

18                   MR. SIDMAN: Thank you. Chairman Nober,  
19                   Vice Chairman Mulvey, my name is Mark Sidman. I'm  
20                   appearing in this proceeding today on behalf of 65  
21                   small railroads that have petitioned the Board to  
22                   commence a rule-making to adopt a class exemption for

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1 expedited abandonment of rail lines. The proposed  
2 exemption would apply to Class II and Class III  
3 carriers.

4 The Petitioners are hopeful that following  
5 today's hearing the Board will initiate a formal rule-  
6 making procedure to amend its regulations as we have  
7 proposed. As indicated in the Board's scheduling  
8 order, I will make my presentation this morning and  
9 reserve any unused portion of the 30 minutes allotted  
10 to Petitioners for rebuttal.

11 When the Petitioners talk in terms of  
12 expedited abandonment, they are not referring to the  
13 period from the commencement of an abandonment  
14 proceeding at the Board to the date that abandonment  
15 authority is finally issued. That period would not  
16 significantly change under the proposed exemption.  
17 Instead the Petitioner's use of the term "expedited  
18 abandonment" refers to a different and far more  
19 critical period; the time between the day on which a  
20 small railroad decides that the prospects of a line  
21 segment are hopeless on the one hand, and the day on  
22 which the railroad begins the abandonment process at

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1 the Board on the other.

2 This period, which I'll refer to as the  
3 pre-filing period, is the one that the Petitioners  
4 seek to shorten. During the pre-file period which can  
5 last for several years, a small railroad, in order to  
6 stem losses on an unproductive line typically will  
7 raise rates to fully compensatory levels, defer  
8 maintenance, cut back on capital spending and reduce  
9 service levels. This is not an evil course of action.  
10 It is nothing more or less than a rational business  
11 behavior in the face of little or no demand for  
12 service, mounting losses and dim prospects and there  
13 is nothing in the ICC Termination Act or elsewhere  
14 that prohibits it.

15 A small railroad takes these steps because  
16 to do otherwise would jeopardize its ongoing  
17 viability. It cannot and should not continue  
18 providing service at a loss and hope to make it up in  
19 volume. The Staggers Act (phonetic) freed railroads  
20 from that syndrome almost 25 years ago.

21 The natural consequence of raising rates  
22 and cutting costs is a degradation of traffic and

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1 infrastructure on the line in question. Only after  
2 the traffic base has largely disappeared and the  
3 physical condition of the line has deteriorated will  
4 the small railroad commence an abandonment proceeding.  
5 More often than not, a railroad delays its filing  
6 until there has been no local traffic handled on the  
7 line for a two-year period which enables it to utilize  
8 the existing notice of exemption procedure for out of  
9 service lines. Why would a small railroad wait  
10 several years to seek regulatory authority to abandon  
11 a line that it had written off long ago as a losing  
12 proposition? Why would it allow the financial drain  
13 of keeping unproductive assets in place go on any  
14 longer than necessary?

15 The unfortunate answer is that to avoid  
16 the expense and uncertain result of a contested  
17 abandonment proceeding, a small carrier is now best  
18 served to file for the abandonment only after the  
19 traffic is gone and the cost of rehabilitating the  
20 line is prohibitive. Then and only then, can the  
21 small carrier be confident that regulatory authority  
22 will be forthcoming. No one benefits from a multi-

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1 year prefiling period in which service levels plummet,  
2 traffic dries up and rail infrastructure deteriorates  
3 beyond repair. Less and less traffic moves over the  
4 line and soon the presence of the railroad doesn't  
5 even serve as an effective stalking horse to keep  
6 truck or barge rates honest.

7 Moreover, the low level of activity on the  
8 line contributes little in the way of employment  
9 opportunities as the jobs were eliminated or  
10 transferred early in the prefiling period. In the  
11 meantime, the railroad has tens of thousands of  
12 dollars of unproductive assets tied up in a barely  
13 operating branch line. And at the end of the day,  
14 having gone through this incredibly wasteful exercise,  
15 the railroad almost always obtains the requested  
16 abandonment authority.

