly assesses a situation and seeks to exit a market that can sustain rail service, then an entrepreneur, shipper group or governmental entity will step up to acquire the line under the enhanced OFA procedures. Shippers apparently understand the futility of requiring small railroads to remain in markets that they have determined to be unsustainable.

The National Industrial Transportation League, through counsel, has filed comments in this proceeding. In those comments, the NIT League, which is one of the largest shipper groups in the country, urges that the Board institute a rule-making on the proposed exemption. Moreover, the league has said as a substantive matter, the league believes that the proposal advanced by Petitioners had fundamental merit. A simplification of the regulatory process for Class II and Class III carriers that permits abandonments and offers of financial assistance to proceed before rail infrastructure deteriorates will
strengthen the rail network.

The NIT League indicates in its comments that it would like to see some of the time frames in the proposal extended so as to allow better development of offers of financial assistance. While the League does not provide any details as to the extensions it would seek, the Petitioners believe that certain extensions would be appropriate. These are the kinds of matters that would be best addressed in a formal rule-making.

The Petitioners urge that the Board use its power under Section 10502 of the ICC Termination Act to adopt the class exemption we have described. Section 10502 provides that the Board shall exempt the class of persons or transaction whenever it finds that the section of the Act, one, is not necessary to carry out the Rail Transportation Policy or RTP, set forth in Section 10101 and two, either the transaction is of limited scope or the application of the section of the act in question is not needed to protect shippers from abusive market power.

As set forth in detail in the petition,
the proposed exemption promotes 11 of the 15 provisions of the RTP and is inconsistent with none.

The proposed exemptions simultaneously one, increases the likelihood of preservation of service over viable lines through the OFA process by beginning the process before the condition of the line and its traffic base has deteriorated, and two, allows a small carrier to limit its losses and efficiently reallocate capital to other parts of its system. The exemption will promote a sound, safe, efficient and competitive transportation system, thereby advancing several goals of the RTP. Similarly, by encouraging small carriers to file for abandonment authority promptly and by enabling carriers to delay the environmental and historic reporting process until the OFA is complete, and by limiting the instances in which a small carrier files a petition only to be told later to file an application, the proposed exemption advances the twin goals of minimizing the need for regulatory control and promoting expeditious handling of resolution of proceedings.

Finally, the exemption requires widespread
publication of information to potential buyers and prevents small carriers from having to compile extensive data that it does not have in order to file an abandonment application. In this way the exemption promotes the policy of making cost information available, while minimizing the burden on the carrier to produce such information. The proposed exemption advances all of these aspects of the RTP while continued application of Section 10903 to small railroad abandonments advances few, if any, of those policies. The proposed exemption is also limited in scope. The typical railroad operates less than 100 miles of track. A review of abandonments by Class II and Class III carriers during 1999 and 2000 indicates that small railroad abandonments average less than 25 miles. The lines have low density in virtually all cases.

The Board has consistently found that abandonments of these types of lines to be limited in scope. Although the second prong of the test in Section 10502 for the appropriateness of an exemption is satisfied by the showing of limited scope, it
should be noted that the alternative prong that regulation is not necessary to protect shippers from the abuse of market power is also met. Small railroads that cannot operate a line profitably obviously do not have much market power, that is power to raise rates over the shippers on the line.

Either those shippers are not tendering enough traffic to keep the lines in service, which suggests the shippers are taking care of the transportation needs in other ways, or they simply don’t have transportation needs of any significant magnitude.

Thus, the proposal satisfies the criteria for a class exemption and addresses the unique characteristics of small railroads as a class. Small railroads have limited commercial opportunities and are loath to walk away from any line they believe can be operated profitably. Under the existing regulatory procedures, a small railroad will often wait to file for abandonment until the out of service exemption becomes available. This delay both drains the small railroad’s limited resources and all but eliminates
the possibility of a successful OFA. The proposed exemption recognizes the unique characteristics of small railroads in the context of rail line abandonments and provides a procedure whereby small railroads as a class can abandon lines in a manner that advances the goals of the RTP.

Under the proposed Notice of Exemption Procedure, the focus would be shifted from second-guessing the profitability determination made by a small railroad to making a line that otherwise would go into a death spiral available for purchase by entrepreneurs, shippers, and communities when the traffic base still exists and the line has not suffered years of deferred maintenance.

This approach recognizes that the existing regulations do not save lines from being abandoned. Instead those regulations simply delay the inevitable abandonment and virtually assure that the abandoned lines will not be acquired for continued rail use. The meager benefits that result from delayed filing for regulatory authority of arguably a few more years of increasingly deteriorating service are more than
offset by the negative effects of freezing unproductive assets in place when the value of those assets could be reinvested in the portions of the small railroad system that require capital investment. We note in this regard that the American Short Line and Regional Railroad Association estimates that upgrading small railroad tracks to accommodate 286,000 pound rail cars, an effort that will benefit shippers and communities, will cost the industry approximately $7 billion. The rail system simply cannot afford a wasteful and unproductive deployment of rail assets. For all these reasons, the Petitioners urge that the Board commence a formal rule-making to adopt the proposed exemption. I would like to reserve any remaining time that I have for rebuttal and I’d be happy to answer any questions that you have.