

PAUL C. THOMPSON
International President

RICK L. MARCEAU
Assistant President

DAN E. JOHNSON
General Secretary and Treasurer



LEGAL DEPARTMENT

CLINTON J. MILLER, III
General Counsel

• KEVIN C. BRODAR
Associate General Counsel

• ROBERT L. McCARTY
Associate General Counsel

• DANIEL R. ELLIOTT, III
Associate General Counsel

UPS NEXT DAY AIR

August 23, 2004

ENTERED
Office of Proceedings

AUG 24 2004

Part of
Public Record



Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Ex Parte No. 647

Dear Mr. Williams:

Please find enclosed the original and 10 copies of United Transportation Union's Written Testimony for filing in the above-captioned matter. In accordance with prior Board requirements, we have also enclosed a disk in WordPerfect format.

Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "D.R. Elliott".

Daniel R. Elliott, III
Associate General Counsel

cc: C. J. Miller, III, General Counsel

Before the
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 647

ALLEGHENY AND EASTERN RAILROAD *et al.*
– PETITION FOR RULEMAKING CLASS
EXEMPTION FOR EXPEDITED
ABANDONMENT PROCEDURE FOR CLASS II
AND CLASS III RAILROADS

UNITED TRANSPORTATION UNION'S
WRITTEN TESTIMONY



ENTERED
Office of Proceedings

AUG 24 2004

Part of
Public Record

United Transportation Union (“UTU”) respectfully submits its written testimony pursuant to the Surface Transportation Board’s (“Board”) July 22 and August 3, 2004 orders in this proceeding. Petitioners seek under 49 U.S.C. § 10502 to exempt Class II and III carriers from the prior approval abandonment requirements of 49 U.S.C. § 10903.

UTU finds this request quite ironic considering the justification for the beginning of most short-line and some regional carriers was to avoid the abandonment of lines that the major carriers found unprofitable to operate. In the past, prior to the ICC Termination Act, the ICC had traditionally exercised its claimed discretion in declining to impose labor protection costs on the sale of lines in § 10901 transactions in order to encourage the purchase and continued operation of marginal lines, and to avoid a chilling effect on future sales of unprofitable lines. *Rarus Railway Corporation – Exemption from 49 U.S.C. § 10901 and 11301*. (ICC decided March 30, 1989). In other words, these carriers were formed on the backs of labor based on an extremely liberal interpretation of § 10901. Now, these same carriers, who were viewed by some as the saviors of these lines, seek the right to abandon these same lines willy-nilly without any say by the Board whatsoever.

The Petitioners argue that the present abandonment procedures are “extremely burdensome and highly inappropriate” for most small carriers. In other words, the Petitioners appear to argue, although not coming out and actually saying it, that the present procedures are such a financial burden on them that the proposed exemption needs to be adopted.

The Petitioners appear to cry poverty on the basis that small carriers appear to be diminutive in comparison to the major carriers. The Petitioners note that small carriers average only 91 miles of line and less than \$5 million in annual operating revenue.

However, what the Petitioners fail to note is that most of the “small” carriers petitioning the Board here are owned by extremely wealthy “holding” or “parent” companies. These are the same holding companies that the short lines used to evade labor protective conditions under Section 11346 by using the Section 10901 “continuance in control” shell game prior to 1995. Now, these same “small” carriers who benefitted from the corporate shell games seem to want to ignore the successes of their “parent” companies. Many of these “holding” companies have become large, highly profitable businesses since the loophole for these short lines was opened in the 1980’s.

In fact, the publicly-traded Genessee & Wyoming, Inc. (“G&W”) owns 22 of the 47 petitioning “small” carriers in this proceeding. G&W’s North American revenues were \$244 million dollars in 2003 based on its Annual Report, just short of the \$250 million to be considered a Class I railroad. G&W’s net income for 2003 was \$28.7 million. In addition, Petitioner Lancaster and Chester Railway Company is owned by the privately-held Springs/Close Family Companies, which also owns Spring Industries, which did approximately \$2.5 billion in business last year. Nine of the other petitioning railroads are owned by Gulf & Ohio, Inc. Five more of the petitioning railroads are run by Anacostia & Pacific Company, Inc. (Gilbertsons). Montana Rail Link, Inc. is owned by the Washington Companies, which is a privately-held entity which collectively generated revenues of \$1

billion last year. Seven other petitioners are owned by Watco, Inc. Finally, the other two remaining petitioning short lines are owned by the Shoemaker, Clay, Head & Drusch group. Once the real players behind this Petition are actually identified, the pleas for less burdensome regulations based on economic tales of woe seem somewhat disingenuous.

