

207815

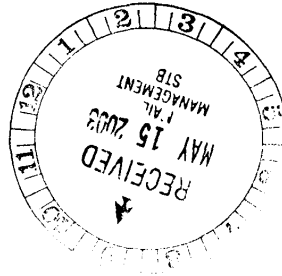
WEINER BRODSKY SIDMAN KIDER PC

1300 NINETEENTH STREET NW
FIFTH FLOOR
WASHINGTON DC 20036 1609
TEL 202 628 2000
FAX 202 628 2011

RICHARD J. ANDREANO, JR.
SANDRA L. BRICKEL
JAMES A. BRODSKY
DONALD C. BROWN, JR.
JO A. DeROCHE
TROY W. GARRIS
CYNTHIA L. GILMAN
CAMILLO M. GONSALVES*
DON J. HALPERN
STEPHEN E. HART
MITCHEL H. KIDER
THOMAS LAWRENCE III*

ALDYS A. LONDON
JAMES M. MILANO
SUZANNE DE ARMOND MUCCHETTI
LEAH SCHMULEWITZ GETLAN
MARK H. SIDMAN
JOHN D. SOCKNAT
DAVID M. SOUDERS
DIAN P. STEVENS
CYNTHIA G. SWANN
MICHAEL S. WALDRON
HARVEY E. WEINER
ROSE-MICHELE WEINRYB
*NOT ADMITTED IN D.C.

May 15, 2003



BY HAND DELIVERY

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

Re: STB Ex Parte No. 647; Allegheny & Eastern Railroad, Inc., et al. –
Petition for Rulemaking – Class Exemption for Expedited Abandonment
Procedure for Class II and Class III Railroads

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and 10 copies of the Petition for Rulemaking – Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads.

Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,

ENTERED
Office of Proceedings

MAY 15 2003


Mark H. Sidman

F:\99990\027\vernon williams cover.doc

Part of
Public Record

207815

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PETITION FOR RULEMAKING

STB EX PARTE NO. 647

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

**Mark H. Sidman
Jo A. DeRoche
Rose-Michele Weinryb
Troy W. Garris
Weiner Brodsky Sidman Kider PC
1300 19th Street NW, Fifth Floor
Washington, DC 20036-1609
(202) 628-2000**

Dated: May 15, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PETITION FOR RULEMAKING

STB EX PARTE NO. 647

ALLEGHENY & EASTERN RAILROAD, INC.; BRADFORD INDUSTRIAL RAIL, INC.;
BUFFALO & PITTSBURGH RAILROAD, INC.; CAROLINA COASTAL RAILWAY, INC.;
COMMONWEALTH RAILWAY, INC.; CHICAGO SOUTHSORE & SOUTH BEND
RAILROAD; CHATTAHOOCHEE & GULF RAILROAD CO., INC.; CONECUH 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., INC.; ILLINOIS INDIANA DEVELOPMENT COMPANY, LLC;
ILLINOIS & MIDLAND RAILROAD, 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.; PITTSBURG & 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.; AND YORK RAILWAY COMPANY

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

Mark H. Sidman
Jo A. DeRoche
Rose-Michele Weinryb
Troy W. Garriss
Weiner Brodsky Sidman Kider PC
1300 19th Street NW, Fifth Floor
Washington, DC 20036-1609
(202) 628-2000

Dated: May 15, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PETITION FOR RULEMAKING

STB EX PARTE NO. 647

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

Allegheny & Eastern Railroad, Inc., and the 46 other carriers shown in the caption (“Petitioners”) are all short line or regional, *i.e.*, class II or III, rail carriers (together, “Small Carriers”). Petitioners hereby petition the Surface Transportation Board (“Board”) to use its exemption authority under 49 U.S.C. § 10502 to adopt a new class exemption procedure for use by Small Carriers in abandoning rail lines (“Proposed Exemption”). While ensuring the regulatory concerns of the Board are satisfied, the Proposed Exemption more effectively will: eliminate current regulatory incentives for Small Carriers to delay abandonment while letting the traffic base and physical condition of low-density lines deteriorate; subject the entry into, and exit from, the rail industry to market forces; and substantially increase dissemination of important commercial information into the market in an effort to preserve lines through the Board’s offer of financial assistance (“OFA”) procedures. In addition, the burden on the Board in abandonment proceedings will be sharply reduced.

For transactions within the class, the proposal also will invert the environmental and historic report (“Report”) preparation procedures, allowing preparation of the Report

after (rather than before) a Small Carrier files for abandonment. Should a Report ultimately prove unnecessary, due to a sale of the line at issue, valuable resources will not be wasted preparing a Report that ultimately goes unused.

Attachments A and B hereto are the proposed revised 49 CFR §§ 1152.50 (exempt abandonments) and 1152.27 (offers of financial assistance) for the Board's consideration, blacklined against the existing versions of those regulations. Petitioners request that the Board initiate a rulemaking proceeding to invite public comments on the Proposed Exemption. Based on the record developed and the Board's long experience in these matters, the Board is requested to promulgate regulations implementing the Proposed Exemption.

I. INTRODUCTION

Petitioners file this Petition to urge that the Board adopt a new class exemption that simplifies and expedites the abandonment of rail lines by class II and III rail carriers. Three basic premises underlie the Proposed Exemption: (i) a Small Carrier seeking to abandon a line has determined that the line in question is not a viable part of its system (ii) once a Small Carrier makes the subjective determination that a line is not a viable part of its system, the carrier will make the prudent business judgment to divert resources and attention from the line to more productive parts of its system, and (iii) the public interest is best served by a regulatory process that allows potential purchasers of the subject line to assess and acquire the line before, rather than after, the physical asset deteriorates and the traffic evaporates.

Under the Proposed Exemption, a Small Carrier is required to publish relevant commercial and engineering information about the line in local newspapers and national

railroad industry publications, in addition to the notice that the Board publishes in the Federal Register. The information includes: three years of aggregate carload and revenue data; a statement of the physical condition of the line; an estimate of the rehabilitation, if any, needed to bring the line up to FRA class 1 condition; the net liquidation value ("NLV") of the line; and information concerning connecting carriers, interchange locations and any operating rights of third parties over the line ("Notice"). Back-up data supporting the information in the Notice will be available to interested third parties, upon request, to facilitate OFAs. In exchange for being able to use the Proposed Exemption, the abandoning carrier agrees to waive any claim for the value of the line in excess of NLV. Also, if a sale is consummated and the subject line connects only to the abandoning carrier, that carrier must provide the purchaser with either haulage or trackage rights (the abandoning carrier may choose which to offer) at commercially reasonable rates to permit traffic to move to and from any connecting carrier with which traffic has moved during the preceding 24-month period. The information in the Notice is comprehensive. If the abandoning carrier is trying to walk away from a line that can be made viable by another entity, the market will ensure that an entrepreneur, shipper or a local government authority will step in to acquire the line for the bargain price of NLV.

The Proposed Exemption is designed to put lines that are abandonment candidates on the market before the traffic base and condition of the line deteriorate. Under today's procedures, Small Carriers have incentive to avoid costly contested abandonments unless the likelihood of success on the merits is extremely high. Unfortunately, the odds of success proportionately increase as the condition and vitality of the line decreases. When a carrier today decides a line is not viable (whether the carrier is "correct" or not), the

carrier, in the exercise of prudent business judgment, typically will increase rates and decrease service, defer maintenance and minimize capital expenditures for the line, in an effort to limit out-of-pocket costs. It is at this point – when the carrier initially and subjectively determines that the line is not viable – that the line is best positioned to be an OFA candidate. But under current procedures, the OFA process often is not initiated for months or even years, thus commencing a death-spiral for the line. Shippers resort to other modes of transportation, while the railroad's capital remains tied up in what it views as unproductive assets. It is a classic lose-lose situation. By the time the railroad seeks abandonment authority, not only is the traffic base gone, the cost of rehabilitating the physical asset is prohibitive. No one benefits from a regulatory scheme that encourages a carrier to delay the commencement of an abandonment proceeding until the prospects of a line are obviously hopeless – not the shippers, not the local communities and certainly not the Small Carriers.

The Proposed Exemption creates a context that can prevent the death spiral of low density lines owned by Small Carriers. The Notice will provide meaningful commercial and engineering information to interested parties. Those parties will have an opportunity to acquire the line for its NLV, with assured access to the abandoning railroad's connections at a reasonable price. In addition, the lines will become available as soon as a Small Carrier determines that it is no longer in its economic interest to run the line, rather than after years of neglect.

In adopting the Proposed Exemption, the Board would find that, as a class: Small Carriers are unlikely to abandon lines they believe can contribute to their systems; current regulations for abandonments, as applied to Small Carriers, encourage these carriers to

delay filing for abandonment (and therefore the OFA process) while the traffic base and physical condition of the lines deteriorate; and the abandoning carrier's waiving of compensation in excess of NLV in an OFA, coupled with a requirement that the carrier provide haulage or trackage rights to connecting carriers, renders it highly likely that any line that is potentially viable will be acquired and remain in service. Accordingly, the Board would find that the abandonment of rail lines by Small Carriers under the Proposed Exemption procedures satisfies the criteria for an exemption under 49 U.S.C. § 10502, and indeed furthers the public interest.

II. BACKGROUND.

Most Small Carriers were created after passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers"). Staggers was the Congressional response to a crisis in the rail industry, resulting in large part from carriers being statutorily prevented from rationalizing their rail systems and abandoning marginal lines. The crisis included several actual, and many threatened, bankruptcies. A fundamental purpose of Staggers was to give railroads much-needed regulatory flexibility to restructure their systems in an economically prudent manner.