17 Between 1996 and 2001 the Board granted  
18 abandonment authority in 521 cases and denied  
19 authority in 18 cases which is a denial rate of less  
20 than three and a half percent. And in those few cases  
21 in which abandonment authority was denied, the  
22 railroad likely could have achieved the opposite

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1 result had it just put off filing a little longer. A  
2 small railroad rarely makes that mistake a second  
3 time.

4           Once abandonment authority is obtained the  
5 offer of financial assistance or OFA procedures kick  
6 in. These well-intended procedures were designed to  
7 preserve rail service by compelling an abandoning  
8 carrier to sell a line for constitutional minimum  
9 value to a third party willing to continue rail  
10 service. But by the time the OFA triggers -- OFA  
11 procedures are triggered, it's simply too late. There  
12 are no buyers for a line that has little or no traffic  
13 and that requires the expenditure of vast amounts of  
14 money for rehabilitation.

15           Although the line might have been  
16 attracted to potential buyers on the day the railroad  
17 decided it couldn't be operated profitably, that's  
18 rarely the case after several years of reduced  
19 maintenance and capital spending. It should come as  
20 no surprise that between 1996 and 2001 offers of  
21 financial assistance were made in just four percent of  
22 proceedings in which abandonment authority was

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1       obtained.

2                   The Petitioners' proposal would address  
3 this broken system and eliminate the death spiral of  
4 a line slated for abandonment during the prefiling  
5 period. The essential features of the proposed class  
6 exemption are as follows. First, a Class II or Class  
7 III railroad that utilizes the exemption can abandon  
8 the line in question by use of a notice of exemption  
9 filing. The abandoning railroad need not make a  
10 showing that the subject line cannot be operated  
11 profitably. Small railroads will no longer have an  
12 incentive to delay the abandonment and OFA process  
13 until there is so little traffic on the line that its  
14 profitability assessment is beyond challenge.

15                   The class exemption shifts the focus from  
16 second guessing a small railroad's profitability  
17 analysis to saving preservable lines and redeploying  
18 unproductive assets. The second essential feature of  
19 the proposed exemption is that it provides shippers,  
20 local governments and the railroad industry at large  
21 with more time to consider and evaluate an OFA. Under  
22 the proposed class exemption, the carrier must provide

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1 all active shippers on the line during the past three  
2 years with at least 40 days notice prior to its filing  
3 the abandonment exemption which is significantly more  
4 than the current application process requires which  
5 can be as little as 15 days.

6 In addition, at least 30 days prior to the  
7 filing of the notice, the carrier must for three weeks  
8 publish notice of the abandonment, not only in the  
9 local county newspapers, as is required today, but  
10 also in a nationally distributed railroad trade  
11 publication, thereby widening the pool of potential  
12 purchasers.

13 Most importantly, the published notice  
14 must contain detailed information aimed at providing  
15 potential purchasers with the data necessary to  
16 evaluate an acquisition. The required information  
17 includes, among other things, details concerning the  
18 line, its mileposts and the like and connecting  
19 carriers, the condition of the line and the cost to  
20 rehabilitate it to FRA Class I condition, the  
21 carrier's calculation of net liquidation value and a  
22 waiver of any right to receive value in excess of NLV,

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1 a statement that the abandoning carrier will provide  
2 access to third party connections by trackage rights  
3 or haulage if the abandoned segment would connect only  
4 to the abandoning carrier and a statement that the  
5 abandoning carrier will supply, upon request the so-  
6 called supporting data which includes three year's  
7 worth of revenue and carload data as well as an  
8 inventory of rail infrastructure and information  
9 concerning bridge condition and the like.

