

Overview

Abandonments

and

**Alternatives to
Abandonment**

2008 edition

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Abandonments and Alternatives to Abandonment
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A Brief Overview of the Abandonment Process

Applications for abandonment are normally handled under a "modified procedure". Cases are decided based on the written submissions of the parties.

Most abandonment applications are filed by the rail carrier owning the track to be abandoned. The reason the carrier files the application is that it believes that the line has become unprofitable - keeping lightly used lines in a state of good repair and losing the opportunity to use the money and assets elsewhere in the carrier's system can be costly.

Pleadings filed in opposition to abandonments are usually filed by shippers or receivers who are stationed along the line to be abandoned, but other persons may also file in opposition, provided that they either challenge the railroad's statements as filed or offer evidence to show that the shippers and receivers on the line would suffer more harm by losing the rail service than the carrier would suffer by continuing to provide the service.

Procedures are available for those who would like to purchase the line and assume the common carrier obligation to provide service (contract or non-contract) over the line, or who would like to offer the carrier a subsidy to continue to provide the service. This is called an "Offer of Financial Assistance" (OFA). OFA's will not be considered unless the STB has decided that the line is a candidate for abandonment, but the OFA must be filed with the STB within 10 days of its decision to permit abandonment. Each OFA is reviewed by the STB to determine whether the offeror is financially responsible and whether the offer itself is reasonable. The carrier and the offeror are then given time to negotiate a deal. If they are unable to do so, the offeror may ask the STB to set the terms and conditions of the transfer. Once the STB has set the terms and conditions, the offeror may accept those terms or decline to pursue its offer. The carrier must accept the terms if the offeror accepts them.

If the STB grants the carrier's application for abandonment authority and if there are no reasonable OFA's, the STB will consider requests for Trail Use or Public Use Conditions to be imposed on the abandonment decision, provided that the STB's Section of Environmental Analysis has found that the right-of-way is suitable for those uses. Although both uses are for the benefit of the public, there is a difference in the two conditions. It is entirely permissible to ask for the imposition of both conditions.

The Public Use Condition can encompass any public use, for example, a trail, light rail, or a highway. Public Use conditions are imposed by the STB, whether or not the railroad consents. The term of the condition is 180 days and the purpose is to hold the abandonment request open for that long to give the parties an opportunity to negotiate for the transfer of the right-of-way. The 180-day negotiation period can not be extended.

The Trail Use Condition can also encompass various types of trail and public uses. The Trail proponent must file a request with the STB asserting its willingness to assume financial

responsibility for the right-of-way. The carrier must consent to the imposition of the Trail Use Condition. The term of the condition is 180 days and the purpose is, as with the Public Use Condition, to hold the abandonment request open for that period to give the parties an opportunity to negotiate for the transfer of the right-of-way. The 180-day negotiation period can be extended if both parties request an extension.

In the case of the Public Use Condition and the Trail Use Condition, the parties must reach an agreement. The STB is not authorized to assist in the negotiations or to set the terms and conditions as it can in the OFA process. Nor can the STB decide what kind of trail is appropriate. That is to say, if some people think the trail would be ideal for snowmobiles and dirt bikes, while others think motorized vehicles should be banned from the trail, that decision must be made locally. The STB has no authority to decide what type of trail or public use will be allowed.

The STB, however, is required to give priority to efforts to continue freight rail service over the line. Therefore, the STB is not permitted to consider Trail Use or Public Use requests unless the current carrier on the line can prove that it is no longer profitable to operate and there have been no reasonable Offers of Financial Assistance, or those who have made any Offers of Financial Assistance have decided to no longer pursue their offer.

The remainder of this publication goes into these processes in more detail and provides some abandonment timelines, as well as a sample request for trail use and public use conditions. It also gives information on how to protest abandonments, how to file an Offer of Financial Assistance, and how to submit a Request for Public and/or Trail Use Condition. Additional information about the STB, including examples of the procedures detailed here can be found on the STB's web site at www.stb.dot.gov. Click on the E-Library button and then click on "Filings" to see what others have filed in situations similar to yours. If you do not have access to the Internet or you have additional questions, please contact Nancy Beiter or Rudy Saint-Louis in our Office of Governmental and Public Services at 202 245-0230.