Soon after Staggers' passage, class I carriers began shedding uneconomic lines. In many cases, the lines were sold to Small Carriers for continued operation. *See, e.g., Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 812 (1985) ("10901 Exemption") (historical discussion). The lines were typically short, with low traffic density. *See, e.g., Class Exemption for Acquisition or Operation Under 49 U.S.C. 10902*, 1 S.T.B. 95, 103 (1996). The Small Carriers often were able to operate these marginal lines by lowering operating costs, providing more

responsive service and using resources more efficiently and flexibly. Many abandonable branch lines previously owned by class I railroads thereby became the main lines of newly-formed Small Carriers.

The average Small Carrier operates 91 miles of line.¹ If only class III carriers are considered, the total is much lower – an approximate average of 55 miles.² Small Carriers typically serve a limited number of shippers, transporting relatively few commodities in carload shipments. According to Board findings, more than 80 percent of Small Carriers in 1995 had less than \$5 million in annual operating revenue. *See Acquisition of Rail Lines Under 49 U.S.C. 10901 and 10902 – Advance Notice of Proposed Transactions*, 2 S.T.B. 592, 602 (1997) (“Advance Notice”).

Because the lines of Small Carriers are geographically limited with marginal traffic bases to begin with, Small Carriers have limited opportunities to increase their traffic bases and are unlikely to walk away from any line that has even a prospect of becoming viable. If anything, Small Carriers are likely to continue attempts to revive unviable lines longer than economically prudent, because abandonment further decreases the carrier’s limited commercial opportunities. When a Small Carrier finally decides to abandon a line, it typically has exhausted all efforts and concluded that the line is hopeless. It has determined that reallocating to its viable operations the resources currently tied up in the subject line is in the carrier’s best interest.

¹ Railroad Facts, 1998 Edition (“Railroad Facts”); 1998 Annual Data Profile of the American Short Line and Regional Railroad Industry. These data use the classification system of the Association of American Railroads (“AAR”), instead of the regulatory classifications used by the Board. The AAR divides non-class I railroads into “Regional” carriers line-haul railroads having at least 350 miles of road and/or revenue of between \$40 million and the Board’s class I threshold and “Local” carriers (line-haul carriers falling below the Regional threshold and switching and terminal carriers).

² Railroad Facts, at 3.

The carrier may be wrong. A more efficient carrier, a carrier with greater financial resources, or a shipper or governmental agency may have the potential to revive the line. Nevertheless, once the carrier determines that the line is not viable, the carrier has few choices. Absent sale or abandonment, the carrier must raise prices to support the uneconomic cost structure of the subject line and/or cease investing its time, energy and resources into the line. Price increases commonly cause shippers to turn to other, more cost-effective transportation. As this happens, the revenue base of the line further declines, forcing the carrier to increase prices repeatedly. The line is strangled.

If the carrier resorts to cost-cutting, the line is similarly doomed. The condition of the line rapidly deteriorates as maintenance is deferred and capital expenditures cease. This results in ever-worsening service that is unpredictable and slow. As before, shippers resort to better transportation services, and revenue from the line declines. The carrier, in turn, diverts ever more of its resources elsewhere on its system and the cycle repeats. In either scenario, the inevitable commercial result is the same: due to the rational deployment of scarce resources, the traffic base and condition of the line will deteriorate to the point where the line cannot be revived by anyone. Only then does the owner commence an abandonment proceeding, because the likelihood of success on the merits is now assured. However, the likelihood of an OFA being submitted at this late stage is low, because the line has little traffic and requires substantial capital investment in order to put any putative new owner in a position to provide competitive service. In most cases, the line simply ends up being scrapped. This is borne out by the Board's own statistics, which show that, out of 565 abandonments sought during the period from 1996

to 2001, only 21 cases were dismissed due to OFA sales, *i.e.*, approximately 3.7 percent. Surface Transportation Board, FY 1998-2001 Report at 25.

During the time between the Small Carrier's determination that the line was not viable and the commencement of the abandonment proceeding, nothing happens to promote the public interest. To the contrary, the prospects of the line dissipate to the point of being barely measurable.

III. ABANDONMENT REGULATION THAT BETTERS THE PUBLIC INTEREST.

A rail carrier may not abandon a common carrier rail line without first obtaining the Board's authorization. 49 U.S.C. § 10903. Today, authorization may occur in three ways: by application; petition for exemption; or notice of exemption for out-of-service lines. However, the Board has made clear that the petition procedure is available only where either there is no opposition to the abandonment or the line clearly is unprofitable. Central Railroad Company of Indiana – Abandonment Exemption – In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X) (STB served May 4, 1998) ("Central"). Thus, in any abandonment where an active shipper is on the line, the carrier really has only two options: the application or notice.

This framework serves the Small Carrier industry extremely poorly. It encourages Small Carriers to delay abandoning lines until the traffic base and condition of the lines have deteriorated to the point where the cost of anyone stepping in to continue rail service is simply prohibitive. This occurs despite the clear policy that rail service should be preserved, where prudent, through such procedures as OFAs. 49 U.S.C. § 10904. The Proposed Exemption resolves these problems.

A. Current Procedures Work Poorly for Small Carriers.

1. Applications.

The traditional way a carrier abandons a line is by application under 49 U.S.C. § 10903. Under this section, the Board may authorize abandonment only if it finds that the “present or future public convenience and necessity require or permit the abandonment.” The Board weighs the burden on shippers from loss of rail service against the burden on the carrier and interstate commerce from forced operation of the line in issue. *See, e.g., Union Pacific Railroad Company – Abandonment – In Polk County, IA*, STB Docket No. AB-33 (Sub-No. 170) (served Jan. 16, 2002) (“Union Pacific”). *See also Colorado v. United States*, 271 U.S. 153 (1926).

In making the finding, the Board considers all relevant factors, including profits or losses incurred from operating the line, costs avoidable by abandonment (such as maintenance and rehabilitation costs) and the opportunity costs incurred by foregoing more profitable use of the carrier’s assets elsewhere. *See, e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981) (“Kalo Brick”).³ No single factor is conclusive. The fact that shippers may incur increased transportation costs is not itself sufficient to outweigh the detriment to the public interest of continued operation of uneconomic and excess rail facilities. *CSX Transportation – Abandonment Exemption – In Guernsey County, OH*, STB Docket No. AB-55 (Sub-No. 576X) (served Nov. 22, 1999). *See also Railroad Comm’n of Tex. v. Eastern Tex. R. Co.*, 264 U.S. 79, 85-86 (1924) (requiring carrier to operate at a loss may in fact constitute a taking of its property without due process).

³ *See also, Union Pacific* at 26; *Use of Opportunity Costs*, 360 I.C.C. 571 (1979) *aff’d sub nom. Farmland Industries, Inc. v. United States*, 642 F. 2d 208 (7th Cir. 1981).

In application proceedings, carriers typically submit evidence that they will sustain a significant burden, by losing money, through continued operations. *See, e.g., Camas Prairie Railnet, Inc. – Abandonment – In Lewis, Nez Perce, and Idaho Counties, ID (Between Spalding and Grangeville, ID)*, STB Docket No. AB-564 (served Sept. 13, 2000) (“Camas Prairie”). Because applications tend not to be granted if the line is even marginally profitable, prudent carriers delay filing until the line at issue has been substantially unprofitable for a significant period of time.⁴

Application proceedings are extremely burdensome and highly inappropriate for most Small Carriers. Board regulations require that the supporting evidence in such proceedings be submitted in a uniform manner. *See* 49 CFR §§ 1152.1 to 1152.37. The applying carrier must present the data for both base and forecast years. Camas Prairie, *supra*; Union Pacific, *supra*. The data, however, are drawn from that maintained by carriers under the Board’s Uniform Systems of Accounts under 49 CFR Part 1201 (“USOA”) and only class I carriers are required to maintain the USOA (49 CFR Part 1201, 1-1(c)). Small Carriers typically lack the necessary data. Thus, to file an application, a Small Carrier must either create the data in a format compatible with the Board’s regulations (for the sole purpose of abandoning a line), or ask the Board to excuse production of missing data through requests for waivers. Either route is unattractive. The first is expensive and produces data useful only once, for an abandonment. The second is only somewhat less expensive, involves considerable delay,

⁴ Profitability is not the only burden that may be considered. *See, e.g., Kalo Brick*, 450 U.S. at 327 (forced rebuilding of a line that continued to wash out would burden interstate commerce); *Purcell v. United States*, 315 U.S. 381 (1942) (forcing carrier to relocate a line scheduled to be submerged by a flood control project would burden interstate commerce).

and contains no assurance the waivers will be granted.⁵ In addition, the Board's current filing fee for waivers alone is \$1,300, adding to the already expensive filing fee of \$16,300 for applications. And this does not take into account the cost of gathering and compiling the data for the application. These are significant sums for a Small Carrier, particularly when the expenditure is required to shed itself of a line that is already a drain on its resources.

The application procedure also takes too long. If the carrier follows the Board's recommendation, it will first request waivers, submitting the application only after the Board has issued decisions on the requests. After compiling all the necessary data, requesting the necessary waivers, preparing the environmental and historic reports and finally filing its application, the proceeding usually takes an additional four months. Ironically, application proceedings are usually much more expensive and time consuming for Small Carriers than for class I carriers. Small Carriers thus have good reason to shun these proceedings.

2. Petitions.

A carrier also may seek authority by filing a petition for exemption. Under 49 U.S.C. § 10502(a), the Board must exempt abandonments from regulation under Section 10903 whenever it finds that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (A) the transaction is of limited scope, or (B) regulation is not necessary to protect shippers from the abuse of market power.

⁵ See Camas Prairie Railnet, Inc. – Abandonment – In Lewis, Nez Perce, and Idaho Counties, ID (Between Spalding and Grangeville, ID), STB Docket No. AB-564, (served Mar. 10, 2000) (request for waiver denied).