10 All of this information is available to  
11 potential purchasers before the carrier even files for  
12 abandonment. All told shippers, communities and the  
13 railroad industry at large will have the necessary  
14 information to assess the line and determine if an OFA  
15 is plausible for as many as 140 days. For comparison  
16 purposes in the existing out- of-service of exemption  
17 procedure, an OFA is due just 30 days after notice of  
18 abandonment is filed -- is published in the Federal  
19 Register and the abandoning carrier is not required to  
20 publish any substantive information on the condition  
21 of the line prior to filing or even in the filing  
22 itself.

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1 Likewise in a petition for exemption, no substantive  
2 information is required today to be made available  
3 prior to the filing.

4           The third essential feature of the proposed  
5 exemption is that the environmental and historical  
6 reporting which now must be done prior to filing for  
7 abandonment, may be done after the abandonment is  
8 effective. In this way if an offer of financial  
9 assistance is made and the line is purchased, neither  
10 the abandoning carrier, the Board nor a multitude of  
11 state and federal agencies who have needlessly wasted  
12 time and money on an exercise that would end up  
13 serving no purpose.

14           The proposed exemption is consistent with  
15 the statutory provision that addresses abandonments.  
16 Section 10903(D) of the ICC Termination Act provides  
17 that a rail carrier may abandon part of its railroad  
18 lines, only if the Board finds the present or future  
19 public convenience and necessity require or permit the  
20 abandonment. The Board and the Courts have  
21 interpreted this statutory provision as requiring the  
22 Board to engage in a balancing test, to weigh the

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1       burden on the carrier of continuing operation against  
2       the burden on the shippers and communities resulting  
3       from a loss of service.

4               The balancing of the interest at stake  
5       here favors adoption of the proposed notice of  
6       exemption procedures.    The new regulations will  
7       eliminate any incentive for a small railroad to  
8       neglect the line for several years prior to filing for  
9       abandonment authority.   By eliminating the death  
10      spiral during the pre-filing period, the proposed  
11      exemption increases the likelihood that a line will be  
12      purchased for continued rail use.   The line will have  
13      far more traffic and be in far better condition at the  
14      time the abandoning carrier seeks authority to abandon  
15      its operations under petitioner's proposal.

16              The prospects of continued rail use will  
17      be further enhanced by the new OFA procedures.  
18      Comprehensive traffic and revenue data and detailed  
19      information concerning the conditions of the line will  
20      be made available widely and potential offers will  
21      have as many as 140 days to consider the prospects of  
22      the line.   In addition, the abandoning carrier must

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1 provide the acquirer with access to third party  
2 connections through trackage rights or haulage if the  
3 abandoned segment will connect only to the abandoning  
4 carrier.

5 The small railroad, on the other hand,  
6 will be able to cut its operating losses and obtain  
7 the value of its assets either through the proceeds of  
8 an OFA sale or by selling the track and other  
9 materials on the line. This will provide the railroad  
10 with funds for capital investment, equipment  
11 acquisition, reduction of debt and the like. The  
12 railroad will be able to use the value of those assets  
13 from the abandonment to serve shippers in communities  
14 where conditions favor the provision of rail service.

15 On the other side of the ledger, little is  
16 lost as a result of adopting a class exemption for  
17 expedited abandonment by Class II and Class III  
18 carriers. From the moment a small railroad identifies  
19 a segment as an abandonment candidate and take  
20 appropriate steps to cut losses, the value of that  
21 rail line as a transportation alternative plummets.  
22 This is borne out by the fact that from 1996 through

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1 2001 more than half of the abandonments filed at the  
2 Board were pursuant to the two-year out of service  
3 exemption. Although the rail line may be physically  
4 present during the death spiral in the pre-filing  
5 period, its presence confers little benefit to  
6 shippers in communities located on it. At the same  
7 time shippers in communities located on viable lines,  
8 end up effectively subsidizing the losing operations  
9 on the abandonment candidate.

10 The pre-filing period doesn't confer much  
11 benefit on employees either. Abandonment candidates  
12 are almost always low density lines that get  
13 infrequent service. Few, if any, of the employees are  
14 still headquartered on those lines. They have long  
15 since been transferred to where the traffic is.  
16 Because the traffic levels produce insufficient  
17 revenues, the lines are characterized by low  
18 maintenance levels. Employees who maintain these  
19 lines spend most of their time working on the portions  
20 of the small railroad system that gives the same  
21 service. Abandonment of these lines sooner rather  
22 than later rarely will result in a material reduction

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1 in force.

