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## Transportation Communications International Union

Robert A. Scardelletti, *International President*

LEGAL DEPARTMENT

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August 24, 2004

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Secretary  
Surface Transportation Board  
1925 K Street, NW, Room 700  
Washington, DC 20423

Re: Class Exemption for Expedited Abandonment Procedure  
for Class II and Class III Railroads  
Ex Parte No. 647

Dear Secretary:

Pursuant to the Board's Order of August 3, 2004, enclosed please find an original and ten (10) copies of the Written Testimony of the Rail Labor Division, Transportation Trades Department, AFL-CIO, in the above-captioned matter.

Thank you for your consideration of this matter.

Very truly yours,

Mitchell M. Kraus  
General Counsel

MMK:fm  
Enclosures  
CC: Mark Sidman, Esquire



211872

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

WRITTEN TESTIMONY OF THE RAIL LABOR DIVISION,  
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

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Introduction

Pursuant to the STB's Order of August 3, 2004, the Rail Labor Division (RLD) of the Transportation Trades Department of the AFL-CIO ("TTD")<sup>1</sup> submits these comments in opposition to the petition for rulemaking filed by forty-six short line and regional carriers seeking a class exemption under 49 U.S.C. § 1052 exempting small carriers from obtaining prior approval for abandonments.

Under Petitioners' proposal, Class II and III carriers desiring to use the proposed class exemption would be required to

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<sup>1</sup>The RLD is composed of American Train Dispatchers Department; Brotherhood of Locomotive Engineers and Trainmen; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; National Council of Firemen and Oilers SEIU; Sheet Metal Workers International Association; Transportation Communications International Union; Transport Workers Union of America.

file a notice of exemption with the STB. In addition, a separate notice must be filed with various state and federal agencies and a verified notice with shippers. Thereafter, the filing carrier automatically is authorized to discontinue service and then abandon the line. This authority to discontinue and abandon is to be granted regardless of shipper opposition, regardless of whether the line in question is in fact operating at a profit or a loss, regardless of whether shippers have access to alternative forms of transportation, and regardless of any other considerations.

The Petitioners attempt to justify this sweeping proposal by claiming that small carriers only seek to abandon a line after they have concluded subjectively that the the line in question will not contribute economically to its rail system. As conceded by Petitioners, this conclusion may be wrong. (Petition pp. 6-7) Nor is it self-evident that a carrier free to abandon as it wishes would, in fact, exhaust all efforts to make the line viable, before filing under the proposed class exemption. Carriers may seek to abandon lines which though viable are not as profitable as they wish. Carrier calculation of cost attributable to or revenue derived from a line it seeks to abandon may well be subject to challenge. See Tulare Valley Railroad Company - Abandonment and Discontinuance Exemption - In Tulare and Kern Counties, CA (Service Date February 21, 1997) at p. 8 (carrier failed to present credible evidence that line could not be operated profitably).

Perhaps the most disingenuous of Petitioners' arguments is the claim that the exemption is necessary so that the carrier is not forced to raise prices to such an extent as to cause shippers to seek other forms of transportation or defer maintenance so that service markedly deteriorates with the same result. According to the Petitioners, under the current procedures, carriers delay filing for an abandonment until it has permitted the line to so deteriorate that it cannot be revived by anyone, thereby assuring success on the merits.

Petitioners suggest that, in order to avoid STB scrutiny, carriers' purposefully plan the deterioration of lines in spite of receiving a certificate to operate such lines consistent with "public convenience and necessity." 49 U.S.C. § 10902(c)). Petitioners' support for this proposition is that only a very small percentage of abandonment cases between 1998 and 2001 were dismissed due to OFA sales. But this fact does not support the conclusion that the carriers had set out to destroy the viability of the lines they served. Curiously, not a single one of the forty-six petitioning carriers filed any evidence that they had engaged in this type of conduct, which they claim is so prevalent as to justify the requested exemption. Nor is there any evidence to support the claim that there will be any increase in OFA sales under the proposed exemption. Indeed, an equally plausible explanation is that very few of the lines actually abandoned under

the current procedures would have been viable under the proposed class exemption, and the proposal will not result in an increase in OFA sales.