In line with the financial argument, Petitioners also claim that these application procedures “are not necessary to carry out the transportation policy of Section 10101” of Title 49 with respect to “small carriers.” Petitioners argue the proposed exemption (1) “would allow small carriers to file for abandonment authority before the lines’ traffic base and physical condition have deteriorated;” (2) “encourages rapid deployment of rail assets;” (3) “shifts the analysis away from a focus on profitability to a focus on saving lines;” (4) “requires dissemination of information important to prospective purchases, maximizing chances for OFA’s;” (5) “makes actual sales under the OFA process much more attractive;” (6) “gives prospective purchasers more time to study and evaluate a line prior to the deadline for submission of OFA’s;” and (7) “substantially decreases the work load of both the Small Carriers and the Board.” In doing these things, Petitioners argue that “the proposed exemption is not inconsistent with, but instead significantly advances the RTP.”

This argument should fail on two grounds. First of all, it assumes that these things can only be accomplished with the proposed exemption in place. However, as discussed earlier, the Petitioners are not the small “mom and pop” operations that they hold themselves out to be. These carriers are all a part of larger, well-to-do operations that can easily afford to timely file abandonment applications or exemptions. Since they can afford to follow the present abandonment procedures, this proposed exemption is simply a disguised request for a financial exemption, which should not be allowed since they are obviously financially capable of following the existing rules.

Moreover, what the Petitioners actually seek here is carte blanche to abandon their lines. As

a result, it seems impossible for the Petitioners to show that application of § 10903 is unnecessary to effectuation of the “rail transportation policy” (“RTP”) with respect to the proposed exemption. Here, as noted, Petitioners basically argue that the proposed exemption advances certain RTP provisions. Petitioners mainly argue that the proposed exemption will stop the deterioration of lines allegedly caused by delay in filing for abandonment because of a need to avoid administrative filing costs. However, it seems that these lines could nonetheless be sold in their peak condition through the normal sale procedures before this deterioration occurs regardless of these filing costs.

Also, the Petitioners conveniently gloss over why application of § 10903 is unnecessary to effectuate 49 U.S.C. § 10101 in making their case for an exemption. The proposed exemption allows the short lines and regional carriers to subjectively determine whether abandonment is appropriate with no checks in place by the STB. This proposed exemption leaves shippers and the rail transportation system vulnerable to the will of these carriers who could abandon important rail lines, could abuse shippers’ rates by threatening abandonment, and could harm rail labor by the loss of work on these lines especially in total carrier abandonment situations. *See* 49 U.S.C. § 10101 (1), (3), (4), (5), (6), (9), (11), (12), (14). This bold request should be rejected since it leaves the shippers, labor, and the rail transportation system at the mercy of these carriers, which clearly runs afoul of the RTP.

For similar reasons, the Petitioners’ “limited scope” and “abuse of market power” arguments also should fail. As mentioned, the proposed exemption would not protect shippers and the rail transportation system since the proposed standard is entirely subjective and has no significant restrictions on the carriers in place. Moreover, regional railroads are quite large which could result in abandonments of large pieces of trackage without any review. (Petitioner Montana Rail Link itself is over 900 miles long). This type of unfettered discretion clearly is not what Congress intended by its enactment of this exemption provision.

In sum, the Petitioners raise various reasons why the proposed exemption is beneficial to the RTP; however, those explanations only appear to relate to the bottom line of these entities. Petitioners can clearly follow the present procedures without undue hardship. The present abandonment application and exemption procedures make sure a request for abandonment meets "the public convenience and necessity." The proposed exemption, on the other hand, provides no protection to rail transportation, shippers or labor.

Respectfully submitted,

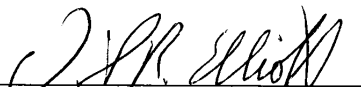
A handwritten signature in dark ink, appearing to read "D. R. Elliott, III", is written over a horizontal line.

Daniel R. Elliott, III
Associate General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107
Tel: (216) 228-9400
Fax: (216) 228-0937

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing United Transportation Union's Written Testimony has been served this 23rd day of August, 2004 via first-class, postage pre-paid mail upon the following:

Mark H. Sidman
Weiner, Brodsky, Sidman & Kider
1300 19th Street, N.W., 5th Floor
Washington, DC 20036-1609


Daniel R. Elliott, III