2 In any event, the proposed exemption would  
3 not change the labor protection afforded to employees  
4 who are adversely effected by abandonments. As with  
5 the shippers, however, employees will benefit from an  
6 abandonment process that allows a small railroad to  
7 redeploy capital in a rational way. If a carrier can  
8 cut losses and obtain the value of rail assets on an  
9 unproductive line, the carrier is better able to  
10 upgrade maintenance and undertake capital projects on  
11 the portion of its system that does support rail  
12 service all of which results in higher activity levels  
13 and safer working conditions for employees.

14 The likelihood that small railroads would  
15 abuse a notice of exemption procedure is remote. On  
16 an average, small railroads operate less than 100  
17 miles. These carriers have extremely limited  
18 commercial opportunities and it is highly unlikely  
19 that they would walk away from segments that have even  
20 a prospect of being operated profitably. A hallmark  
21 of short line operations, the Board has frequently  
22 noted, is hands-on, highly responsive customer

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1 service. These companies do not walk away from  
2 business lightly.

3 But in the event that a small railroad  
4 incorrectly assesses a situation and seeks to exit a  
5 market that can sustain rail service, then an  
6 entrepreneur, shipper group or governmental entity  
7 will step up to acquire the line under the enhanced  
8 OFA procedures. Shippers apparently understand the  
9 futility of requiring small railroads to remain in  
10 markets that they have determined to be unsustainable.  
11 The National Industrial Transportation League, through  
12 counsel, has filed comments in this proceeding. In  
13 those comments, the NIT League, which is one of the  
14 largest shipper groups in the country, urges that the  
15 Board institute a rule-making on the proposed  
16 exemption. Moreover, the league has said as a  
17 substantive matter, the league believes that the  
18 proposal advanced by Petitioners had fundamental  
19 merit. A simplification of the regulatory process for  
20 Class II and Class III carriers that permits  
21 abandonments and offers of financial assistance to  
22 proceed before rail infrastructure deteriorates will

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1 strengthen the rail network.

2 The NIT League indicates in its comments  
3 that it would like to see some of the time frames in  
4 the proposal extended so as to allow better  
5 development of offers of financial assistance. While  
6 the League does not provide any details as to the  
7 extensions it would seek, the Petitioners believe that  
8 certain extensions would be appropriate. These are  
9 the kinds of matters that would be best addressed in  
10 a formal rule-making.

11 The Petitioners urge that the Board use  
12 its power under Section 10502 of the ICC Termination  
13 Act to adopt the class exemption we have described.  
14 Section 10502 provides that the Board shall exempt the  
15 class of persons or transaction whenever it finds that  
16 the section of the Act, one, is not necessary to carry  
17 out the Rail Transportation Policy or RTP, set forth  
18 in Section 10101 and two, either the transaction is of  
19 limited scope or the application of the section of the  
20 act in question is not needed to protect shippers from  
21 abusive market power.

22 As set forth in detail in the petition,

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1 the proposed exemption promotes 11 of the 15  
2 provisions of the RTP and is inconsistent with none.  
3 The proposed exemptions simultaneously one, increases  
4 the likelihood of preservation of service over viable  
5 lines through the OFA process by beginning the process  
6 before the condition of the line and its traffic base  
7 has deteriorated, and two, allows a small carrier to  
8 limit its losses and efficiently reallocate capital to  
9 other parts of its system. The exemption will promote  
10 a sound, safe, efficient and competitive  
11 transportation system, thereby advancing several goals  
12 of the RTP. Similarly, by encouraging small carriers  
13 to file for abandonment authority promptly and by  
14 enabling carriers to delay the environmental and  
15 historic reporting process until the OFA is complete,  
16 and by limiting the instances in which a small carrier  
17 files a petition only to be told later to file an  
18 application, the proposed exemption advances the twin  
19 goals of minimizing the need for regulatory control  
20 and promoting expeditious handling of resolution of  
21 proceedings.

