

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte No. 647

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

STATEMENT OF BEHALF OF
JOHN D. FITZGERALD, GENERAL CHAIRMAN
UNITED TRANSPORTATION UNION (GO-386)

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Office of Proceedings

AUG 04 2004

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Gordon P. MacDougall

August 11, 2004

This written statement is on behalf of John D. Fitzgerald, who could not be here today. Mr. Fitzgerald serves as General Chairman for United Transportation Union-General Committee of Adjustment (UTU/GO-386), on lines of The Burlington Northern and Santa Fe Railway Company (BNSF), with offices at Vancouver, WA. Mr. Fitzgerald's committee also represents persons employed by Puget Sound & Pacific Railroad, a class III carrier, and by the former Montana Western Railway Co., Inc., a class III carrier.^{1/}

BNSF employees have an interest in the abandonment regulations applicable to Class II and Class III rail carriers. First, the employees of a number of these carriers are represented by the

^{1/} BNSF assumed an interest in, and operation of, Montana Western Railway pursuant to the exemption granted in Finance Docket No. 34330, The Burlington Northern and Santa Fe Railway Company-Acquisition and Operation Exemption-Montana Western Railway Company, Inc. (served June 23, 2003), 68 Fed. Reg. 38108 (June 26, 2003).

standard employee organizations, including UTU. A present example is Puget Sound & Pacific Railroad, whose employees are represented by UTU, and are serviced by UTU/GO-386. Second, BNSF directly connects with many class II and class III rail carriers, and/or participates in rail business having a movement on such rail carriers; accordingly, abandonment/discontinuance by these smaller carriers, and associated offers of financial assistance (OFA), public use conditions, and interim trail use/rail banking, have important impacts upon the present and future rail freight handled by BNSF and its employees. Third, the interest of employees is not restricted to job opportunities and imposition of minimum employee protective conditions, but extends to maximum short-term and to long-term benefits of full employment.

1. Background to this Proceeding. The Board has followed an unusual and novel approach in this rulemaking. It is clear the procedure has become confusing to the public.

A. Order Instituting an Investigation. Some 47 named rail carriers, all represented by a single law firm, on May 15, 2003, filed a petition that the Board institute a proceeding to exempt class II and class III carriers from the abandonment/discontinuance requirements of 49 U.S.C. 10903, and to revise the Board's rules for exempt abandonments (49 CFR 1150.52) and offers of financial assistance (49 CFR 1152.27). The petition was amended on May 2, 2003, to include 18 additional carriers. Subsequently, an additional 11 carriers, through a different attorney, indicated support for the May 15, 2003 petition.^{2/}

^{2/} Denver Rock Island Railroad Company, et al., filed July 22, 2004.

The Board on August 7, 2003 (served August 13), instituted a proceeding, pursuant to 49 U.S.C. 10502(b). The Board stated it was not seeking public comment on the petition at the time, but intended to consider this proposal, and any other matters regarding the abandonment process generally, at an oral hearing; the Board stated it would issue a subsequent notice setting forth the details for filing comments on these matters and for participating in the hearing. The Board's August 13, 2003 order also made reference to a Federal Register notice being issued the same day:

(t)he Board will institute a proceeding under section 10502. However, the Board is not seeking public comment on petitioners' proposal at this time. Instead, as set forth in the notice to be published in the Federal Register under this docket number today, the Board intends to consider this proposal, and any other matters that interested persons may raise regarding the abandonment process generally, at an oral hearing to be held in the fall of this year. While the Board is not now seeking public comment on petitioners' proposal or on the Board's abandonment process in general, the Board will issue a subsequent notice setting forth the details for filing comments on these matters and for participating in the Board's hearing.

B. The First Federal Register Notice. The first Federal Register notice (August 13, 2003), unlike the Board's August 13 decision, carried a caption: "Advance Notice of Proposed Rulemaking." 68 Fed. Reg. 48332-33. (ANPRM). The Federal Register notice went into considerable detail concerning the purposes, objectives, and effects of the proposed class exemption and rule revisions. The Federal Register notice is attached as Appendix 1. Among other things, the Board in the ANPRM states the proposal would allow small carriers to file a notice of exemption whenever the carrier

makes the business judgment that a given line was no longer economically viable.