While the Petitioners' extol the virtues of "market driven solutions," their petition suggests that they require the "dead hand" of regulation to force them to do what they are free to do today. There is no extant regulation that prohibits the Petitioners from taking any of their lines of railroad that they "subjectively" believe are not viable and offer it to the public for its net liquidation value ("NLV") with appropriate safeguards for the interchange of traffic from that line. Indeed, the Board's existing exemption procedures at 49 C.F.R. §1150 (Subpart D) would permit consummation of such transactions seven (7) days after the parties filed a notice of exemption. Given that the Petitioners are free to dispose of these "subjectively" unviable lines in the manner they propose today, an ulterior motive must be at work in this petition.<sup>2</sup>

Additionally, Petitioners' proposal could lead to a "backdoor" way for Class I carriers to shed lines they know they could not abandon. Under Petitioners' scheme, a Class I carrier could sell

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<sup>2</sup>Petitioners concede they will need at least \$7 billion to upgrade their lines to accommodate higher capacity cars. Pet. at 16, n. 9. Perhaps the threat of expedited abandonment will be a tool they use to pressure shippers, communities, and/or state and federal governments to put forward subsidies for those lines under threat of quick cessation of rail service.

a line to a Class II or III carrier under very favorable terms to the acquiring entity because that entity would not have to assume the risk of continued operation of the line. Essentially, the Class II and Class III carriers would act as straw men for the Class I carriers to facilitate the abandonment of line the Class I carriers "subjectively" determined were not viable.

Under Petitioners' proposal, shipper and community interests play no role, since the exemption will be automatically granted once proper notice is given. They operate from an assumption that market forces will adequately protect shippers and the public interest. As we demonstrate below, this assumption is belied by the language of the Interstate Commerce Act ("ICA") and at least eighty years of its application.

**A. The Proposed Class Exemption Would Replace the Balancing Test Used To Determine Whether Abandonment Is Consistent With Public Convenience and Necessity.**

The STB's power to regulate abandonments by rail carriers stems from the Transportation Act of 1920, Ch. 91, 41 Stat. 477-78, which added a new section 1(18) to the ICA, which has been recodified in 49 U.S.C. § 10903(d), which provides that a carrier may abandon any part of its rail lines or discontinue operations:

...only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

The Supreme Court has repeatedly held that the ICC was required to use a balancing test in applying this test:

In deciding whether to permit an abandonment, the Commission must balance "the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other."

Chicago & Northwestern v. Kalo Brick & Tile, 450 U.S. 311, 321 (1981), citing Purcell v. United States, 315 U.S. 381, 384 (1942). See State of Colorado v. United States, 271 U.S. 159, 168-69 (1926) (degree of dependence of communities must be balanced against financial loss incurred by carrier).

The STB has stated that, in applying this test, it is responsible to determine

...whether the burden on the railroad from continued operation is outweighed by the burden on the shippers and public parties from the loss of rail service. This involves a question of whether, and to what degree, shippers will be harmed if rail service is no longer available....

\* \* \*

In determining whether to grant or deny an abandonment or discontinuance application, we consider a number of factors, including operating profit or loss, other costs the carrier may experience (including rehabilitation and economic costs), and the effects on shippers and communities. No one factor is conclusive.

Camas Prairie Railnet, Inc. - Abandonment - In Lewis, Nez, Perce and Idaho Counties, Docket No. 564-0 (Service Date September 13, 2000) at p. 24.

The STB has repeatedly held that, in any abandonment case, whether abandonment is sought by application or petition, the railroad must demonstrate that the lines in question are a burden on interstate commerce. Petitioners seeking an exemption under Section 10502 bear the burden of showing that its current situation imposes a burden on them that outweighs the harm that would befall shippers, other members of the public, and the adverse impact on rural and community development if the lines were abandoned. Where petitioning carriers have failed to meet this burden, the STB has denied their request for an exemption. See, e.g., BNSF - Abandonment of Chicago Area Trackage, IL, STB Docket No. AB-6 (Sub-No. 32X) (Service date September 21, 1999); Grauley River Railroad, LLC - Abandonment and Discontinuance of Service - In Webster and Nicholas Counties, WV, STB Docket No. AB-559 (Sub-No. 1X) (Service Date June 16, 1999); Buffalo & Pittsburgh Railroad, Inc. - Abandonment Exemption - In Erie and Cattaraugus Counties, NY, STB Docket No. AB-369 (Sub-No. 3X) (Service Date September 18, 1998); Owensville Terminal Co., Inc. - Abandonment Exemption - In Edwards and White Counties, IN, STB Docket No. AB-477 (Sub-No. 1X) (Service Date August 1, 1997).