Because a petition for exemption does not require the detailed data of an application, or the format of the Board's USOA, this proceeding is (at least facially) more attractive. Filing fees also are less, though the administrative costs in preparing the filing are still significant. The problem with petition proceedings is they are highly charged with uncertainty. The Board has stated that petitions are appropriate only where there is no shipper opposition or operation of the line is clearly unprofitable. *See e.g., Central supra*, STB Docket No. AB-459 (Sub-No. 2X) (the petition procedure is primarily intended for use in "uncontested or noncontroversial proceedings").⁶ This sharply curtails the situations in which the petition process may be used and encourages carriers to delay seeking an exemption until there are few, if any, shippers using the line (and therefore no significant opposition) and/or the cost of operating the line (due to deteriorating infrastructure) vastly exceeds potential operating income (due to low traffic density). Only then does a prudent petitioner file. By this time, not even the most optimistic railroader is likely to consider the line a candidate for an OFA. Petitioners reiterate that the Board's own data shows that only 3.7 percent of abandonments resulted in an OFA for the six year period from 1996 to 2001. Surface Transportation Board, FY 1998-2001 Report at 25.

⁶ *See also Tulare Valley Railroad Company – Abandonment and Discontinuance Exemption – In Tulare and Kern Counties, CA*, STB Docket no. AB-397 (Sub No. 5X) (served Feb. 21, 1997), *aff'd* in decision served Mar. 6, 1998 (the type of abandonments typically exempted are "those where the shippers do not contest the abandonment or . . . revenue from their traffic is clearly marginal compared to the cost of operating the line"); *San Joaquin Valley Railroad Company – Abandonment Exemption – In Kings and Fresno Counties, CA*, STB Docket No. AB-398 (Sub-No. 4X) (served May 23, 1997), *aff'd* by decision served Mar. 5, 1999 (same); *Boston and Maine Corporation – Abandonment Exemption – In Hartford and New Haven Counties, CT*, STB Docket No. AB-32 (Sub-No. 75X) (served Dec. 31, 1996) (same).

Making matters worse, a carrier must present its entire case in its initial petition filing, with no right to respond to opposition.⁷ This is true even if the opposition's allegations are meritless, and even if the opposition seeks to keep a line in service (at the carrier's expense) solely as a threat to keep motor, water or other rail carrier rates in check. In the face of opposition, the Board will deny the petition and the Small Carrier must thereafter file either an application (which it sought to avoid in the first place) or another petition (which already failed once) to rebut the opposition.⁸ This results in further delay and expense; the death-spiral continues.

3. Out-of-Service Exemption.

The third method of abandonment is available only for lines that are effectively dead. A carrier may obtain authority to abandon under the Board's current class exemption procedures only if no local traffic has moved over the line in at least two years, any overhead traffic can be rerouted, and no formal complaint has been filed by a user regarding cessation of the line either is pending or has been decided against the railroad during the two-year period. 49 CFR § 1152.50(b).

By definition, this procedure is available only after total erosion of a line's traffic base. The Board has found, as a class, that continued operation of these lines is a burden on interstate commerce, and no showing of unprofitability is required. See Futurex v. ICC, 897 F.2d 866, 874 (7th Cir. 1990) ("Futurex"). As there is no traffic, except that which can move over other lines, the lines are deemed to constitute properly abandonable excess facilities. See Exemption of Out-of-Service Rail Lines, 366 I.C.C. 885 (1983),

⁷ See e.g., Central, *supra*, STB Docket No. AB-459 (Sub-No. 2X) (if the carrier wanted to assure itself of the right to rebut a filing in opposition, it should have filed a formal application).

⁸ Id.

after) the line's traffic base and physical condition have deteriorated. Current regulations encourage Small Carriers to defer seeking abandonment authority until after the lines deteriorate to the point where they are un preservable. Under the Proposed Exemption, a Small Carrier is encouraged to file as soon as it decides a line is no longer viable; it need not prove the line lacks viability. The market can better do that, and the interest of shippers and the public is much better served by the carrier *promptly* putting the line on the market for prospective purchasers (including shippers, governmental entities and others), widely disseminating business information important to such potential purchasers, offering the line at NLV and providing any buyer with needed access to third-party connections. The incentive for Small Carriers to permit lines to deteriorate is eliminated, the possibility of line preservation is maximized for shippers, and the burdens of the current abandonment procedures are eliminated for the Small Carrier and the Board.

Second, the Proposed Exemption encourages rapid redeployment of rail assets. Under current regulations, the economic and physical assets of Small Carriers remain tied up in unabandoned (but unwanted) lines, often for years, while the carrier waits for the line to become sufficiently "abandonable." The Proposed Exemption reverses this waste of important national resources. As soon as the Small Carrier decides a line can no longer be operated, the carrier is encouraged to redeploy its assets elsewhere. Meanwhile, if any other entity believes the line can be operated profitably, that person may acquire the line for its NLV. This is particularly crucial today, as Small Carriers scramble to upgrade their lines to meet the immediate need to handle 286,000 pound cars, the new

vacated and remanded at Simmons v. ICC, 787 F.2d 616 (D.C. Cir. 1986), readopted at Exemption of Out of Service Rail Lines, 2 I.C.C.2d 146 (1986), and *aff'd* at Simmons v. ICC, 848 F.2d 1246 (D.C. Cir. 1988); Futurex, 897 F.2d at 874 (a profitability analysis for out-of-service lines would be “redundant”).

The class exemption is the most attractive option to Small Carriers. It is faster, the authority typically becoming effective 50 days after filing. 49 CFR § 1152.50(d)(2). It is cheaper, requiring substantially less information to be submitted and filing fees of only \$2,700. Perhaps most importantly, it provides a level of certainty absent in the other proceedings. So long as the carrier meets the out-of-service criteria, the authority typically will become effective. *See, e.g., Futurex*, 897 F.2d at 874. This certainty provides a compelling reason to permit the traffic base on an unwanted line to be eliminated permanently.

In sum, the existing regulatory scheme encourages Small Carriers, in effect, to delay abandoning unprofitable lines until the lines clearly are losing substantial sums of money over significant periods or at least two years have passed with not a single carload of traffic originating or terminating on the line. Such delay is a serious burden on the carrier’s limited resources, an unnecessary drain on interstate commerce, and bad for shippers because their last hope for continued rail service (an OFA) is frustrated while the line rots in place.

B. Proposed Exemption.

The Proposed Exemption eliminates many of these shortcomings furthering the interests of carriers, shippers, the public and interstate commerce. *First*, the Proposed Exemption allows Small Carriers to file for abandonment authority, before (rather than

standard in the industry. In addition, after September 11, 2001, there has been a dire need for capital for security and rising insurance costs.⁹

Third, the Proposed Exemption shifts the analysis away from a focus on profitability to a focus on saving preservable lines. The Proposed Exemption permits the Small Carrier quickly to extricate itself from serving a line it deems an economic drain. In return, the carrier must widely publish important business information about the line, offer the line for sale for NLV and provide the buyer with access to third party carriers via trackage or haulage rights. *See* Proposed 49 CFR § 1152.50(d)(2)(ii)(B). In this way, a better equipped, better financed, more experienced or more efficient operator can acquire the line for a bargain price. If no entity wants the line (including shippers and local governments), that is a clear market-based indicator that the line cannot be operated in a sufficiently viable manner by anyone, and should be abandoned as a burden on commerce. Numbers on spreadsheets cannot provide a more accurate, objective analysis than this. And shippers on other parts of the carrier's system should not have to subsidize the continued operation of the unviable line.

Fourth, the Proposed Exemption requires wider dissemination of information important to prospective purchasers, maximizing chances for OFAs. Current regulations require only limited publication alerting potential purchasers of abandonments, none of which provides detailed commercial information. Under the Proposed Exemption, the

⁹ *See, e.g., TEA-21 Reauthorization: Hearing Before the House Subcomm. on Transp. & Infrastructure, 108th Cong.* (Mar. 6, 2003) (statement of Richard F. Timmons, President of the American Short Line and Regional Railroad Association) (industry studies indicate that meeting the "286" requirements will cost Small Carriers approximately \$7 billion and post September 11 security costs pose substantial burdens on Small Carriers). *See also* 147 Cong. Rec. S11,891-93 (daily ed. Nov. 15, 2001) (statement of Sen. Specter) (sixty percent of Pennsylvania's Small Carrier infrastructure is in need of "extensive rehabilitation," and the problem is dramatically growing as a result of customers demanding new, substantially heavier cars).

abandoning carrier must publish 36-month's worth of traffic and revenue information, a description of the current physical condition of the line, an estimate of rehabilitation costs, the carrier's calculation of the NLV, the names of connecting carriers and points of interchange. *See* Proposed 49 CFR § 1152.50(d)(2)(ii)(B). The carrier must publish this information for three consecutive weeks in newspapers in the county in which the line runs, and in a nationally-distributed, railroad-related trade publication. *See Id.* If a potential purchaser wishes to review the data underlying the published information, the abandoning carrier must provide such information within five days of the request ("Supporting Data").¹⁰ *See Id.* and 49 CFR § 1152.27(a)(4).

Fifth, the Proposed Exemption makes actual sales under the OFA process much more attractive. Current procedures permit abandoning carriers to assert a going concern value in OFA proceedings, and carriers need not provide access to third-party connections. When using the Proposed Exemption, the abandoning carrier agrees to sell the line for NLV. Also, if either the carrier or a potential purchaser requests that the Board determine the amount of the NLV, the amount asserted by the carrier must be supported by the Supporting Data. *See* Proposed 49 CFR §§ 1152.50(d)(2)(ii)(B) and 1152.27(h)(3). In addition, the Proposed Exemption assures any purchaser will have access to third-party carriers through either trackage or haulage rights at commercially reasonable rates. *See* Proposed 49 CFR § 1152.50(d)(2)(ii)(B).

