

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

301327

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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Docket No. EP 763, Montana Rail Link, Inc. -- Petition for Rulemaking –
Classification of Carriers (49 C.F.R. Pt. 1201)

Dear Ms. Brown:

Attached is the Reply of Montana Rail Link, Inc. in the above-referenced proceeding. If there are any questions concerning this filing, please contact me by e-mail at rnardi@bakerandmiller.com.

Sincerely,



Rose-Michele Nardi

Attachment

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP 763

**MONTANA RAIL LINK, INC.
- PETITION FOR RULEMAKING -
CLASSIFICATION OF CARRIERS (49 C.F.R. 1201)**

REPLY COMMENTS OF MONTANA RAIL LINK, INC.

On February 14, 2020, Montana Rail Link, Inc. (“MRL”) filed with the Surface Transportation Board (“Board”) a petition for rulemaking to amend the rail carrier classification regulations set forth in 49 C.F.R. 1201, 1-1(a) (the “Petition”). On May 14, 2020, the Board initiated a rulemaking proceeding for the Petition. In response, the American Short Line and Regional Railroad Association (“ASLRRA”) filed comments in support of the Petition, and the Transportation Trades Department, AFL-CIO (“TTD”) filed comments opposing the Petition. On July 2, 2020, MRL filed reply comments.

After considering the comments of ASLRRA, TDD and MRL, the Board issued a notice of proposed rulemaking on September 30, 2020, to amend the rail carrier classification regulations, as requested by the Petition (the “Proposed Rulemaking”).¹ In response to the Proposed Rulemaking, ASLRRA reiterated its support, TDD reiterated its opposition, and the National Grain and Feed Association (“NGFA”) stated that it “does not oppose” the Petition, “[s]ubject to subsequent observations”.²

A. TDD Comments, November 2, 2020

In its Proposed Rulemaking, the Board notes TDD has not persuaded the Board that the current level of labor protection for MRL employees would be insufficient if the Petition were granted.³ TDD’s most recent comments add nothing new to change the Board’s position.

TDD notes its principal concern is the Proposed Rulemaking’s effect on labor protection. TDD argues the Proposed Rulemaking would unfairly maintain the status quo because it would deprive MRL employees of enhanced labor protection.⁴ However, the Petition and MRL’s July 2, 2020, comments demonstrate that maintenance of the status quo is fair and appropriate

¹ Montana Rail Link, Inc. – Petition for Rulemaking – Classification of Carriers, Docket No. EP 763, September 28, 2020.

² Comments of the NGFA, Docket No. EP 763, at 2, November 2, 2020 (“NGFA Comments”).

³ Proposed Rulemaking, at 6.

⁴ Comments of TDD, Docket No. EP 763, Nov. 2, 2020, at 2 (“TDD Comments”).

because MRL's operating and financial characteristics continue to be that of a Class II carrier. As the Board notes in the Proposed Rulemaking: "Based on the record to date, it does appear that regional railroads, such as MRL, even with revenues approaching the current threshold, function more like significant Class II carriers and do not possess the comparative attributes of Class I carriers".⁵ In fact, even the rising revenues of MRL are consistent with the status quo. As noted in the Petition, the current revenue differential between MRL and Class I railroads is similar to the revenue differential the Board faced in the 1992 proceeding,⁶ in which the Board's predecessor last amended the revenue classification standards.

TDD also continues to suggest that if the Board proceeds with the Proposed Rulemaking, MRL only should be excused from the Class I accounting and reporting requirements, and not the Class I labor protection requirements.⁷ However, given that MRL continues to maintain the status quo and function as a Class II carrier, TDD offers no rationale that would support such a selective application of the Board's classification system. And, as noted by the Board, the adoption of such "'unique conditions' for MRL would not establish a more appropriate demarcation between Class I and Class II carriers generally".⁸

In addition, TDD continues to minimize the burdens MRL would incur if it were classified as a Class I carrier and required to comply with Class I accounting and reporting requirements. In its Petition, MRL discusses the significant burden the Class I accounting and reporting requirements would impose on MRL, as well as the lack of any significant offsetting public benefit to justify this burden. The Board in the Proposed Rulemaking appears to share this concern.⁹ In addition, the Board appears to acknowledge the added concern that the regulatory impact of a Class I designation "extends beyond the Board's regulations".¹⁰ This additional concern is well-founded.