The August 13, 2003 Federal Register notice is unusual for its detailed description of the May 15, 2003 proposal, in contrast with the very limited description of the proposal in the Board's August 13, 2003 decision. Ordinarily, the reverse is the case; that is, the Board's decision is the issuance which describes the proposed action in detail, whereas the Federal Register notice merely summarizes the Board's action, and directs the reader to a more detailed statement in the Board's document, available for purchase through an outside contract printer.

C. July 22 Notice; July 27, 2004 Fed. Reg. Notice. The Board after a lapse of about one year, on July 22, 2004 (Thursday), issued notice of a public hearing for August 11, 2004, with written notice of intent to participate due July 26 (Monday), and written testimony due August 3. The Board's service list for its July 22 notice contained only one person apart from the three attorneys for the petitioning rail carriers.

The Board published its second Federal Register notice, advising its July 22 hearing decision, on July 27, 2004, but this was one day after the July 26, 2004 deadline for filing a notice of intent to participate at the August 11, 2003 hearing, and to file written testimony on August 3, 2004. 69 Fed. Reg. 44727-28 (July 27, 2004).

The Board's second notice (July 22, 2004), differs from its earlier first notice (August 12, 2003), in that the Board now seeks the expression of views on the proposal and other proposed changes to the abandonment regulations as they relate to class II

and class III carriers. The Board's July 22 notice went on to stated that the August 11 hearing will provide a forum for the oral discussion of the proposed class exemption and any proposals to amend the abandonment regulations:

The Surface Transportation Board (Board) will hold a public hearing on Wednesday, August 11, 2004, at its offices in Washington, DC, to provide persons an opportunity to express their views on the subject of the Board's abandonment regulations for Class II and Class III rail carriers. (Notice, 7/22/04, 1).

On May 15, 2003, sixty-five short-line regional carriers (petitioners) filed a petition to institute a proceeding under 49 U.S.C. 10502 to exempt a class of small carriers from the prior approval abandonment requirements of 49 U.S.C. 10903. Petitioners included a detailed proposal including revised rules for 49 CFR 1152.50 (exempt abandonments) and 1152.27 (offers of financial assistance). The Board will hold a public hearing to provide a forum for the expression of views by rail shippers, railroads, and other interested persons, on this and other proposed changes to the Board's abandonment regulations as they relate to Class II and Class III rail carriers. This hearing will provide a forum for the oral discussion of the proposed class exemption and any proposals that interested persons might wish to offer to amend the abandonment regulations.

2. Present Scope of Proceeding/Hearing.

The above background indicates there is a lack of clarity as to the present scope of the proceeding. The Board in its first Federal Register notice, characterized the proceeding as ANPRM. 68 Fed. Reg. 48332. Thus, it is appropriate for interested persons to first await a Notice of Proposed Rulemaking (NPRM), prior to the submissions of written/oral comments or views, and a number of responses to the Board's July 22 notice already have taken this approach.^{2/}

^{2/} National Grain and Feed Association (7/26/04), Rail America, Inc. (7/30/04), West Virginia Dept. of Transportation (8/2/04).

The first notice (August 13, 2003), invited "comments," whereas the second notice (July 22, 2004) requested "views." The standard nomenclature is "comments," as in "notice-and-comment" rulemaking. Cf. Texas Office of Public Utility Counsel v. FCC, 265 F.3d 317, 325 (5th Cir. 2000); Reytblatt v. U.S. Nuclear Regulatory Com'n, 105 F.3d 715, 722 (D.C. Cir. 1997) However, section 4(c) of the Administrative Procedure Act, 5 U.S.C. 553(c), employs the term "views."

UTU/GO-386 will await more concrete proposals before submitting definitive suggestions of its own. Today's "comments" or "views" are tentative.

I. The Predicate for the Proposal is Faulty. The May 15, 2003 petition proposes a sweeping exemption from 49 U.S.C. 10903 for all abandonments by class II and class III rail carriers merely upon the desire of the carrier. There is no justification for such deregulation. In most class exemption proceedings, the Board has some prior experience with a class exemption proposal by reference to previous individual cases, and these are often cited in the agency's class exemption decision. Here, in contrast, the petition omits relevant examples of routine exemption approvals. Indeed, the petition points to the opposite--denial of individual exemptions. (Pet., 3/15/03, 12 n.6). Examples of prior agency class exemption practice to proceed first with granting individual exemptions, include the out-of-service exemption, Exemption of Out-of-Service Rail Lines, 366 I.C.C. 885 (1983), vac. sub nom. Illinois Commerce Com'n v. ICC, 787 F.2d 616 (D.C. Cir. 1986); and the non-carrier line acquisition class exemption, Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810

(1985), aff'd Illinois Commerce Com'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987).