¹⁰ The Supporting Data includes, for example, the number and location of the shippers that have used or inquired about rail service during the 36-month period; the number of cars tendered or received by shippers on the line, and the revenue per car received for the traffic, broken down on a monthly basis; the weight and condition of the rail; the number and condition of ties; the number, location and condition of any bridges; and, to the extent that an asserted NLV includes property values, the total acreage held in fee and the price per acre of such property, denoting differently priced parcels, if any. For a full description of the required information to be included in the Supporting Data, *see* Proposed Sections 1152.50(d)(2)(ii)(B). Recipients of the Supporting Data will be required to execute a confidentiality agreement.

Sixth, the Proposed Exemption gives prospective purchasers more time to study and evaluate a line prior to the deadline for submission of OFAs. Today, the out-of-service exemption requires OFAs to be filed within 30 days after publication in the Federal Register and an offeror must obtain and analyze the line's commercial data during that short period. The Proposed Exemption allows 90 days and makes the data available before that clock starts ticking.¹¹ See Proposed 49 CFR §§ 1152.50(b)(2)(ii)(B) and 1152.27(b)(2)(ii).

Finally, the Proposed Exemption substantially decreases the work load of both the Small Carriers and the Board. Today, filing an application or petition requires substantial compilation of traffic, revenue, cost and other data by the Small Carriers, and review of the data by the Board. Under the Proposed Exemption, the detailed presentation of economic minutiae and exhaustive review by the Board can be avoided, while enhancing the OFA process and furthering the public interest. The filing fee for Small Carrier abandonments also will drop to \$2,700, the current fee for notices of exemption. In sum, the Proposed Exemption furthers the interests of carriers, shippers, the public and interstate commerce by removing regulatory incentives to permit deterioration, promoting productive use of rail assets, making it more likely that service over economically viable lines will be continued and reducing the burden on the Board's staff.

The Board should reject any arguments that the Proposed Exemption will lead to wholesale abandonments of branch line systems. The systems operated by Small Carriers are small in size, and Small Carriers will not walk away from markets they believe can

¹¹ In application and petition proceedings, OFAs are currently due by the earlier of 120 days after filing with the Board or 10 days after a Board decision granting abandonment. They do not require publication of commercial data before filing.

sustain the investment required to support competitive service. Small Carriers have limited commercial opportunities and will not irrationally exit viable markets. If a Small Carrier does seek to abandon a line with good prospects, the enhanced OFA procedures in the Proposed Exemption are highly likely to result in the line being acquired. In addition, the Proposed Exemption precludes a purchaser under the enhanced OFA provisions from using the Small Carrier Exemption to abandon the same line for five years. *See* Proposed 49 CFR § 1152.27(i)(4). At the end of the day, the public interest simply is not served by requiring a Small Carrier that has determined a line is not viable to delay commencement of an abandonment proceeding until the traffic is gone and the infrastructure deteriorated. The Proposed Exemption promotes a more rational deployment of capital and rail assets and the best chance for preservation of marginal lines.

C. Improved Environmental and Historic Reporting.

The Proposed Exemption also improves current environmental and historic Report procedures. When a carrier seeks to abandon a line, the carrier and the Board must comply with certain environmental and historic reporting laws. *See* 49 CFR §§ 1105.6(a)(2), 1105.7 and 1105.8. By Board regulation, the process begins with the carrier consulting federal and state agencies,¹² publishing notice of the proposed abandonment in newspapers and drafting a detailed environmental and historic Report regarding the potential effects of the proposed abandonment. The preparation process expends considerable resources, typically taking over a month to compile. 49 CFR

¹² The agencies normally include the state clearinghouse and Governor of each State, the State Coastal Zone Management agency, the head of each county, the Fish and Wildlife Service, the U.S. Army Corps of Engineers, the National Park Service, the U.S. Soil Conservation Service, the National Geodetic Survey, the State Historic Preservation agency and others. 49 CFR §§ 1105.7, 1105.8.

§ 1105.7(c). The carrier then must serve the finished Report on all the consulted agencies at least 20 days before filing its pleadings with the Board. 49 CFR §§ 1105.7(b) and 1105.8(a).

Using the Report, the Board's Section of Environmental Analysis ("SEA") then conducts its own investigation into the matter, consulting with the appropriate federal and state agencies. SEA generally prepares an environmental assessment regarding the proposed abandonment, 49 CFR § 1105.6(a)(2), which SEA publishes as a recommendation to the Board regarding environmental and historic matters. The decision is issued prior to the deadline for OFAs, even though a successful OFA renders the entire process moot. This process is a drain on the resources of Small Carriers, the Board and the various other agencies which become involved in analyzing the effects of an abandonment that may never occur.

The Proposed Exemption fully addresses the Board's environmental and historic preservation concerns but eliminates waste. The Proposed Exemption requires rail carriers to comply fully with the environmental and historic report requirements prior to "consummating" an abandonment and removing the steel, other track materials and railroad-owned structures. However, the proposed regulations defer preparation of the Report until *after* the OFA process is over (*see* Proposed 49 CFR § 1152.50(b)(2)) but prior to removal of the track structure.

Although a railroad would not be able to consummate the abandonment of a line prior to satisfying the Board's Report filing requirements, the proposed regulations permit the carrier to *discontinue* service over the subject line *if* (i) the OFA process has terminated, and (ii) the carrier has certified in its notice of exemption that a

discontinuance would not exceed the threshold levels set forth at 49 CFR §1105.7(e)(4) and (5) and that the carrier has no plans to alter or remove any historic properties. *See* Proposed 49 CFR § 1152.50(d)(7). The discontinuance of service should not have any broad environmental effects, given the low levels of traffic characteristic of abandoned lines.¹³ By requiring a Small Carrier to comply with the environmental reporting process prior to abandoning its rail line, but permitting it to discontinue service once it is clear that the OFA process will not result in continued rail service, the environment and historical assets are protected and the railroad avoids the expense of providing unprofitable rail service over the line during the environmental review period.

D. Labor Protection; Trail and Public Use.

Under the Proposed Exemption, existing labor and public/trail use regulation would not materially be affected.

IV. THE PROPOSED EXEMPTION SATISFIES THE STANDARD OF SECTION 10502.

Under 49 U.S.C. § 10502, the Board must exempt a transaction from the Board's prior approval requirements, including 49 U.S.C. § 10903, when the Board finds that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 (the "RTP"); and (2) either (A) the transaction is of limited scope, or (B) regulation is not necessary to protect shippers from an abuse of market power. The Proposed Exemption fully satisfies the exemption criteria. It promotes many aspects of the transportation policy under Section 10101 and is inconsistent with none. The

¹³ This temporary discontinuance of service is unlikely to raise any environmental issues as recognized by the Board in the context of lawful embargoes. A carrier may lawfully embargo service over a line without complying with environmental and historic reporting requirements. *See Decatur County Commissioners, et al v. The Central Railroad Company of Indiana*, STB Finance Docket No. 33386 slip op. at 1 n.3 (served Sept. 29, 2000) (embargoes do not require Board approval).

proposed class exemption also is limited in scope and will not result in an abuse of market power.

A. The Proposed Exemption Is Not Inconsistent With, But Instead Significantly Advances, the RTP.

Current abandonment procedures encourage Small Carriers to allow the condition of unwanted lines to waste away before filing for abandonment. This regulatory scheme serves neither carriers nor the shippers, and runs counter to many important goals of the RTP. The Proposed Exemption eliminates many of these problems.

The Proposed Exemption eliminates the current regulatory incentive for Small Carriers to permit the traffic base and physical condition of lines deemed unviable to deteriorate through delay of filing for abandonment, increased prices, deferral of maintenance and cessation of capital investments. The Proposed Exemption also requires widespread dissemination of important business information for the line to permit potential buyers to consider acquisition, requires a sale at the NLV price and binds the abandoning carrier to provide access to third party connections via trackage or haulage rights (if necessary) to any buyer, thereby increasing the likelihood of preservation of service over viable lines through the OFA and other processes. In addition, the Proposed Exemption encourages Small Carriers to redeploy resources expeditiously on other parts of their systems. In these ways, the Proposed Exemption “allow[s], to the maximum extent possible, competition and the demand for services to establish reasonable rates,” 49 U.S.C. § 10101(1), “ensure[s] the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes,” 49 U.S.C. § 10101(4), “foster[s] sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other

modes,” 49 U.S.C. § 10101(5), “reduce[s] regulatory barriers to entry into and exit from the industry,” 49 U.S.C. § 10101(7), and “encourage[s] honest and efficient management of railroads,” 49 U.S.C. § 10101(9).

In addition, because it encourages abandoning carriers to file for abandonment promptly (putting the line on the OFA market at the NLV price before further deterioration occurs), reverses the environmental and historic Report preparation process, increases the instances where the Board expeditiously approves routine abandonments while relying on after-the-fact remedies to correct any abuses, and limits the instances where a Small Carrier files a petition for exemption only to be told later to file an application in the same matter, the Proposed Exemption “minimize[s] the need for Federal regulatory control over the rail transportation system . . . require[s] fair and expeditious regulatory decisions,” 49 U.S.C. § 10101(2), and “provide[s] for the expeditious handling and resolution of . . . proceedings,” 49 U.S.C. § 10101(15).

Likewise, as it requires widespread publication of information important to potential buyers and prevents Small Carriers from having to create the extensive data required for abandonment applications (data Small Carriers usually do not have), the Proposed Exemption “ensure[s] the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information.” 49 U.S.C. § 10101(13).

Finally, because it permits Small Carriers to limit losses quickly and efficiently and reallocate critical resources to other parts of their systems, removing the regulatory incentive to permit lines to physically deteriorate, the Proposed Exemption “promote[s] a safe and efficient rail transportation system by allowing rail carriers to earn adequate

revenues,” 49 U.S.C. § 10101(3), and “[operation of] transportation facilities and equipment without detriment to the public health and safety,” 49 U.S.C. § 10101(8), and “encourages fair wages and safe and suitable working conditions in the industry,” 49 U.S.C. § 10101(11).

