

3 MR. KRAUS: Thank you for giving me the
4 mike, Chairman Nober and Vice Chairman Mulvey. I also
5 want to thank you for the opportunity to participate
6 in today's hearing as well as your grant of an
7 extension which afforded us an opportunity to present
8 the written comments to you in a timely manner. I'm
9 here today on behalf of the Rail Labor Division of the
10 Transportation Trades Department that is an
11 organization representing virtually all of the major
12 rail unions. The only one that's not participating is
13 my colleague, Mr. Elliot, representing the UTU.

14 My name is Mitchell Kraus. I am general
15 counsel of the Transportation and Communications Union
16 which is one of the affiliated organizations of the
17 TTD. I'd like to start very briefly and I don't
18 intend to use all of my time either and I will attempt
19 to summarize the written testimony that was previously
20 submitted. Certainly, I'll be glad to answer any
21 questions that either of you may have. But I'd like
22 to start very briefly with looking at what the current

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1 regulatory environment is which the Petitioner is
2 saying they need relief from.

3 And as Petitioner acknowledged, the
4 statute itself which is a good place to start, says
5 that the Board should grant abandonment only if it
6 finds that the present or future, and then it uses the
7 term quite clearly, public convenience and necessity,
8 require or permit the abandonment or discontinuance.
9 That has been interpreted by the United States Supreme
10 Court as a balancing test where the interest of those
11 served by the line have to be balance against a burden
12 on the line to continue providing that service. And
13 the Board itself has indicated that it is accepting
14 that test and again, will judge the relative burden on
15 the railroad seeking to abandon as opposed to the
16 burden on the community and shippers who are served by
17 the abandoning line.

18 There are a number of factors that the
19 Board is to consider and among them is opportunity
20 cost which is effectively whether a line may well be
21 profitable albeit not significantly profitable enough.
22 And this procedure places the burden where we believe

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1 the burden ought be on the petitioning carrier seeking
2 the abandonment to come up with the data which they
3 have. Whether there could be a change in the format
4 that that data is required, there's some technical
5 points in the Petitioners' position that I'm not
6 really going to comment on and I'd like to focus on
7 the major thrust of their argument.

8 Clearly, they have the data and it should
9 not be a huge burden for them to come up with it. The
10 current exemption process at the Board grants the
11 exemption for abandonment unless there is significant
12 shipper opposition and even in the face of opposition,
13 it will be granted if it's quite clear that the costs
14 of operating the line are simply marginal at best. So
15 the exemptions are routinely granted as Petitioner has
16 acknowledged.

17 What Petitioner is focused on as I
18 understand it is what they refer to as the pre-
19 petition or pre-filing period being the big problem,
20 and, of course, there's no evidence as to how long
21 that period is, whether it is in fact, years, months,
22 whatever goes on in that period except counsel's

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1 argument that it goes on for a long time, and during
2 that period lots of bad things happen on the line so
3 that at the end of the day no one will buy it.

4 What's missing from this analysis that
5 emphasizes the benefits of the market is any reference
6 to the market itself. There is nothing preventing the
7 small line carriers from the day they decide that they
8 no longer want to operate a line to try to sell it and
9 there is nothing to prevent in today's regulatory
10 environment for them to voluntarily sell it from day
11 one when they make that decision for the net
12 liquidation cost of the line. There is nothing to
13 prevent them from publicizing it. There's nothing to
14 prevent them from getting out into the real community
15 generally a variety of data that a perspective
16 purchaser might want to look at. And so the claimed
17 benefits of this for the public seem to me to be
18 largely illusory as Petitioners would contend as it
19 pertains to the sale process to any other potential
20 interested buyers.

21 What Petitioner ignores is several
22 factors. One, although they acknowledge that

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1 subjectively the short line may make an error, in some
2 of the abandonment cases where exemption was denied
3 and the one they use as the poster child is the
4 Illinois Central case. In point of fact, that line
5 was not abandoned. It was, in fact, sold and at least
6 to my knowledge is still operating. It certainly was,
7 at least as reported from what I could tell from the
8 Board's procedures.

9 The last issue which is -- there are two
10 last issues, excuse me, that I wanted to cover. One
11 is the concern we have by giving the Petitioners carte
12 blanche to abandon simply via a notice may well, and
13 there's no comment from Petitioners on this, result in
14 an increase in abandonments, an increase in
15 abandonments of lines that would not otherwise be
16 necessarily good candidates for abandonment.

17 And secondly, and I won't go into it in
18 detail but just to reiterate the point that Dan made,
19 I think all of the rail unions have a genuine concern
20 that this process could be abused in a sort of two-
21 step dance permitting Class I carriers to easily
22 abandon existing lines by using the Class II's and

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1 III's and thereby avoiding any regulatory
2 consideration as far as an abandonment is concerned
3 from this body. And that certainly is one of the
4 concerns of Rail Labor.

5 With that, I'll conclude my remarks. I
6 thank you very much and, again, I would certainly be
7 glad to answer any questions that you may have.