INTRODUCTION

By the mid-1970's, our nation's rail transportation system was in dire financial condition. Rail carriers were faced with increased competition from other modes of transportation (especially trucking), rising labor, fuel and maintenance expenses, and pervasive regulation that made it difficult for rail carriers to get rid of unprofitable lines. These conditions had contributed to the bankruptcy of several prominent rail carriers.

Against this background, Congress enacted a series of new laws, most notably the Staggers Rail Act of 1980 (Staggers Act). Together with the implementing regulations issued by the Interstate Commerce Commission (ICC), the STB's predecessor, this legislation sought to increase the role of the marketplace and to decrease the role of government regulation in shaping rail transportation. In essence, the Staggers Act gave railroads more flexibility to set prices and adjust services as the market requires and thus enabled them to act more competitively. At the same time, the necessity for some regulatory involvement was recognized because rail carriers still have significant market power in particular situations, and because rail transportation is vital to the public and provides a relatively environmentally friendly mode of transportation. The current regulatory scheme governing abandonments and acquisitions seeks to balance these competing considerations.

Where the market has spoken clearly and a line is no longer in use or is used very little, a rail carrier may usually abandon a line subject to appropriate labor protection and environmental conditions. Lines over which no local traffic has moved for two years without any formal complaint have been exempted from traditional regulatory scrutiny and can be abandoned simply by filing a Notice with the STB.

Under the more detailed abandonment application processes for active lines, the Board balances the economic burden of continued operation against the public's need for the service. Permission usually will be given to abandon lines on which there are significant operating losses. On the other hand, the carrier's ability to earn more money by disinvesting from a line and reinvesting its assets elsewhere usually is not sufficient to allow abandonment in the face of a public need for service.

Although it may be easier for carriers to abandon unprofitable lines, it is also now much easier for States and private parties to preserve rail service. The Feeder Railroad Development Program enables any financially responsible person to force a rail carrier to sell a line that has been designated for possible abandonment, even though no abandonment application has been filed. Similarly, once an abandonment application or a Notice has been filed for a line, any financially responsible party can offer to subsidize the carrier's service or force the railroad to sell them the line for continued rail service. To encourage entrepreneurs and the States to operate these lines, the Board has frequently exempted them from many regulatory requirements. Labor protective conditions are not imposed in forced sales.

The ICC Termination Act of 1995 amended the Interstate Commerce Act by abolishing the Interstate Commerce Commission and by establishing the Surface Transportation Board. While many aspects of rail regulation were changed by that Act, the legislation governing rail abandonments was essentially unchanged, but the old ICC rules were revised by the STB. The new statutory reference is 49 U.S.C. 10903. The new rules are codified at 49 CFR Parts 1105 and 1152. A guide to using our web site where these rules are available appears at Appendix I.

Chapter 1

REGULATION OF ABANDONMENTS

Under the ICC Termination Act of 1995 (the Act), a railroad may abandon a line only with the STB's permission. The Board must determine whether the "present or future public convenience and necessity require or permit" the abandonment. In making this determination, the Board balances two competing factors. The first is the need of local communities and shippers for continued service. That need is balanced against the broader public interest in freeing railroads from financial burdens that are a drain on their overall financial health and lessen their ability to operate economically elsewhere.

In most years, the majority of abandonments that are filed with the STB are filed under one of its two "exemption" procedures. The exemption procedures do not exempt the abandonment from regulation altogether, but exempt the carrier from those procedures that require it to produce extensive evidence of its economic losses. Exempt abandonments are still subject to regulatory review when necessary. Lines slated for abandonment are eligible for purchase through forced sale procedures. Railroads are required to provide the information necessary to prepare an environmental review and are subject to labor protective conditions whenever they abandon a line. Notice requirements differ, but notice must be published in the legal notices section of a local public newspaper.

When a rail consumer (shipper or receiver) is notified that its rail service will cease and it does not understand the reason for the cessation and has a continuing need for service, that consumer should contact the STB immediately to begin exploring options for continued service. Sometimes service interruptions are temporary. Railroads may embargo lines in order to make necessary repairs. But otherwise rail carriers have a common carrier obligation to provide service to customers until they have received authority to abandon the line from the STB.

While most rail abandonments are filed by the carrier that owns and operates the line, there are exceptions. Some carriers operate by lease or trackage rights over a line that is owned by someone else. Those carriers may file for authority to cease operations by filing for authority to "discontinue" service. Carriers who own and operate a line may also file for "discontinuance" authority when they do not want to abandon the line. They may need the line for storage or repair, but they want to discontinue their common carrier obligation to provide transportation service over the line. Finally, third parties may file for abandonment authority for lines they neither own nor operate. The standard for granting such authority is very high because a grant of such authority requires a carrier to get rid of an asset in which it has a large investment.