B. Limited Scope

The Proposed Exemption also is limited in scope. A review of the abandonment proceedings decided by the Board in 1999 and 2000 demonstrates that abandonments by class II and class III railroads average less than 25 miles in length and are in two or fewer counties in a single state.¹⁴ In addition, any line for which a class II or III carrier seeks abandonment authority generally will be a very low-density line. Abandonments with similar characteristics repeatedly have been determined to satisfy the “limited in scope” requirement. *See e.g., St. Louis Southwestern Railway Company – Abandonment Exemption – In Pulaski, Lonoke, and Jefferson Counties, AR*, ICC Docket No. AB-39 (Sub-No. 16X) (served May 22, 1991) (“transaction is of limited scope since the proposed abandonment involves only 35.79 miles of line in a single State”).¹⁵

C. Abuse of Market Power

The limited scope of the Proposed Exemption is dispositive under the alternative test of Section 10502(a)(2), *see, e.g., Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company*, Docket No. 41987 (STB served

¹⁴ This data is drawn from Petitioners own review of abandonments by Small Carriers for the years 1999 and 2000.

¹⁵ *See also Wisconsin Central Ltd. – Abandonment Exemption – In Douglas County, WI*, ICC Docket No. AB-303 (Sub-No. 10X) (ICC served Oct. 7, 1992) (“transaction is of limited scope since the proposed abandonment involves only 33.14 miles of line”); *Tulare Valley Railroad Company – Abandonment Exemption – In Kings and Tulare Counties, CA*, Docket No. AB-397 (Sub-No. 1X) (ICC served Mar. 24, 1994) (abandonment of “only 29.5 miles of line in a single State” is limited in scope).

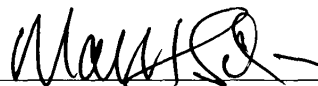
February 11, 1997).¹⁶ In any event, regulation of the transactions within the subject class is not needed to protect shippers from an abuse of market power. The Proposed Exemption, with its enhanced publication, valuation and OFA procedures, benefits shippers as well as Small Carriers and the public interest. By encouraging Small Carriers to quickly refocus financial resources and managerial attention on lines deemed viable, the Proposed Exemption promotes a healthy rail system that can compete with other modes. In addition, the Proposed Exemption quickly moves lines into the marketplace, brimming with vital economic and engineering information to permit any interested person to buy the line at NLV and with assured access to other carriers. The Proposed Exemption gives shippers their best chance to date for long-term survival of viable rail service over marginal lines.

¹⁶ See also Union Pacific Railroad Company – Abandonment Exemption – In Coos County, OR, Docket No. AB-33 (Sub-No. 148X) (STB served Oct. 30, 2000) (finding of lack of market power is similarly dispositive under the alternative test of Section 10502(a)(2)).

V. CONCLUSION

For these reasons, Petitioners ask the Board to commence a rulemaking proceeding to take comments on the Proposed Exemption, and then, based on the record and the Board's extensive experience in these matters, adopt new regulations for a class exemption that would permit class II and III railroads to expeditiously abandon uneconomic lines. The public convenience and necessity demand no less.

**RESPECTFULLY SUBMITTED
ON BEHALF OF PETITIONERS**



Mark H. Sidman
Jo A. DeRoche
Rose-Michele Weinryb
Troy W. Garriss
Weiner Brodsky Sidman Kider PC
1300 19th Street NW, Fifth Floor
Washington, DC 20036-1609

Dated: May 15, 2003

F:\99990\027\twg815nine finalclass exempt.doc

Attachment A

**Proposed 49 CFR § 1152.50 Blacklined
Against Current Version**

Subpart F--Exempt Abandonments and Discontinuances of Service and Trackage Rights

Sec. 1152.50 Exempt abandonments and discontinuances of service and trackage rights.

- (a) (1) A proposed abandonment or discontinuance of service or trackage rights over a railroad line is exempt from the provisions of 49 U.S.C. 10903 if the criteria in this section are satisfied.
- (2) Whenever the Board determines a proposed abandonment to be exempt from the requirements of 49 U.S.C. 10903, whether under this section or on the basis of the merits of an individual petition, the provisions of Secs. 1152.27, 1152.28, and 1152.29 as they relate to exemption proceedings shall be applicable.

- (b) ~~(1)~~ An abandonment or discontinuance of service or trackage rights is exempt under the out-of-service exemption if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending), or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

(2) An abandonment by a class II or III carrier ("Small Carrier") of a railroad line that has had traffic during the preceding two years shall be exempt if the abandoning Small Carrier complies with the applicable requirements of this section and with the environmental and historic report provisions of 49 CFR Part 1105, as applicable to abandonments ("Small Carrier Exemption"); provided, however, the carrier may opt

to commence the environmental and historic report process after the later of: (A) the deadline for filing offers of financial assistance ("OFAs"), if no OFAs have been filed, (B) the date on which the Board issues a decision finding that no financially responsible person has submitted an OFA, in the event one or more OFAs are filed, and (C) the date on which the Board vacates its decision postponing the effective date of the exemption because one or more OFAs have been filed but no agreement for continued rail service has been entered. If an OFA results in continued rail service, the environmental and historic reporting requirements, as applicable to abandonments, will not apply. In no case shall this section be construed to permit a carrier to consummate an abandonment prior to completing the applicable environmental and historic process.

(c) The Board has found:

- (1) That its prior review and approval of these abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and
- (2) That these transactions are of limited scope and continued regulation is unnecessary to protect shippers from abuse of market power. 49 U.S.C. 10502. A notice must be filed to use ~~this~~these class ~~exemption~~exemptions. The procedures are set out in Sec. 1152.50(d). ~~This~~These class ~~exemption~~exemptions ~~does~~do not relieve a carrier of its statutory obligation to protect the interests of employees. 49 U.S.C. 10502(g) and 10903(b)(2). ~~This~~They also ~~does~~do not preclude a carrier from seeking an exemption of a specific abandonment or discontinuance that does not fall within this class.

(d) ~~Notice~~Notices of exemption.

(1) At least 10 days prior to filing a notice of exemption with the Board, the railroad seeking the exemption must notify in writing:

- (i) The Public Service Commission (or equivalent agency) in the state(s) where the line will be abandoned or the service or trackage rights discontinued;
- (ii) Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program);
- (iii) The National Park Service, Recreation Resources Assistance Division; and
- (iv) The U.S. Department of Agriculture, Chief of the Forest Service.

The notice shall name the railroad, describe the line involved, including United States Postal Service ZIP Codes, indicate that the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Board. The notice shall include the following statement "Based on information in our possession, the line (does) (does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it."

(2) ~~The (i) In out-of service rail line exemption proceedings, the~~ railroad must file a verified notice using its appropriate abandonment docket number and subnumber (followed by the letter "X") with the Board at least 50 days before the abandonment or discontinuance is to be consummated. The notice shall include the proposed consummation date, the certification required in Sec. 1152.50(b), the information required in Secs. 1152.22(a) (1) through (4), (7) and (8), and (e)(4), the level of labor protection, and a certificate that the notice requirements of Secs. 1152.50(d)(1) and 1105.11 have been complied with.

(ii) (A) Notice to shippers. In Small Carrier Exemption proceedings, at least 40 days prior to filing a verified notice of exemption under this section, the

abandoning carrier shall serve a letter-notice on each shipper that is:
located on the line and has tendered or received traffic over the line in
the preceding 36-month period. The letter-notice shall state that: (A)
the carrier intends to file a notice of exemption to abandon the line, (B)
certain traffic and revenue data regarding the shipper will be made part
of the Supporting Data packet provided for under 49 CFR §§
1152.50(d)(2)(ii)(B) and 1152.27(d), and (C) the shipper can request that
such information not be included in the Supporting Data packet if the
shipper serves on the abandoning carrier a written request for exclusion
of such information within five days after the date of letter-notice.

(B) *Verified Notice for Small Carrier Exemptions.* To qualify for the Small
Carrier class exemption, the carrier must file a verified notice of
exemption (“Small Carrier Verified Notice”) with the Board, using the
carrier’s appropriate abandonment docket number and sub number
followed by the letter X. At the time of the filing, a copy of the Small
Carrier Verified Notice also must be served on each shipper located on
the line that has tendered or received traffic over the line during the
preceding 36-Month Period. The carrier also shall publish the
information from the Small Carrier Verified Notice (except for the map)
for three weeks, in both a newspaper of general circulation in each
county where the line is located, and in a nationally-distributed,
railroad-related trade publication. The carrier must begin publication
within the 30-day period immediately preceding filing of the Small

Carrier Verified Notice. The Small Carrier Verified Notice must contain a verified statement by an officer of the carrier providing the information required in 1152.50(d)(2)(i), and also the following additional information:

- a general description of the line and its operations, including the counties and states in which it is located, milepost designations of the line (to the extent available), any stations located on the line, the names of all connecting carriers and the points of interchange with such carriers, the names and addresses of all carriers that have operating rights over the line and the locations where such carriers operate;
- a description of the current physical condition of the line and, if all or any portion of the line is below FRA class 1 standard, as defined in 49 CFR Part 213, an estimate of the cost to rehabilitate the line to that standard;
- the carrier's calculation of the net liquidation value ("NLV") for the line, which the carrier will use in any OFA proceeding;
- a statement that, in connection with any OFA properly filed with respect to the line (or any part thereof), the constitutional minimum value of the line shall be equal to the line's NLV, and that the carrier waives any right to claim compensation in excess of NLV;

- the date the carrier intends to discontinue service over and/or abandon the line;
- a statement that any OFA must be received by the STB and the railroad's counsel or representative within 90 days after the date of publication of the notice in the Federal Register, pursuant to Section 1152.50(d)(3) ("Federal Register Notice");
- a statement that, if any purchase through an OFA would result in shippers on the acquired line having no access to a third-party carrier (to or from which traffic has flowed within the preceding 24 month period) except via the abandoning carrier, the abandoning carrier will grant the purchaser either trackage or haulage rights at commercially reasonable rates; provided, however, the abandoning carrier shall have the sole discretion to determine which form of access to grant;
- a statement that, based on available information in its possession, the line does not contain federally granted rights-of-way, and that any documentation in the carrier's possession in this regard will be made available to requesting persons;
- a statement of whether the carrier believes the property to be abandoned is appropriate for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation;
- a statement of whether the carrier is willing to negotiate trail use;

- a statement, as appropriate, that either (i) the carrier already has filed the environmental and/or historic reports required by 49 CFR Part 1105, or (ii) cessation of service will not exceed the environmental thresholds described in 49 CFR §§ 1105.7(e)(4)-1105.7(e)(5), there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older, and the carrier will file the appropriate environmental and/or historic reports after completion of the OFA process.
- a certification that the carrier is in compliance with the notice requirements of this Section 1152.50(d)(2)(ii)(B); and
- a statement that, in accordance with 49 CFR § 1152.27(d), Supporting Data (including appropriate traffic and revenue information) will be provided upon request.

