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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Docket No. EP 763, Montana Rail Link, Inc. -- Petition for Rulemaking –
Classification of Carriers (49 C.F.R. Pt. 1201)

Dear Ms. Brown:

Attached is the Reply of Montana Rail Link, Inc. in the above-referenced proceeding. If there are any questions concerning this filing, please contact me by e-mail at rnardi@bakerandmiller.com.

Sincerely,

Rose-Michele Nardi
Rose-Michele Nardi

Attachment

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. P 763

**MONTANA RAIL LINK, INC.
- PETITION FOR RULEMAKING -
CLASSIFICATION OF CARRIERS (49 C.F.R. 1201)**

REPLY OF MONTANA RAIL LINK, INC.

On February 14, 2020, Montana Rail Link, Inc. (“MRL”) filed with the Surface Transportation Board (“Board”) a petition for rulemaking to amend the rail carrier classification regulations set forth in 49 C.F.R. 1201, 1-1(a) (the “Petition”). The Petition included support letters from numerous Montana industry associations representing diverse interests. On June 15, 2020, the American Short Line and Regional Railroad Association also filed a letter with the Board supporting the Petition (the “ASLRRRA Support Letter”). No shipper or shipper-related organizations or governmental entities opposed the Petition. The sole opposition to the Petition was a letter filed by Transportation Trades Department, AFL-CIO (“TTD”) (the “Opposition Letter”), which represents only 11.5 percent of MRL employees.

A. BACKGROUND

As detailed in the Petition, MRL is completely distinct from current Class I railroads, both financially and operationally. The average operating revenue of the Class I railroads in 2018 (approximately \$10.883 billion) is more than *27 times* the total revenue of MRL in 2018.¹ And, in 2018 the smallest Class I railroad still generated operating revenue about *3.5 times* MRL’s total revenue. To put these numbers in perspective, MRL’s total revenue for 2018 is approximately *5-tenths of one percent* of the combined operating revenue of the Class I railroads (approximately 76.177 billion).²

Moreover, the Board, as well as its predecessor, the Interstate Commerce Commission (the “Commission”), recognized that the operating revenue of a carrier will not always be the determining factor for Class I status. The Board’s regulations already treat certain types of railroads (*e.g.*, switching railroads, terminal railroads, and electric railroads) generally as Class III carriers, *regardless of their operating revenue*.³ Accordingly, the Board recognizes the operating profile of a carrier can be as important as its financial profile in determining whether to treat a railroad as a Class I carrier.

¹ See Petition, at 8.

² See Railroad Fact 2019, Association of American Railroad (“2019 AAR Railroad Facts”), at 65 (identifying total Class I operating revenue).

³ See 49 C.F.R. 1201 1-1(d) and (e).

Operationally, MRL is easily distinguished from a Class I carrier. None of the hallmarks of a Class I carrier apply to MRL:

1. Track Miles.

- ❖ The average amount of track over which a Class I carrier operated in 2018 was approximately 16,969 miles, with the smallest Class I railroad still operating approximately 3,397 miles⁴.
- ❖ MRL only operated over approximately 720 miles of mainline track in 2018.

2. Geographic Reach.

- ❖ Class I railroads operate over numerous states, with the smallest reaching 10 states and two countries.
- ❖ Approximately 95 percent of the main line tracks over which MRL operates is located in a single state.⁵

3. Interchange Partners.

- ❖ Class I railroads have numerous interchange partners.
- ❖ MRL's only interchange partner is BNSF Railway Company ("BNSF"), and approximately 84% of MRL's total revenue is generated from traffic interchanged with BNSF and ancillary services MRL performs for BNSF.

4. Ratemaking Authority.

- ❖ Class I railroads generally have rate-making authority for their movement of freight.
- ❖ BNSF sets the freight transportation rates for approximately 96% of MRL's traffic (excluding switching).

5. Ownership of Mainline Tracks.

- ❖ Class I railroads generally own a substantial portion of the main line tracks over which they operate.
- ❖ MRL owns *none* of the main line tracks over which it operates; all of its operating rights over main line track arise from lease rights or trackage rights granted by BNSF.

6. Locomotives and Cars.

- ❖ Class I railroads own or lease the majority of its locomotives and rail cars.
- ❖ The vast majority of MRL's locomotive and rail cars are provided by BNSF.

7. Traffic.

- ❖ Class I railroads handle diversified traffic.
- ❖ The vast majority of MRL's traffic consists of only three commodities.

As the above facts demonstrate, MRL, with its heavy dependence on BNSF and the regional economy, exhibits operational characteristics much more akin to a short line carrier than a Class I carrier.

B. TDD's OPPOSITION TO THE PETITION

TDD suggests that MRL has not sufficiently substantiated the regulatory burdens it will incur if MRL is treated as a Class I carrier. In its Petition, MRL identifies the key burden on a

⁴ See 2019 AAR Railroad Facts, at 65 (identifying total mileage of Class I railroads) and 69.

⁵ This percentage is even higher if non-main line tracks are considered.

new Class I carrier as the accounting/reporting regulations, and provides detailed examples – both in terms of burden hours and monetized costs - regarding the significant nature of this burden. Moreover, the burden hours (and resulting monetized costs) are directly based on the Board’s own calculations of certain burdens its accounting/reporting regulations impose on Class I railroads.⁶

The Board’s regulations classifying railroads based on operating revenue was established “[f]or purposes of *accounting and reporting*”.⁷ Accordingly, the primary analysis of the burdens and benefits of a Class I designation should focus on the accounting and reporting regulations. The Commission stated the rationale of the accounting and reporting regulations was “to gather representative information and accurately monitor the financial condition of *the carriers that carry the great majority of the traffic of the railroad industry*”.⁸ Imposing the accounting/reporting regulations on MRL – which had revenue in 2018 that accounted for only approximately five-tenths of one percent of the combined Class I operating revenue - would not further the purpose of those regulations.