Petitioners have cited the Board's denial of an exemption in Central Railroad Company of Indiana - Abandonment Exemption - In Dearborn, Decatur, Franklin, Ripley and Shelby Counties, STB Docket No. AB-459 (Sub-No. 2X) (Service Date November 6, 1998)

("Central"), as an example of the policy which in their view needs to be changed. But contrary to Petitioner's, Central demonstrates the benefits of the current policy. In Central, the STB denied the requested exemption in the face of shipper claims inter alia of grossly understated revenue attributable to the line, the exclusion of overhead revenue related to Conrail traffic, and overstated operating expenses and rehabilitative costs. Shippers also argued that the exemption would have a severe adverse impact on the shipping public.

Although Central filed a petition to reopen the exemption proceeding, it withdrew said petition after being sold to Rail Tex, Inc., and the line was not abandoned. Central, supra. See San Joaquin Valley Railroad Company - Abandonment Exemption in Kings and Fresno Counties, CA, STB Docket No. AB-398 (Sub-No. 4X) (Service Date May 23, 1997), where exemption was denied because of insufficient information and shipper willingness to help finance rehabilitation of line.

Under the proposed class exemptions, Class II and III carriers will have no burden of proof, and as noted above a balancing test will no longer be utilized in determining whether the specific abandonment will be consistent with public convenience and necessity. Under the proposal, petitions for abandonment would receive no scrutiny from the Board. Carriers interest is effectively equated with public interest.

Petitioners urge that this balancing test be effectively discontinued through the exemption process. They argue that Class II and Class III carriers should be permitted to abandon lines as they deem appropriate and that the market will best protect shippers. Effectively, if a small carrier's line is making a profit, albeit less than it deems desirable, Petitioners argue that they be able to abandon simply by filing a notice.

But lines' profitability is part of the regulatory balancing test. In 1979, the ICC adopted opportunity costs as one of the factors to be considered in applying the balancing test. The Commission recognized that a factor to be considered is whether the line earns an adequate rate of return. Abandonment of Railroad Line - Use of Opportunity Costs, 360 ICC 571. In adopting opportunity costs as a factor to be considered, the ICC did not abandon the balancing test first articulated by the Supreme Court in Colorado v. U.S., supra. Opportunity costs are only one of the factors, not the only factor, to be considered. See, Cartersville Elevator v. ICC, 724 F.2d 668, 675 (8<sup>th</sup> Cir. 1984) (cases cited therein).

Petitioners' proposal would effectively make opportunity cost the only factor and leave it to the carrier alone to determine what rate of return it should receive on its investment, without scrutiny from the Board. The proposed class exemption is an end run around the well established abandonment balancing test which,

as we set forth below, is contrary to the STB's own recent decisions, the transportation policy set forth in Section 10101, and is likely to leave shippers without protection from market abuse. As we set forth below, the proposed exemptions effective removal of any scrutiny of Class I and II carrier abandonments fails to meet the requirements for receiving an exemption under 10502.

**B. The Proposed Exemption Should Be Denied Because It Fails to Meet the Test Established by Section 10502.**

Under Section 10502 the Board may exempt a rail carrier from the application process if it finds that said procedure (1) is not necessary to carry out the transportation policy of Section 10101; and (2) either (a) the transaction is of limited scope, or (b) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power. 49 U.S.C. § 10502(a). Petitioners have conceded that the Board's use of the exemption process in abandonments has been limited to situations where there is no shipper opposition or operation of the line is clearly unprofitable. See Petition at p. 12. The Petition for a Class Exemption is in effect an attempt to have the Board reverse this policy and withdraw totally from the regulation of abandonments.

In Central, the Board rejected carrier's petition for an exemption holding that carrier should file an application for abandonment under Section 10903. The Board found that the

exemption procedure for abandonment "is primarily intended to be used to expedite decisions and minimize regulatory burdens in uncontested or non-controversial proceedings." Central Railroad at p. 12. This procedure should not be used where there is shipper opposition requiring analysis of revenues and costs. See Minnesota Northern Railroad, Inc. - Abandonment Exemption - Between Redland Junction and Fertile, In Polk County, MN (Service Date November 14, 1997) at footnote 17, p. 11.