Because other federal agencies adopt the Board's classification system, the treatment of MRL as a Class I railroad would deprive MRL of substantial resources to invest in and improve its infrastructure. For example, if MRL were a Class I carrier, it would no longer be eligible for the Short Line Rehabilitation Tax Credit under which MRL received an average of approximately \$2.8 million worth of tax credits per year for 2018 and 2019. Similarly, MRL would lose eligibility to access funds under the Railroad Rehabilitation and Infrastructure (RRIF) Express Program and the Consolidated Rail Infrastructure and Safety Improvements (CRISI) Program.

At the same time, classification as a Class I railroad also could impose new requirements on MRL (both now and in the future). For example, Class I railroads generally must comply with the extensive and costly positive train control requirements established by the Federal Railroad Administration. The utilization of the Board's classification system by other federal agencies

⁵ Proposed Rulemaking, at 4.

⁶ Petition of Montana Rail Link, Inc., Docket No. EP 763, at 7, n.4, February 14, 2020.

⁷ TDD Comments, at 3.

⁸ Proposed Rulemaking, at 6.

⁹ Proposed Rulemaking, at 5, n.5, September 28, 2020 (noting "the burden of additional reporting by carriers with MRL's characteristics is not justified by any potential use of that information from analysis, monitoring, and other purposes").

¹⁰ *Id.*, at 5.

underscores the importance of excluding railroads, such as MRL, from Class I status. Other federal agencies likely will assume all railroads designated as Class Is share the same fundamental operating and financial characteristics. As a result, a Class I designation could subject MRL to requirements intended for a class of railroads that average more than 27 times MRL's revenue¹¹ and that operate in a manner MRL cannot replicate, given its dependence on a single connecting carrier and its limited geographic reach.

B. NGFA Comments, November 2, 2020

NGFA generally supports the Proposed Rulemaking and also notes its Montana affiliate, the Montana Grain Elevator Association ("MGEA") supports the MRL Petition. The MGEA provided MRL with a letter of support, along with numerous other Montana-based business associations.

NGFA states it "generally agrees with the Board's statement" that regional carriers like MRL "function more like significant Class II carriers and do not possess the comparative attributes (e.g., operational characteristics) of Class I carriers".¹² In addition, NGFA states it agrees with the Board that "MRL provides a persuasive argument that the benefits of certain Class II carriers becoming Class I carriers... would not outweigh the burdens that would be imposed on the newly classified carriers".¹³

Despite its agreement with these core principles and its support of the Proposed Rulemaking, NGFA's Comments also discuss whether Class II railroads should be subject to additional regulation in proceedings governing unreasonable rates and reciprocal switching (including some of the same financial data reporting requirements already identified in the Proposed Rulemaking as a significant Class I burden). The NGFA comments regarding unreasonable rates and reciprocal switching exceed the scope of the Proposed Rulemaking, and can be addressed, if and when appropriate, in specific proceedings for those issues.

However, MRL must respond to NGFA's unsupported statement that MRL "has a virtual monopoly on all rail traffic in the state of Montana, and it often exercises that market power with its customers in a manner not dissimilar from Class I carriers".¹⁴ As MRL has previously pointed out in this proceeding, MRL does not generally have rate-making authority for its freight movements; BNSF Railway Company ("BNSF") sets the freight transportation rates for approximately 96% of MRL's traffic (excluding switching). BNSF also is MRL's sole interchange partner, and the vast majority of MRL's traffic consists of only three commodities. Thus, MRL's dependence on BNSF is similar to a Class III carrier. In addition, BNSF operates more than twice as much track in Montana as MRL. Under these circumstances, NGFA does not attempt to explain how MRL could exercise market power like a Class I carrier or have a monopoly over all Montana rail traffic.

¹¹ Petition, at 8.

¹² NGFA Comments, at 3 (quoting Proposed Rulemaking, at 4).

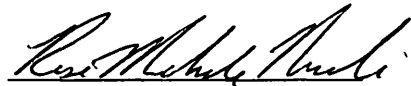
¹³ Id. (quoting Proposed Rulemaking at 5)

¹⁴ Id. at 4.

C. Conclusion

MRL's filings in this proceeding have demonstrated that MRL continues to function as a Class II railroad, and not a Class I. If MRL were treated by the Board as a Class I railroad, MRL would incur substantial burdens without significant off-setting public benefits. Accordingly, the Board should continue to treat MRL as a Class II rail carrier and should adopt the amendment in the Proposed Rulemaking.

Respectfully submitted,



Rose-Michele Nardi
Baker & Miller PLLC
2401 Pennsylvania Ave., NW, Suite 300
Washington, DC 20037
rnardi@bakerandmiller.com

Counsel for Montana Rail Link, Inc.

Dated: December 1, 2020