Given that (1) the railroad classifications were implemented for the accounting/reporting requirements, and (2) treating MRL as a Class I railroad would not serve the intended purpose of the accounting/reporting requirements, *any* burden on MRL resulting from the imposition of such regulations is arguably too high, especially in light of the statutory mandate for the Board to minimize accounting/reporting burdens on railroads.⁹ Nevertheless, MRL in its Petition identified specific and significant economic and administrative burdens that would be imposed on it if subject to the Class I accounting/reporting regulations. Despite these facts, TDD suggests, without explanation, that MRL has not clearly substantiated undue regulatory burdens.

TDD also questions whether MRL will exceed the current Class I threshold in the near term. In its Petition, MRL states its 2018 total revenue is \$398,374,000, and that the overwhelming majority of its total revenue is operating revenue.¹⁰ Because MRL is not required to comply with the Board’s accounting/reporting regulations, the manner in which MRL calculates its operating revenue may vary from the manner in which Class I carriers calculate their operating revenue. Accordingly, in an effort to be conservative when comparing MRL’s revenue to Class I revenue, MRL used its total revenue, rather than its operating revenue in the Petition. MRL calculates its operating revenue for 2018 as approximately \$375,600,000 which amount excludes equipment lease revenue, joint facility lease revenue, non-carrier rent/lease revenue, car hire revenue, and other billable project revenue. MRL is a privately-held company (unlike most Class I carriers) and its financial information is largely non-public. The fact that MRL is willing to make certain financial information public in this proceeding, and to incur the

⁶ See Petition, at 8-9.

⁷ See 49 C.F.R. 1201.1-1(a) (emphasis added). See also Montana Rail Link, Inc. – Petition for Rulemaking – Classification of Carriers, served May 14, 2020 (noting the STB regulation “describes the revenue thresholds for the classes of carriers for the purposes of accounting and reporting”).

⁸ See Petition, at 9 (emphasis added).

⁹ See 49 U.S.C. 11161 and 10101(13).

¹⁰ See Petition, at 7, n. 2.

time and expense of initiating the Petition, demonstrates MRL's significant concern regarding the current revenue threshold for Class I carriers.

In addition, TDD points out that regulations of other federal agencies incorporate the Board's classification system and impose greater restrictions on Class I railroads.¹¹ However, the fact that other federal agencies are incorporating the Board's classification system only underscores the importance of ensuring that the railroads the Board classifies as Class I carriers all share the same fundamental financial and operating characteristics.

For example, TDD expressly acknowledges that the Transportation Safety Administration recently imposed greater restrictions on Class I railroads "*based on their revenue and the Nation's dependence on these systems*".¹² MRL does not come close to generating the revenue or having the geographic footprint or autonomy of the Class I railroads. As noted above and in the Petition, (1) the average revenue of a Class I carrier is more than 27 times MRL's revenue (and even the smallest Class I carrier has revenue about 3.5 times MRL's revenue),¹³ and (2) MRL's operating profile – both in terms of its limited regional nature and its dependence on a single Class I carrier – is much more similar to a short line railroad than a Class I railroad. If the Board permits a railroad such as MRL to be reclassified as a Class I carrier – despite the fundamental differences between MRL, on the one hand, and all the other Class I carriers, on the other – MRL unintentionally may be subjected to numerous additional burdens imposed by other federal agencies.

Lastly, TDD raises the issue of labor protection but only cites to a single example of how employees may be affected by MRL's classification. TDD notes if MRL merges or consolidates with a Class III rail carrier, and retains its Class II status, MRL's employees will not get the same level of labor protection they would have received if MRL was treated as a Class I rail carrier. TDD then suggests that the Board may relieve MRL of complying with Class I accounting/reporting requirements, but should not relieve it from complying with Class I labor protection requirements.

As noted above, the classification system for carriers was established for the purpose of implementing the accounting/reporting regulations. TDD offers no rationale to support treating MRL as a Class I carrier for purposes of labor protection, when such treatment is not supported for purposes of the accounting/reporting regulations. In addition, TDD offers no rationale to support treating MRL as a Class I carrier for labor protection purposes, given the fundamental financial and operating differences between MRL and the other Class I carriers.

MRL has never disputed that certain regulatory burdens apply to Class I carriers that do not apply to Class II carriers. The issue is whether MRL should be classified as a Class I carrier and subjected to those additional burdens. As noted above, MRL has received support for the

¹¹ See Opposition Letter, at 2-3. See also ASSLRA Support Letter, at 3, 4 (noting certain Federal Railroad Administration regulations that apply differently to Class I and Class II railroads, and noting MRL would no longer have access to important tax credit for infrastructure investment if MRL were treated as a Class I carrier.)

¹² See Opposition Letter, at 3 (emphasis added).

¹³ See Petition at 5-7.

Petition from numerous industry associations and the ASLRRRA. The Petition has received no opposition from any shipper, shipper organization, or governmental entity, and has not received broad-based opposition from labor organizations. The only opposition to the Petition was from TDD, which represents only 11.5 percent of MRL employees. Given (1) the distinct nature of MRL's operating and financial profiles, (2) the significant burdens that would be imposed on MRL, (3) the limited (if any) benefits that would accrue to the public, and (4) the minimal opposition to the Petition, the Board, consistent with historical policy and statutory mandate, should continue to treat MRL as a Class II carrier.

For all the reasons set forth in this Reply and in the Petition, MRL requests that its Petition be granted.

Respectfully submitted,

Rose - Michele Nardi /AC

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Dated: July 2, 2020