It seems clear that the purpose of the May 15, 2003 petition is not with §10903 abandonments, but is an attempt to revise the OFA process. However, OFA is covered by §10904, not §10903. In short, the petitioners have not justified any new class exemption for the provisions of §10903.^{4/}

The petition proposes to change Board abandonment policy, not to facilitate the current process under the current standards. The need for change has not been proven and, in any event, properly is for the U.S. Congress.

II. The OFA Process is Not the Exclusive Process. The OFA process is not the exclusive method for transferring the operation of a line to another entity. The more orderly method has been the line acquisition class exemption for non-carriers or class III carriers. 49 CFR 1150.31, 1150.41.

For all that appears, petitioners would hold the threat of summary §10903 abandonment over the heads of shippers, rail employees, and communities, as a bargaining chip in the OFA process under §10904.

III. The Rulemaking Process. This commentor does not consider the process followed by the agency in this rulemaking,

^{4/} Petitioners present a faulty history of the short-line railroad industry, which arrived on the scene well before the Staggers Act. See: Levine, Harvey A., et al., Small Railroads (AAR, 1982). Financial assistance programs stem from the 3-R Act (1973). The AAR identified 383 small railroads in 1979. (Ibid., p. VIII). The figure in 2003 is 545, for both "small" and "regional" rail carriers. AAR, Railroad Facts, 3 (2003 ed.). The real railroad "deregulation" legislation was the 4-R Act (1976), not the Staggers Act (1980). Stone, Richard D: The Interstate Commerce Commission and the Railroad Industry, 65-84 (Praeger, 1991).

set forth earlier in this written statement, to give fair notice to the public, or to follow open procedures for a proper "forum" as suggested in the July 22, 2004 notice.

The Board on August 2, 2004, issued a decision in this proceeding, but did not give any indication of such issuance on the Board's website, or at the Board's public docket room.^{5/}

UTU/GO-386, at the public hearing held July 21, 2004,^{6/} commented on the Board's failure to allow speakers to see presentations filed beforehand by other participants. The selective issuance by the Board's decision of its July 30 decision (served August 2) is in the same vein of restricting full discussion.

Respectfully submitted,

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August 3, 2004

Attorney for John D. Fitzgerald

^{5/} Apparently, only persons already on the Board's service list, or those filing a notice of intent to participate, were served by mail.

^{6/} Ex Parte No. 646, Rail Rate Challenges in Small Cases.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1152

[STB Ex Parte No. 647]

Class Exemption for Expedited
Abandonment Procedure for Class II
and Class III Railroads

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (Board) has received a proposal to create a class exemption under 49 U.S.C. 10502 for Class II and Class III railroads from the prior approval abandonment requirements of 49 U.S.C. 10903. The Board intends to consider this proposal, and any other matters that interested persons may raise regarding the abandonment process generally, at an oral hearing to be held in the fall of this year. The Board is not seeking public comment at this time but will issue a subsequent notice setting forth the details for filing comments and participating in the Board's hearing.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600. [Federal Information Relay Service (FIRS) for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: On May 15, 2003, sixty-five regional and short-line carriers¹ (petitioners) filed a

¹ The sixty-five carriers are: Allegheny & Eastern Railroad, Inc.; Bradford Industrial Rail, Inc.; Buffalo & Pittsburgh Railroad, Inc.; Carolina Coastal Railway, Inc.; Commonwealth Railway, Inc.; Chicago South Shore & South Bend Railroad; Chattahoochee & Gulf Railroad Co., Inc.; Connecut Valley Railroad Co., Inc.; Corpus Christi Terminal Railroad, Inc.; The Dansville & Mount Morris Railroad Company; Eastern Idaho Railroad, Inc.; Genesee & Wyoming Railroad Company; Golden Isles Terminal Railroad, Inc.; H&S Railroad Co.,

petition before the Board to use its exemption authority under 49 U.S.C. 10502. Petitioners ask the Board to adopt a new class exemption for use by small carriers in abandoning rail lines. Petitioners claim that the proposal would eliminate current regulatory incentives for small carriers to delay abandonment while letting the traffic base and physical condition of low-density lines deteriorate; subject exit and entry to the rail industry to market forces; and increase the dissemination of commercial information to facilitate the offer of financial assistance (OFA) procedures. In addition, petitioners claim that the proposal would reduce the administrative burdens on the Board.