8 CHAIRMAN NOBER: Well, thank you very
9 much, Mr. Kraus, and thank all of you for your
10 excellent testimony and thoughts. Mr. Sidman, do you
11 want to take your time now to respond or do you want
12 to --

13 MR. SIDMAN: Yes, I would.

14 CHAIRMAN NOBER: How much time does he
15 have left? Nine minutes?

16 MR. SIDMAN: Thank you. Mr Elliot and Mr.
17 Kraus raise one point with which Petitioners agree and
18 that is that we do not intend the proposed exemption
19 to be a conduit whereby Class I railroads would sell
20 lines to Class II's or III's with the intention of
21 those railroads turning around and immediately
22 abandoning them. And while we don't have our own

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1 proposal today on how to address that, we think that's
2 a legitimate concern and it should be addressed. It
3 could probably be addressed through holding periods or
4 the like.

5 CHAIRMAN NOBER: Yeah, some period of time
6 by which it would put a moratorium on that.

7 MR. SIDMAN: Exactly. But there's several
8 things that I would like to respond to that both
9 gentlemen raised. The first is, conspicuously absent
10 from their presentations is any explanation of where
11 the harm to labor is in this. And I would submit to
12 you that there's very little or perhaps none and the
13 reason why is that as a rail line heads towards
14 abandonment, there is a long period. Let's take half
15 of the abandonments filed in the six-year period from
16 1998 to -- 1996 to 2001.

17 Fifty percent of those were done on the
18 two-year out of service exemption. You know, how
19 many years do you think it took to get an active line
20 to go from whatever traffic base it had to zero and
21 then keep it for two years. There are no employees on
22 those lines, none on those lines. Perhaps a

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1 maintenance crew goes out periodically. But, in fact,
2 what happens is that as these lines wind down towards
3 their inevitable abandonment, the jobs are transferred
4 or the jobs are abolished and that is well before the
5 -- an abandonment is ever filed.

6 The second point is that there is this
7 sense that -- several comments were made that why
8 don't the small railroads just sell these lines?
9 There's nothing that stops them from turning around
10 and selling them. I think what that fails to
11 recognize is the reality and an entrepreneur and
12 admittedly some of these are publicly traded holding
13 companies, but even the local -- the local management
14 of a holding company or all of the other non-holding
15 company railroads, they have an empire that is tiny.
16 It's a 100-mile empire. That's all they do. That's
17 the only place they have in order to make their money
18 and the last thing that anybody wants to do who runs
19 that empire is to shrink it.

20 They don't want to shrink their empire.
21 They do everything that they can to grow the empire.
22 The lines, not in all cases, but in most cases, were

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1 bought from Class I's as low density lines. So those
2 lines were abandonment candidates in the hands of the
3 Class I's. The small railroad then spends as many
4 years and as many dollars as it can tolerate trying to
5 build that traffic base and at the point that it walks
6 away, the truth is, it is not going to work. I have
7 never, in all the years that I've represented short
8 line railroads I have never once seen a short-line
9 railroad say I want to get rid of this line that is
10 marginally profitable. It does not happen -- if
11 anything the opposite happens, these guys hang on way
12 too long because they -- you know, they think that the
13 -- you know, that the industrial park is going to
14 locate on the line next year, that sort of thing.

15 A question was raised about whether this
16 sort of carte blanche would increase the number of
17 abandonments. I think in the short term the answer is
18 yes, there is an inventory of abandonment candidates
19 out there that once you adopted this exemption, in
20 fact, you would have a spate of abandonments. But
21 once you got through that initial pipeline, I think
22 you would have essentially the same level of

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1 abandonments. You know, it would just happen much
2 faster and some additional lines would be bought in
3 OFAs.

4 I think most of those, because the small
5 railroad judgment is usually right, I don't thing
6 entrepreneurs are going to be buying them. I think
7 mostly local governments will step in and acquire
8 lines because they think, as a public matter, as a
9 matter of public policy, they think it's a good
10 expenditure of public funds to keep the rail
11 infrastructure in place until that industrial park
12 does locate on the line. So I don't think you're
13 going to see -- you're not going to see more
14 abandonments because these guys want to be in the
15 railroad business. They don't want to be out of the
16 railroad business and the unions suggest otherwise.

17 Very quickly to address the AAR issues, we
18 appreciate the AAR's support. We agree with them
19 wholeheartedly that to the extent that an OFA
20 purchaser would acquire any trackage rights or haulage
21 rights that they would never exceed the limits of what
22 the abandoning carrier had over the connecting Class

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1 I, that makes absolute sense. In terms of the -- they
2 raise a question of discontinuance and what would
3 happen if a small railroad discontinued a line owned
4 by a Class I which would typically be a leased
5 situation or an operating agreement situation. The
6 truth is we did not draft the proposal with
7 discontinuances in mind. And if you read it carefully
8 you'll see that it doesn't really address that, but we
9 think the proposal is a good one. We think that it
10 makes sense for it to apply to discontinuances. And
11 in situations where the discontinuance is not a result
12 of an expiration of a lease, for example, but is based
13 on a lack of business opportunity, it would make sense
14 to us that there be one proceeding rather than several
15 proceedings. That strikes us as a good idea.

16 We also agree with the AAR's request for
17 categorized exclusions from the Shpo (phonetic)
18 process and that, we agree, should happen whether or
19 not this proposal goes forward. That concludes my
20 comments.

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