

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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FD 36148

**ADRIAN & BLISSFIELD RAIL ROAD COMPANY
PETITION FOR DECLARATORY RELIEF**

**PETITION FOR LEAVE TO INTERVENE AND INITIAL COMMENTS
OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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INTRODUCTION AND RELIEF REQUESTED

Pursuant to 49 CFR §1112.4, the American Short Line and Regional Railroad Association ("ASLRRA" or "The Association"), petitions the Board for leave to intervene and submit comments in the above-captioned preemption proceeding supporting the Adrian & Blissfield Rail Road Company ("ADBF"). The forced taking of easements through condemnation presents significant safety and operating issues for the railroad industry and can make it more difficult for railroads to meet their common carrier obligation. Accordingly, the Board should initiate a proceeding, accept ASLRRA's comments, and find that the ICC Termination Act ("ICCTA") preempts Michigan condemnation law.

ASLRRA's INTEREST

The American Short Line and Regional Railroad Association ("ASLRRA" or "The Association") is the national trade association representing the nation's 600 Class II and III railroads commonly referred to as "short lines." Many short line railroads operating in the United States today such as ADBF are small and locally based. While the short line industry represents just under 47,500 route miles, or nearly one third of the national railroad network, it generates only about 5% of the rail industry's total revenues. Short lines are small entrepreneurial businesses in every sense of the word. Many Association member railroads operate light density routes serving rural parts of the country that are too marginal for larger carriers to serve. Short lines are often called the first mile/last mile operators of the nation's railroad system as they handle the origin or destination of nearly one out of every five rail cars moving on the national system.

Short lines have a significant interest at stake here inasmuch many of their rights of way are crossed by or burdened with licenses, leases, and easements for utilities. Frequently, larger railroads conveyed these rights before divesting these lines to smaller railroads. In other cases these rights were reserved by the Class I railroad sellers or lessors from transactions transferring those lines to short line railroads and then transferred to utilities contrary to the needs of these small carriers. Short lines are understandably concerned as to impact that these rights will have on both their safety and operations especially when they have little or no say as to how the utility company will use their rights.

ASLRRA' s COMMENTS

As a preliminary matter, ASLRRA respectfully believes that it should be allowed to intervene and submit comments in support of the Petition for Declaratory Relief filed on October 30, 2017, by its member, ADBF. Although the Board has yet to institute a proceeding pursuant to its modified procedure regulations, the Association urges the agency to accept its comments. Granting the ASLRRA's intervention request will not delay the Board's consideration of this matter inasmuch as no procedural schedule for filing statements has been set and no decisions have been issued. Moreover, permitting ASLRRA's intervention will not broaden the issues raised by the Petition. Allowing ASLRRA's intervention is supported by agency precedent. *SEA-3, Inc.- Emergency Petition for Declaratory Order*, FD 35853 (STB decision served March 17, 2015)(although the Board denied the Petition, it allowed intervention by several railroad parties in support of the petition).

Three issues raised in the Petition in the case have serious implications for the small railroad industry and create real concern at the ASLRRA that an adverse ruling by the Board could be harmful to ability to short lines' to fulfill their common carrier obligation going forward. First is the attempt to bypass the exclusive jurisdiction of the Board over rail construction and operations by filing state court actions for condemnation in cases where the ability of the railroad to use its right for common carrier activities is at risk. Second is the vulnerability of small private railroads with limited capital to be blackmailed by large public utilities operating with special powers and protections arising from state condemnation laws. Third is the threat that the Board might condone an express taking of the railroad's unfettered right to conduct rail operations on its right of way and turn that control over to a non-railroad not under the jurisdiction of the Board.

This action presents the typical range of contested facts and allegations, but the salient fact that concerns ASLRRA is that a utility is attempting to obtain a 2 ½ mile permanent *longitudinal* [emphasis supplied] easement which would run right through the railroad's right of way. Because the easement would be permanent, future potential rail use is relevant and should not be dismissed as speculative. If the Board does not assert its exclusive jurisdiction over a matter where the issue is a 2 ½ mile permanent *longitudinal* easement running right through the right-of-way, utilities and others with the right of condemnation will be emboldened to use state condemnation proceedings to compromise railroad rights-of-way for their own economic benefit everywhere.