The proposal would allow small carriers to file a notice of exemption whenever they make the business decision that a given line was no longer economically viable. Petitioners argue that their proposal would eliminate delays in the abandonment process and allow small carriers to quickly redeploy limited assets. This, petitioners maintain, would facilitate maintenance and infrastructure upgrades necessary for small carriers to continue in operation.

The proposed notices of exemption would include 36-months of traffic and revenue information, a description of the current physical condition of the line, an estimate of rehabilitation, the

Inc.; Illinois Indiana Development Company, LLC; Illinois & Midland Railroad Company, Inc.; Kansas & Oklahoma Railroad, Inc.; Knoxville & Holston River Railroad Co., Inc.; Lancaster and Chester Railway Company; Laurinburg & Southern Railroad Co., Inc.; Louisiana & Delta Railroad, Inc.; Louisville & Indiana Railroad Company; Minnesota Prairie Line, Inc.; Montana Rail Link, Inc.; New York & Atlantic Railway Company; Pacific Harbor Line, Inc.; Palouse River & Coulee City Railroad, Inc.; Pennsylvania Southwestern Railroad, Inc.; Piedmont & Atlantic Railroad Inc.; Pittsburgh & Shawmut Railroad, Inc.; Portland & Western Railroad, Inc.; Rochester & Southern Railroad, Inc.; Rocky Mount & Western Railroad Co., Inc.; St. Lawrence & Atlantic Railroad Company; Salt Lake City Southern Railroad Company; Savannah Port Terminal Railroad, Inc.; South Buffalo Railway Company; South Kansas & Oklahoma Railroad Company; Stillwater Central Railroad; Talleyrand Terminal Railroad, Inc.; Three Notch Railroad Co., Inc.; Timber Rock Railroad, Inc.; Twin Cities & Western Railroad Company; Utah Railway Company; Willamette & Pacific Railroad, Inc.; Wiregrass Central Railroad Company, Inc.; York Railway Company; AN Railway, LLC; Atlantic and Western Railway, Limited Partnership; Bay Line Railroad, LLC; Central Midland Railway; Copper Basin Railway, Inc.; East Tennessee Railway, L.P.; Galveston Railroad, L.P.; Georgia Central Railway, L.P.; The Indiana Rail Road Company; KWT Railway, Inc.; Little Rock & Western Railway, L.P.; M & B Railroad, L.L.C.; Tomahawk Railway, Limited Partnership; Valdosta Railway, L.P.; Western Kentucky Railway, LLC; Wheeling & Lake Erie Railway Company; Wilmington Terminal Railroad, L.P.; and Yolo Shortline Railroad Company.

carrier's calculation of the line's net liquidation value (NLV), the names of connecting carriers and the points of interchange. The abandoning carrier would publish this information for three consecutive weeks in local newspapers and in nationally-distributed, railroad trade publications. A potential purchaser could review the data underlying the published information and the abandoning carrier would be required to provide such information within 5 days.

Petitioners' proposal would require carriers availing themselves of the class exemption to stipulate that any OFA sale would be at NLV and would forgo any claim of a going concern value. In addition, the proposed exemption would assure that any purchaser would have access to third-party carriers through trackage or haulage rights at

commercially reasonable rates where traffic moved via those connections during the preceding 24-month period. Further, the proposal would give OFA purchasers more time to consider and evaluate a line by allowing offers up to 90 days after publication in the **Federal Register** and it would make the data available before the OFA process formally begins.

Petitioners' proposal would also invert the environmental and historic preservation requirements. Currently, abandoning carriers must prepare environmental and historic reports before filing for abandonment authority. Petitioners argue that this is sometimes wasteful, as a successful OFA purchase obviates the need for such reports. Petitioners' proposal would allow the environmental and historic reporting to

be made after the completion of the OFA process.

As noted, the Board intends to hold a hearing during the fall on this petition and on other matters that interested persons may raise regarding the Board's abandonment process. The Board will issue a subsequent notice providing details for persons interested in submitting written comments and participating in the Board's hearing.

Board decisions, notices, and the May 15, 2003 petition are available on our Web site at <http://www.stb.dot.gov>.

Decided: August 7, 2003.

By the Board, Roger Nober, Chairman.

Vernon A. Williams,
Secretary.

[FR Doc. 03-20588 Filed 8-12-03; 8:45 am]

BILLING CODE 4915-00-P