The information provided in the Small Carrier Verified Notice must be based on supporting materials containing pertinent data and documentation for three items: traffic and revenue attributable to the line; the physical condition of the line; and the net liquidation value (the “Supporting Data”). The Supporting Data must include, for the immediately preceding 36-month period (the “36-Month Period”), the number and location of the shippers that have used or inquired about rail service over the line, the aggregate number of loaded cars tendered or received by shippers on the line (by month), and the average revenue per carload received for this traffic (by month). Regarding the physical

characteristics of the line, the Supporting Data must contain information in the carrier's possession regarding: the general weight and condition (scrap or relay) of the rail and other track material present on the line, the estimated net tonnage of rail and other track material on the line, the date and a description of the most recent rail and tie replacement program (if known), the number and location of any bridges, and copies of the most recent track and bridge inspection reports (if any) in the carrier's possession. To the extent that the carrier claims a net liquidation value of the line that includes a value for real property, the Supporting Data must include documentation in the carrier's possession of: the total acreage held in fee, the average price per acre of such property (denoting differently priced parcels, if any) and a copy of any real estate appraisals performed within the preceding 24-month period. The Supporting Data need not include traffic and revenue data for shippers that timely request that their data be excluded pursuant to Section 1152.50(d)(2)(ii)(A), but shall indicate that the shipper has requested exclusion.

- (3) The Board, through the Director of the Office of Proceedings, shall publish a notice in the Federal Register within 20 days after the filing of the notice of exemption. The notice shall include a statement to alert the public that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Petitions to stay the effective date of the notice on other than environmental or historic preservation grounds must be filed within 10 days of the publication. ~~Petitions~~ In out-of-

service exemption proceedings, petitions to stay the effective date of the notice on environmental or historic preservation grounds may be filed at any time but must be filed sufficiently in advance of the effective date in order to allow the Board to consider and act on the petition before the notice becomes effective. In Small Carrier Exemptions, petitions to stay the effective date of the notice on environmental or historic preservation grounds must be filed within 30 days after the date the environmental and historic reports are served on the appropriate agencies identified in 49 CFR §§ 1105.7(b) and 1105.8(c), and comments regarding environmental, energy or historic preservation matters also must be filed by this date. Petitions for reconsideration, comments regarding environmental, energy and historic preservation matters (except for such comments in Small Carrier Exemption proceedings), and requests for public use conditions under 49 U.S.C. 10905 and 49 CFR 1152.28(a)(2) must be filed within 20 days after publication. Requests for a trail use condition under 16 U.S.C. 1247(d) and 49 CFR 1152.29 must be filed within 10 days after publication. ~~The exemption will be effective 30 days after publication, unless stayed.~~ If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Board shall summarily reject the exemption notice.

- (4) In out-of-service and Small Carrier rail line exemption proceedings under 49 CFR 1152.50, the Board, on its own motion, will stay the effective date of individual notices of exemption when an informed decision on pending environmental and historic preservation issues cannot be made prior to the date that the exemption authority would otherwise become effective.

- (5) A notice or decision to all parties will be issued if use of the exemption is made subject to environmental, energy, historic preservation, public use and/or interim trail use and rail banking conditions.
- (6) To address whether the standard labor protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), adequately protect affected employees, a petition for partial revocation of the exemption under 49 U.S.C. 10502(d) must be filed.

(7) **Effective date of exemption.**

- (i) **In out-of-service exemption proceedings, the exemption will be effective 30 days after publication, unless stayed.**
- (ii) **In Small Carrier Exemptions, absent a stay, if the carrier already has complied with the applicable provisions of Part 1105, the exemption shall be effective 91 days after the date of the Federal Register Notice. If the carrier has not yet complied with the applicable provisions of 49 CFR Part 1105, but has made the certification regarding environmental and historic matters provided for in Section 1152.50(d)(2)(ii)(B), then the carrier shall have the authority to discontinue service beginning on the 91st day after the date of the Federal Register Notice. The authority to abandon shall become effective 30 days after the carrier has complied with the applicable provisions of 49 CFR Part 1105, subject to any conditions imposed by the Board.**

- (e) Consummation notice. As provided in Sec. 1152.29(e)(2), rail carriers that receive authority to abandon a line under Sec. 1152.50 must file with the Board a notice that abandonment has been consummated.

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34670, June 27, 1997]

F:\99990\027\current\1152.50.doc

Attachment B

**Proposed 49 CFR § 1152.27 Blacklined
Against Current Version**

Sec. 1152.27 Financial assistance procedures.

- (a) Provision of information. An applicant **in proceedings other than the Small Carrier Exemption** must provide promptly upon request to a party considering an offer of financial assistance to continue existing rail service, and concurrently to the Board, the following:
- (1)
 - (i) In an application or petition for exemption proceeding, an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;
 - (ii) In a class exemption proceeding, either an estimate of the annual subsidy or the minimum purchase price, depending upon the type of financial assistance indicated in the potential offeror's formal expression of intent submitted under paragraph (c)(2)(i) of this section;
 - (2) Its most recent reports on the physical condition of the involved line; and
 - (3) Traffic, revenue, and other data necessary to determine the amount of annual financial assistance that would be required to continue rail transportation over that part of the railroad line. In an exemption proceeding, the data to be provided must at a minimum include the carrier's estimate of the net liquidation value of the line, with supporting data reflecting available real estate appraisals, assessments of the quality and quantity of track materials in a line, and removal cost estimates (including the cost of transporting removed materials to point of sale or

point of storage for relay use), and, if an offer of subsidy is contemplated, an estimate of the cost of rehabilitating the line to Federal Railroad Administration class 1 Safety Standards (49 CFR part 213).

(4) In Small Carrier Exemption proceedings, the carrier shall provide to any requesting person the Supporting Data described in Section 1152.50(d)(2)(ii)(B) within five days after receipt of a request. The deadline for requests for the Supporting Data shall be 65 days after the date the Board publishes notice of the exemption in the Federal Register under Section 1152.27(b).

(b) Federal Register notice—

- (1) Abandonment and discontinuance applications. The Federal Register publication, which gives notice of the filing of the application 20 days after the application is filed, will serve as notice to persons intending to offer financial assistance to assure continued rail service under 49 U.S.C. 10904 and these regulations as they relate to abandonment and discontinuance applications. Offers of financial assistance will be due 120 days after the application is filed or 10 days after a decision granting the application is served, whichever occurs sooner.
- (2) *Exemption proceedings.*
 - (i) If a petition for individual exemption from the prior approval requirements of 49 U.S.C. 10903 is filed with the Board for abandonment or discontinuance of a line of railroad, the Board will publish notice of the petition in the Federal Register within 20 days

of the filing of the petition. The Federal Register publication will serve as notice to persons with a potential interest in providing financial assistance to assure continued rail service on the line under 49 U.S.C. 10904 and these regulations as they relate to exempt abandonments and discontinuances. Offers ~~for~~ financial assistance will be due 120 days after the filing of the petition for exemption or 10 days after service of a Board decision granting the exemption, whichever occurs sooner.

- (ii) If a notice of exemption is filed under one of the class exemption proceedings, the Board will publish notice of the exemption in the Federal Register within 20 days of filing. The Federal Register publication will serve as notice to persons with a potential interest in providing financial assistance to assure continued rail service on the line under 49 U.S.C. 10904 and these regulations as they relate to exempt abandonments and discontinuances. Offers of financial assistance will be due no later than 30 days after the date of the Federal Register publication giving notice of the exemption in out-of-service exemption proceedings. In Small Carrier Exemption proceedings, offers of financial assistance will be due no later than 90 days after Federal Register publication.

(c) Submission of financial assistance offer—

- (1) Abandonment and discontinuance applications and petitions for exemption—

- (i) *Service and filing.* An offeror must serve its offer of assistance on the carrier owning and operating the line and all parties to the abandonment or discontinuance application or exemption proceeding. The offer must be filed concurrently with the Secretary, Surface Transportation Board, Washington, DC 20423.
- (A) An offer may be filed and served at any time after the filing of the abandonment or discontinuance application or petition for exemption. Once a decision is served granting an application or petition for exemption, however, the Board must be notified that an offer has previously been submitted.
- (B) An offer, or notification of a previously filed offer, must be filed and served no later than 10 days after service of the Board decision granting the application or petition for exemption. This filing and service is subject to the requirements of 49 CFR 1152.25 (d)(1), (d)(2), and (d)(4).
- (C) If, after a bona fide request, applicant or petitioner has failed to provide a potential offeror promptly with the information required under paragraph (a) of this section and if that information is not contained in the application or petition, the Board will entertain petitions to toll the 10-day period for submitting offers of financial assistance under paragraph (c)(1) of this section. Petitions must be filed

with the Board within 5 days after service of the decision granting the application or petition for exemption. Petitions should include copies of the prior written request for information or an accurate outline of the specific information that was orally requested. Replies to these petitions must be filed within 10 days after service of the decision granting the application or petition for exemption. These petitions and replies must be filed on or before their actual due date under 49 CFR 1152.25(d)(4). The Board will issue a decision on petitions within 15 days after service of the decision granting the application or petition for exemption.