The prospect of increased condemnation actions involving small railroad rights-of-way is troubling to ASLRRA not only because of the obvious operational impact but

the financial impact of such litigation on small railroads. Small railroads have limited resources to defend against state condemnation actions brought by large public utilities. These proceedings create David and Goliath confrontations which utilities can use to deplete the financial resources of the railroads attempting to defend their rights-of-way. Practically the entire small railroad industry has been created under the control and supervision of the Surface Transportation Board and its predecessor the Interstate Commerce Commission. Small railroads rely on the applicability and uniformity of the Board's decisions in developing their business plans. They also rely on the Board's unique understanding of the ways that railroads use their rights-of-way now and in the future for the growth and changing needs of shippers, not to mention their all-important interchange relationships with connecting Class I railroads. Allowing disputes like the one here to be resolved in state courts rather than at the Board will place small railroads everywhere in a very vulnerable position which is inconsistent with the Board's exclusive jurisdiction over matters involving the operation of railroads. Courts simply don't have that knowledge or understanding of the railroad industry.

This case presents a clear attempt by a non-railroad utility whose operations are not under the jurisdiction of the Board to wrest control of significant portions of a railroads operating right-of way permanently. The ASLRRA has no desire to enter the debate about the facts of this action, but one fact is clear, undisputed and a threat to both the operational control of the railroad and to the Board's jurisdiction over the activities of the railroad. The easement would grant "unimpaired access, to the extent said access does not interfere with the safety of the Owner's railroad operations". In other words only safety concerns, not railroad operational concerns, would be grounds

for the railroad to limit access to the electric lines to be built on the easement through the railroad property. Even worse, the easement would forbid the railroad from building any structure on its own operating property in the easement area “without the express authorization of Consumers, which may be withheld in Consumers’ *sole discretion*” [emphasis supplied].

Railroads routinely build structure and facilities on their property to support rail operations. If the Board allows a state condemnation action to proceed, the Board will no longer control construction on this rail line. It will be decided by the utility in its sole discretion. If the Board allows a state condemnation action to proceed, it will deprive the Board of its jurisdiction over that construction. ASLRRA asserts this easement is inconsistent with the exclusive jurisdiction of the Board over rail construction and will permanently impede the railroad’s ability to plan and build facilities it and this Board expect will support the fulfillment of its common carrier obligation. Allowing a state condemnation action to proceed under these terms is a threat to all small railroads, and ASLRRA strongly asserts that this Board should not allow it.

ASLRRA believes that reasonable business entities – utilities and small railroads included - ought to work together to find solutions that benefit economic and operational growth for everyone. There is a very real threat to good, workable solutions when one or both parties try to use the leverage of government action to get an economic benefit at the expense of the other. ASLRRA believes the railroad and the utility are in the best position to identify a resolution outside of litigation that assures the ability of the railroad to use its right of way for railroad operations as it deems best and at the same time offers the utility a viable and economic means to construct its electric lines. For

this purpose the ASLRRA recommends the Board encourage the parties to use Board procedures for voluntary mediation of this dispute. That will maintain the sanctity of Board jurisdiction over rail operations and give the parties the best chance for a private sector solution that best meets the needs of them both.

Respectfully submitted,

A handwritten signature in black ink that reads "Keith T. Borman". The signature is written in a cursive, flowing style.

Keith T. Borman
Senior Vice President & General Counsel

CERTIFICATE OF SERVICE

I, Keith Borman, certify that on December 21, 2017, I served a copy of the foregoing Petition for Leave To Intervene and Initial Comments of the American Short Line and Regional Railroad Association, on the following by email and US Mail.

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Dated: December 21, 2017