22 Finally, the exemption requires widespread

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1 publication of information to potential buyers and  
2 prevents small carriers from having to compile  
3 extensive data that it does not have in order to file  
4 an abandonment application. In this way the exemption  
5 promotes the policy of making cost information  
6 available, while minimizing the burden on the carrier  
7 to produce such information. The proposed exemption  
8 advances all of these aspects of the RTP while  
9 continued application of Section 10903 to small  
10 railroad abandonments advances few, if any, of those  
11 policies. The proposed exemption is also limited in  
12 scope. The typical railroad operates less than 100  
13 miles of track. A review of abandonments by Class II  
14 and Class III carriers during 1999 and 2000 indicates  
15 that small railroad abandonments average less than 25  
16 miles. The lines have low density in virtually all  
17 cases.

18 The Board has consistently found that  
19 abandonments of these types of lines to be limited in  
20 scope. Although the second prong of the test in  
21 Section 10502 for the appropriateness of an exemption  
22 is satisfied by the showing of limited scope, it

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1 should be noted that the alternative prong that  
2 regulation is not necessary to protect shippers from  
3 the abuse of market power is also met. Small  
4 railroads that cannot operate a line profitably  
5 obviously do not have much market power, that is power  
6 to raise rates over the shippers on the line.

7 Either those shippers are not tendering  
8 enough traffic to keep the lines in service, which  
9 suggests the shippers are taking care of the  
10 transportation needs in other ways, or they simply  
11 don't have transportation needs of any significant  
12 magnitude.

13 Thus, the proposal satisfies the criteria  
14 for a class exemption and addresses the unique  
15 characteristics of small railroads as a class. Small  
16 railroads have limited commercial opportunities and  
17 are loath to walk away from any line they believe can  
18 be operated profitably. Under the existing regulatory  
19 procedures, a small railroad will often wait to file  
20 for abandonment until the out of service exemption  
21 becomes available. This delay both drains the small  
22 railroad's limited resources and all but eliminates

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1 the possibility of a successful OFA. The proposed  
2 exemption recognizes the unique characteristics of  
3 small railroads in the context of rail line  
4 abandonments and provides a procedure whereby small  
5 railroads as a class can abandon lines in a manner  
6 that advances the goals of the RTP.

7 Under the proposed Notice of Exemption  
8 Procedure, the focus would be shifted from second-  
9 guessing the profitability determination made by a  
10 small railroad to making a line that otherwise would  
11 go into a death spiral available for purchase by  
12 entrepreneurs, shippers, and communities when the  
13 traffic base still exists and the line has not  
14 suffered years of deferred maintenance.

15 This approach recognizes that the existing  
16 regulations do not save lines from being abandoned.  
17 Instead those regulations simply delay the inevitable  
18 abandonment and virtually assure that the abandoned  
19 lines will not be acquired for continued rail use.  
20 The meager benefits that result from delayed filing  
21 for regulatory authority of arguably a few more years  
22 of increasingly deteriorating service are more than

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1 offset by the negative effects of freezing  
2 unproductive assets in place when the value of those  
3 assets could be reinvested in the portions of the  
4 small railroad system that require capital investment.  
5 We note in this regard that the American Short Line  
6 and Regional Railroad Association estimates that  
7 upgrading small railroad tracks to accommodate 286,000  
8 pound rail cars, an effort that will benefit shippers  
9 and communities, will cost the industry approximately  
10 \$7 billion. The rail system simply cannot afford a  
11 wasteful and unproductive deployment of rail assets.  
12 For all these reasons, the Petitioners urge that the  
13 Board commence a formal rule-making to adopt the  
14 proposed exemption. I would like to reserve any  
15 remaining time that I have for rebuttal and I'd be  
16 happy to answer any questions that you have.

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