The exemption procedures under Section 10502 for abandonments are now typically used in those situations where the shippers do not contest the abandonment or, if they do contest it, revenue from traffic is marginal compared to the cost of the operation of the line. The Board has been reluctant to grant an exemption for abandonments where shippers have asserted that they have no transportation alternatives. Where there is an inadequate record to grant the petition for exemption, the petition is denied. Petitioner may then refile if it can cure the problems or, alternatively, it may file an application for abandonment. Boston and Maine Corporation - Abandonment Exemption - In Hartford and New Haven Counties, CT, STB Docket No. AB-355 (Service Date December 31, 1996) at pp. 5-6.

The Board has denied petitions for exemptions in the face of shipper opposition on the grounds that under those circumstances the petitioner failed to establish that continued regulation was

not necessary to carry out the national rail transportation policy, citing specifically to the policy of ensuring the development and continuation of a sound rail transportation system as set forth in Section 10101(5). See, e.g., Soo Line Railroad Company - Abandonment Exemption - In Marshall and Roberts Counties, SD, STB Docket No. AB-57 (Sub-No. 48X) (Service Date November 17, 1999) at p. 6.

For the very good reasons previously articulated by the Board in denying previous specific exemption petitions, the Board should now deny petitioners class exemption leaving the determination of when an exemption is appropriate solely at the discretion of Class II and III railroads, with no recourse for affected shippers. The Board should adhere to the balancing test long used to determine the propriety of abandonments whether sought through application or petition.

Additionally, a number of the issues raised by the Petitioners can be addressed without resort to a class exemption.

The Petitioners assert that the Board's abandonment regulations require that economic data be presented in a format kept only by Class I carriers. Pet. at 10. Accordingly, the Petitioners state they are compelled to file petitions with the Board excusing them from filing certain data or otherwise obtain waivers of certain reporting requirements. It also appears that such requests are granted routinely by the Board. If so, then the

Petitioners, or the Board *sua sponte*, should amend the regulations to accommodate Class II and Class III carriers. A wholesale class exemption is not necessary to make this correction.

Petitioners' also contend that seeking an individual exemption by petition is unfair because it has no right to respond to oppositions to the petition. Pet. at 13. Again, this alleged problem can be corrected by permitting the petitioner in such cases the right to reply to oppositions to the original petition for exemption. The wholesale and overbroad changes sought by Petitioners here are unnecessary to correct these minor procedural matters.

**C. Providing Class II and II Carriers With a Class Exemption Will Create a Chain Reaction Leading to Wholesale Unregulated Abandonment of Class I Lines.**

Petitioners assiduously avoid discussing the impact their proposal will likely have on Class I carriers. By their silence on this subject, they apparently hope that the Board will draw an inference that there will be none. As set forth below, the contrary is likely to be the case.

As acknowledged by Petitioners, many of them were able to purchase lines from Class I carriers with minimal oversight through a class exemption. Petition at p. 5. Class Exemption for Acquisition or Operation Under 49 U.S.C. § 10902, 1 STB 95 (1996).

Under the proposed class exemption, Class I carriers will be encouraged to sell branch lines, which they otherwise could not

abandon, to Class II and III carriers. Class II and III carriers will be encouraged to purchase such branch lines, knowing that they will be free to subsequently abandon them without any scrutiny. The effect is likely to be an increase in sales of Class I branch lines and a concomitant increase in the abandonment of such lines by Class II and III carriers.

The ultimate effect is likely to be a marked increase of abandonments of lines that otherwise could be operated by Class I carriers on a profitable basis, albeit not as profitable as they may wish. Such an increase in the abandonment of profitable lines will be contrary to the public interest and the national transportation policies set forth in Section 10101.

#### Conclusion

Based on the foregoing, it is respectfully requested that Petitioners' request for a class exemption be denied.

Respectfully submitted,



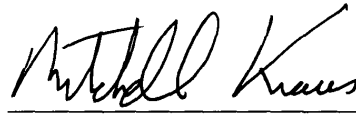
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Counsel for Transportation  
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Rail Labor Division, Transportation Trades Department, AFL-CIO, Written Testimony has been served this 24<sup>th</sup> day of August, 2004, via first-class, postage prepaid mail, upon the following:

Mark H. Sidman  
Weiner, Brodsky, Sidman & Kider  
1300 - 19<sup>th</sup> Street, NW, 5<sup>th</sup> Floor  
Washington, DC 20036-1609

A handwritten signature in black ink, appearing to read "Mitchell M. Kraus", is written over a horizontal line.

Mitchell M. Kraus