- (ii) *Contents of offer.* The offeror shall set forth its offer in detail. The offer must:
 - (A) Identify the line, or the portion of the line, in question;
 - (B) Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations; governmental entities will be presumed to be financially responsible; and
 - (C) Explain the disparity between the offeror's purchase price or subsidy if it is less than the carrier's estimate under

paragraph (a)(1) of this section, and explain how the offer of subsidy or purchase is calculated.

(2) Class exemption proceedings—

- (i) *Expression of intent to file offer.* Persons with a potential interest in providing financial assistance must, no later than 10 days after the Federal Register publication described in paragraph (b)(2)(ii) of this section **in out-of service exemption proceedings, and no later than 90 days after such date in Small Carrier Exemption proceedings.** submit to the carrier and the Board a formal expression of their intent to file an offer of financial assistance, indicating the type of financial assistance they wish to provide (i.e., subsidy or purchase). Such submissions are subject to the filing requirements of Sec. 1152.25(d)(1) through (d)(3). Submission of a formal expression of intent under this subsection will automatically stay the effective date of the notice of exemption under the **out-of-service** class exemption for 40 days (normally, this will be 10 days beyond the date stated in the Federal Register publication), **and will stay such effective date under the Small Carrier Exemption until the date the Board issues its decision regarding whether a financially responsible person has offered assistance pursuant to Section 1152.27(e)(2).**
- (ii) *Service and filing.* An offeror must serve its offer of assistance on the carrier that instituted the exempt filing as well as all other

parties to the proceeding. The offer must be filed concurrently with the Secretary, Surface Transportation Board, Washington, DC 20423.

- (A) An offer may be filed and served at any time after the filing of the notice of exemption. Once a notice of exemption is published in the Federal Register, however, the Board must be notified that an offer has previously been submitted.
- (B) An offer, or notification of a previously filed offer, must be filed and served no later than 30 days after the Federal Register publication described in paragraph (b)(2)(ii) of this section. This filing and service is subject to the requirements of 49 CFR 1152.25 (d)(1), (d)(2), and (d)(4).
- (C) If, after a bona fide request, applicant has failed to provide a potential offeror promptly with the information required under paragraph (a) of this section and if that information is not contained in the notice of exemption, the Board will entertain petitions to toll the 30-day period for submitting offers of financial assistance under paragraph (c)(2) of this section. Petitions must be filed with the Board within 25 days after publication in the Federal Register (described in paragraph (b)(2)(ii) of this section): **in out-of-service exemption proceedings, and within five days after the date on which the carrier was required to provide the**

Supporting Data in Small Carrier Exemption

proceedings. Petitions should include copies of the prior written request for information or an accurate outline of the specific information that was orally requested. Replies to these petitions must be filed within 30 days after the publication **in out-of-service exemptions and within five days after receiving the petition in Small Carrier**

Exemption proceedings. These petitions and replies must be filed on or before their actual due date under 49 CFR 1152.25(d)(4). The Board will issue a decision on petitions to toll the offer period within 35 days after publication **in out-of-service proceedings, and within 10 days after the petition is timely filed in Small Carrier Exemption proceedings.**

- (D) Upon receipt of a formal expression of intent to file an offer under paragraph (c)(2)(i) of this section, the rail carrier applicant may advise the Board and the potential offeror that additional time is needed to develop the information required under paragraph (a) of this section. Applicant shall expressly indicate the amount of time it considers necessary (not to exceed 60 days) to develop and submit the required information to the potential offeror. For the duration of the time period so indicated by the applicant, the ~~30-day~~ period

for submitting offers of financial assistance under paragraph (c)(2) of this section shall be tolled without formal Board action.

(iii) *Contents of offer.* The offeror shall set forth its offer in detail. The offer must meet the requirements of paragraph (c)(1)(ii) of this section.

(d) *Access to documents.* Upon receipt by the carrier of a written comment under Sec. 1152.25 or a formal expression of intent under paragraph (c)(2)(i) of this section indicating an intent to offer financial assistance, or upon receipt by the carrier of an offer of financial assistance, whichever occurs earlier, the carrier must make available to that party or offeror the records, accounts, appraisals, working papers, and other documents used in preparing Exhibit 1 (Sec. 1152.36)-~~or, if an~~ out-of-service exemption proceeding, those documents that would have been used in preparing Exhibit 1 had an abandonment or discontinuance application been filed, or other records, reports, and data in the possession of the carrier seeking the exemption that provide comparable data; ~~or if a Small Carrier Exemption proceeding, the Supporting Data described in Section 1152.50(d)(2)(ii)(B).~~ These documents shall be made available during regular business hours at a time and place mutually agreeable to the parties, provided, however, the Supporting Data shall be sent to the requesting persons in Small Carrier Exemption cases. Notwithstanding the foregoing, in Small Carrier Exemption proceedings, the person seeking access to the Supporting Data shall certify to the Board that it seeks such information solely for use in

connection with a potential OFA, before the carrier shall be obligated to furnish the Supporting Data.

(e) Review of offers—

(1) *Abandonment and discontinuance applications.* The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will issue a decision postponing the effective date of the authorization for abandonment or discontinuance. This decision will be issued within 15 days of the service of the decision granting the application (or within 5 days after the offer is filed if the time for filing has been tolled under paragraph (c)(1)(i)(C) of this section, or within 5 days after expiration of the 120 day (4 month) period described in 49 U.S.C. 10904, if that occurs first). Under the delegation of authority at Sec. 1011.8, the Director of the Office of Proceedings will make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations. Appeals of initial decisions determining whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations will be acted upon by the entire Board pursuant to 49 CFR 1011.2(a)(7).

(2) *Exemption proceedings.*

(i) The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will postpone the effective date either of

the decision granting a petition for individual exemption or the notice of exemption under ~~the~~ a class exemption and partially revoke the exemption or (in the case of a class exemption) the notice of exemption to the extent it applies to 49 U.S.C. 10904. The decision to postpone and partially revoke will be issued within 15 days of the service date of a decision granting a petition for exemption, ~~or~~ within 35 days of the Federal Register publication described in paragraph (b)(2)(ii) of this section (~~in out-of-service exemption proceedings,~~ in out-of-service exemption proceedings, or within ~~5~~ five days after the offer is filed in Small Carrier Exemptions or if the time for filing has been tolled under paragraph (c)(1)(i)(C) or (c)(2)(ii) (C) or (D) of this section). Under the delegation of authority at Sec. 1011.8, the Director of the Office of Proceedings will make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of partial revocation and institution of negotiations. Appeals of initial decisions determining whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of partial revocation and institution of negotiations will be acted upon by the entire Board pursuant to 49 CFR 1011.2(a)(7).

(f) *Agreement on financial assistance.*

- (1) If the carrier and a person offering financial assistance enter into a subsidy agreement designed to provide for continued rail service, the Board will

postpone the effective date of the abandonment or discontinuance. If a decision granting a petition for individual exemption, or a notice of exemption, has been issued, the Board will postpone the effective date of the decision or notice of exemption. The postponement will be for as long as the subsidy agreement is in effect.

- (2) If the carrier and a person offering to purchase a line enter into a purchase agreement which will result in continued rail service, the Board will approve the transaction and dismiss the application for abandonment or discontinuance, or the petition for exemption or notice of exemption. Board approval is not required under 49 U.S.C. 10901, 10902, or 11323 for the parties to consummate the transaction or for the purchaser to institute service and operate as a railroad subject to 49 U.S.C. 10501(a).

(g) *Failure to reach agreement on financial assistance.*

- (1) If the carrier and a financially responsible person fail to agree on the amount or terms of subsidy or purchase, either party may request the Board to establish the conditions and amount of compensation. This request must be filed with the Board within 30 days after the offer is made and served concurrently by overnight mail on all parties to the proceeding. The request must be accompanied by the appropriate fee, codified at 49 CFR 1002.2(f)(26). Replies will be due 5 days later.
- (2) If no agreement is reached within 30 days after the offer of purchase or subsidy is made, and no request is made to the Board to set the conditions and amount of compensation under paragraph (g)(1) of this section, the

Board will serve a decision vacating the prior decision, which postponed the effective date of the decision granting the application, the decision granting the exemption, or the notice of exemption and, which, if applicable, partially revoked either the decision granting the exemption or (in the case of a class exemption) the notice of exemption. The Board will issue the decision to vacate within 10 days of the due date for requesting the Board to set the conditions and amount of compensation, and the Board will make the decision to vacate effective on its date of service.

(h) *Request to establish conditions and compensation for financial assistance.*

- (1) If the Board is requested to establish conditions and compensation for financial assistance under paragraph (g)(1) of this section, the Board will issue a decision within 30 days after the request is due.
- (2) If the applicant receives multiple offers of financial assistance, requests to establish conditions and compensation will not be permitted before the applicant selects the offeror with whom it wishes to transact business. (See paragraph (l)(1) of this section.)
- (3) A party requesting the Board to establish conditions and compensation for financial assistance must, within the time period set forth in paragraph (h)(4) of this section, provide its case in chief, including reasons why its estimates are correct and the other negotiating party's estimates are incorrect, points of agreement and points of disagreement between the negotiating parties, and evidence substantiating these allegations. The offeror has the burden of proof as to all issues in dispute. **In Small**

Carrier Exemption proceedings, the carrier's case and evidentiary support must be based on the Supporting Data prepared in accordance with Section 1152.50(d)(2)(ii)(B).

- (4) The offeror must submit all evidence and information supporting the terms it seeks within 30 days after the offer is made. The carrier's reply to this evidence and support for the terms it seeks are due within 35 days after the offer is made. No rebuttal evidence will be permitted and evidence and information submitted after these dates will be rejected.
- (5) If requested, the Board will determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line. In Small Carrier Exemption proceedings, the Board may require the submission of additional information related to subsidies if necessary. Under 49 U.S.C. 10904(f)(4)(B), no subsidy arrangement approved under section 10904 shall remain in effect for more than one year unless mutually agreed by the parties.
- (6) If requested, the Board will determine the price and other terms of sale. The Board will not set a price below the fair market value of the line (including, unless otherwise agreed upon by the parties, all facilities on the line or portion necessary to provide effective transportation services). Fair market value equals constitutional minimum value which is the greater of the net liquidation value of the line or the going concern value of the line. The constitutional minimum value is computed without regard to labor

protection costs. Notwithstanding the foregoing, in Small Carrier Exemption proceedings, the carrier shall have no claim to an amount in excess of the net liquidation value in acquisitions under this section, as carriers waive any right to such value when using the Small Carrier Exemption proceeding.

- (7) Within 10 days of the service date of the Board's decision, the offeror must accept or reject the Board's terms and conditions with a written notification to the Board and all parties to the proceeding. If the offeror accepts the terms and conditions set by the Board, the Board's decision is binding on both parties. If the offeror withdraws its offer or does not accept the terms and conditions set by the Board with a timely written notification, the Board will serve, within 20 days after the service date of the Board decision setting the terms and conditions, a decision vacating the prior decision, which postponed the effective date of either the decision granting the application or exemption or the notice of exemption, and which, if applicable, partially revoked the exemption or (in the case of a class exemption) the notice of exemption (unless other offers are being considered under paragraph (l) of this section). The decision to vacate will be effective on its date of service.

(i) *Substitution of purchasers and disposition after sale.*

- (1) Prior to the consummation of a purchase under this section, an offeror may substitute its corporate affiliate as the purchaser under an agreement, provided the Board has determined either:

- (i) The original offeror has guaranteed the financial responsibility of its affiliate; or
 - (ii) The affiliate has demonstrated financial responsibility in its own right.
- (2) Except as provided in paragraph (i)(3) of this section, a purchaser under this section may not:
 - (i) Transfer the line or discontinue service over the line prior to the end of the second year after consummation of the original sale under these provisions; or
 - (ii) Transfer the line, except to the carrier from whom the line was purchased, prior to the end of the fifth year after consummation.
- (3) Paragraph (i)(2) of this section does not preclude a purchaser under this section from transferring the line to a corporate affiliate following the consummation of the original sale. Prior Board approval of the affiliate's acquisition and operation, however, is required under 49 U.S.C. 10901, 10902, or 11323. A corporate affiliate acquiring a line under this section is prohibited from discontinuing service over the line or transferring the line to a party that is not a corporate affiliate during the time periods prescribed in paragraph (i)(2) of this section.
- (4) Notwithstanding anything to the contrary in these regulations, in a Small Carrier Exemption proceeding, no person who acquires a rail line under this section may use the Small Carrier Exemption

**procedures to abandon the acquired line prior to the end of the fifth
year after consummation.**

- (j) *Discontinuance of subsidy.* A subsidizer may discontinue a subsidy under this section by giving 60 days notice of the discontinuance to the applicant and all other parties to the proceeding. Unless another financially responsible party enters into a subsidy agreement as beneficial to the carrier as the discontinued subsidy agreement in a situation where the 1-year time limit of 49 U.S.C. 10904(f)(4)(B) has not yet run, the carrier may by filing a request with the Board and serving the request on all parties to the abandonment or exemption proceeding obtain a decision vacating the decision postponing the effective date of either the decision granting the application, or petition for individual exemption, or the notice of exemption. The Board will issue a decision to vacate within 10 days after the filing and service of the request. This decision to vacate will be effective on its service date.
- (k) *Default on agreement.* If any party defaults on its obligations under a financial assistance agreement, any other party to the agreement may promptly inform the Board of that default. Upon notification, the Board will take appropriate action.
- (l) *Multiple offers of financial assistance.*
 - (1) If an applicant receives more than one offer to purchase or subsidize the line from offerors found to be financially responsible, the applicant must select the offeror from those with whom it wishes to transact business. In abandonment and discontinuance application and petition for exemption proceedings within 25 days after service of the decision granting the

application or petition for exemption, ~~and in out-of-service~~ class exemption proceedings within 45 days after the Federal Register publication described in paragraph (b)(2)(ii) of this section, ~~and in Small Carrier Exemption proceedings, within 15 days after the deadline for filing OFAs~~, the railroad must:

- (i) File a written notification of its selection with the Board; and
 - (ii) Serve a copy of the notification on all parties to the proceeding.
- (2) (i) *Abandonment and discontinuance applications and petitions for exemption.* If the applicant has received multiple offers of financial assistance from persons found to be financially responsible and has selected the offeror with whom it wishes to transact business, the negotiating parties shall complete the sale or subsidy agreement or request the Board to establish the conditions and amount of compensation within 40 days after the service date of the decision granting the application or petition for exemption. A request to the Board to set terms and conditions must be served concurrently on all parties to the proceeding. If no agreement on subsidy or sale is reached within the 40-day period and the Board has not been requested to establish the conditions and amount of compensation, any other financially responsible offeror may request the Board to establish the conditions and amount of compensation. This request must be filed at the Board within 50 days of the service date of the decision granting the application or petition for exemption and

served concurrently on all parties to the proceeding. If no other request is filed, the Board will issue a decision authorizing abandonment or discontinuance within 60 days of the service date of the decision granting the application or petition for exemption. This decision will be effective on the date of service.

- (ii) *Class exemption proceedings.* If the carrier seeking the exemption has received multiple offers of financial assistance from persons found to be financially responsible and has selected the offeror with whom it wishes to transact business, the negotiating parties shall complete the sale or subsidy agreement or request the Board to establish the conditions and amount of compensation within 60 days after the Federal Register publication described in paragraph (b)(2)(ii) of this section: **in out-of service exemption proceedings, or within 45 days after the deadline for filing OFAs in Small Carrier Exemption proceedings.** A request to the Board to set terms and conditions must be served concurrently on all parties to the proceeding. If no agreement on subsidy or sale is reached within the ~~60-day~~applicable period and the Board has not been requested to establish the conditions and amount of compensation, any other financially responsible offeror may request the Board to establish the conditions and amount of compensation. This request must be filed at the Board within 70 days of the Federal Register publication described in paragraph

(b)(2)(ii) of this section in out-of-service exemption proceedings, or within 60 days after the deadline for filing OFAs in Small Carrier Exemption proceedings, and served concurrently on all parties to the proceeding. If no other request is filed, the Board will issue a decision vacating the decision postponing the effective date of the notice of exemption within 80 days of the Federal Register publication described in paragraph (b)(2)(ii) of this section in out-of-service exemption proceedings, and within 10 days after the deadline for secondary requests to establish terms in Small Carrier Exemption proceedings. The decision to vacate will be effective on the date of service.

- (3) If the Board has established the conditions and amount of compensation, and the original offer is withdrawn under paragraph (h)(7) of this section, any other offeror found to be financially responsible may accept the Board's decision within 20 days after the service date of the Board's decision setting terms and conditions. If the decision is accepted by another such offeror, the Board will require the applicant to accept the terms incorporated in the Board's decision.

- (m) *Additional time for filing.* Notwithstanding the deadlines previously set forth in part 1152 for filing an offer of financial assistance, parties that can show that they would be materially prejudiced by having less than the full 4 months for filing an offer of financial assistance provided in 49 U.S.C. 10904(c) for application proceedings may seek relief under 49 CFR part 1117.

(n) *Special provisions for summary discontinuance and abandonment of lines not part of the Final System Plan.*

- (1) Board authorization is not needed for the cessation of service on a line of railroad formerly in reorganization that was not included in the Final System Plan (Plan) under the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 et seq., as amended by the Railroad Revitalization and Regulatory Reform Act of 1976, if the line has been continuously subsidized since the inception of the Plan. To provide an opportunity for rail service continuation through offers of financial assistance, however, the owner of the line must give not less than 60 days' notice of a discontinuance, and beginning 120 days after discontinuance, not less than 30 days' notice of abandonment. Designated operators need only comply with the notice requirements of Sec. 1150.11 of this title. In instances of discontinuance by a designated operator, the line owner is not obligated to operate the line. Notice is to be sent by the line owner to the Board, the governor and transportation agencies and the government of each political subdivision of each state in which such rail properties are located and to each shipper who has used the rail service during the previous 12 months. The Board will generally apply the OFA procedures in this section (49 CFR 1152.27) for class exemptions to summary abandonment and discontinuance notices (except that the Board will not postpone the effective date of a summary discontinuance). For example, notice of summary abandonment or discontinuance will be published by the Board

in the Federal Register within 20 days of filing. Paragraph (b)(2)(ii) of this section. Expressions of intent to file an offer must be filed no later than 10 days after the Federal Register publication. Paragraph (c)(2)(i) of this section. An offer must be filed within 30 days of the Federal Register publication. Paragraphs (b)(2)(ii) and (c)(2)(ii)(B) of this section. The Board will review offers to determine if a financially responsible person has offered assistance. If this criterion is met, the Board will postpone the effective date of the summary abandonment (but not the discontinuance) within 35 days of the Federal Register publication. Paragraph (e)(2) of this section. If the carrier and financially responsible person fail to agree on the amount or terms of subsidy or purchase, either party may request the Board to establish the conditions and amount of the compensation. This request must be filed within 30 days after the offer of purchase or subsidy is made, and the Board will issue a decision within 30 days after the request is due. Paragraphs (g)(1) and (h)(1) of this section.

- (2) Where a designated operator is being used, it shall be paid a reasonable management fee. If the parties cannot agree on this fee, it shall be four and one-half percent of the total annual revenues attributable to the branch.

[61 FR 67883, Dec. 24, 1996, as amended at 63 FR 28290, May 22, 1998]