Docket Numbers. Case Names and Service Dates

When an abandonment is filed at the Board, it is assigned a docket number. Abandonment docket numbers start with the prefix "AB" and the letters are followed by a number that is unique to the carrier. For example, AB 55 numbers all involve abandonments of track operated by CSX Transportation. AB 167 are abandonments by Conrail. The Sub number follows. The Sub number is different for each abandonment filed by the carrier. The Sub number may be followed by a letter. The most frequently used letter is "X". The letter "X" signals an exemption case, rather than a full abandonment application. If you know the docket

number of the abandonment you wish to discuss when you telephone or e-mail someone at the STB, staff will be able to assist you more quickly.

Abandonment dockets also have names that can tell you something about the case. The name usually consists of the name of the carrier, then a dash, then the name of the type of proceeding such as "Abandonment Exemption" and then another dash followed by name of the county or counties and state or states through which the track passes, e.g., AB 32 (Sub-No. 101X) BOSTON & MAINE CORPORATION--ABANDONMENT EXEMPTION--IN HARTFORD COUNTY, CT.

All filings before the Board in a particular case must contain the appropriate docket number. To avoid confusion caused by inadvertent typographical mistakes, we recommend that the case name be included also.

The most important date on a Board decision is the "service date". The "service date" differs from the "decided date" in most cases and it means the date the decision was released to the public. That date is important because it begins the tolling of various time periods described below.

Four Types of Abandonment Dockets

There are four ways in which rail lines can be abandoned, but all abandonments of rail lines must come before the Surface Transportation Board. There are no *de facto* abandonments. Lines that have not come before the STB or the ICC, no matter how many years or decades they may have been out-of-service, are referred to as "out-of-service", not "abandoned".

The four ways are explained in detail below. The most frequent case is the Class Exemption when all the carrier needs to do is file a Notice of Exemption with the STB to let the Board know that it is abandoning a line that has been out-of-service for two years or longer. While in most instances these dockets receive little scrutiny, it is still possible to protest the abandonment and/or to take advantage of one of the alternatives to abandonment. (See below for more detail)

If the line has not been out-of-service for two years or more, but has seen very little use, the carrier may Petition the Board for an individual exemption. It should be clear to the Board from the evidence in the Petition that the line has seen little use. This evidence can, of course, be challenged. All of the alternatives to abandonment are also available. A full discussion of Petitions for Abandonment begins on page 8.

Abandonment applications are filed by carriers in situations where the carrier believes it cannot continue to operate the line profitably in spite of the fact that the line is used. The burden of proof is on the carrier to show that the line is not profitable and that evidence is subject to challenge. Here too, alternatives to abandonment are available. Further discussion begins on page 10.

Finally, there are abandonment dockets that are not filed by carriers but are filed by third parties. These are called "Adverse Abandonments" and are generally opposed by the carrier who owns the line. Reasons for these kinds of cases vary. They are filed only in rare instances, and so will be discussed in Appendix V.

Class Exemptions for Out-of-Service Lines (49 CFR §1152.50)

By far the type of abandonment or discontinuance case most frequently filed at the STB comes under the class exemption for out-of-service lines. To invoke the class exemption for out-of-service lines, a carrier must file a Notice at the Board certifying that (1) no local traffic has moved on the line for the past 2 years; (2) any overhead traffic that has moved over the line can be rerouted over other lines; and (3) no formal complaint about a lack of service is pending or has been decided in favor of the shipper. Formal complaints are those filed with the STB or those pending in a U.S. District Court and which allege that the carrier has imposed an illegal embargo or has otherwise unlawfully failed to provide service. (See 49 CFR 1152.50(b))

Unlike the traditional application process, no Notice of Intent to abandon, and no amendment to the system diagram is required.¹ However, 10 days before filing the exemption notice with the Board, the railroad must notify the affected State's Public Service Commission or equivalent agency, the U.S. Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program), the National Park Service, Recreation Resources Assistance Division, and the U.S. Department of Agriculture, Chief of the Forest Service, of its intention to do so.

The notice should 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 must 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."

Under the Board's environmental rules (49 CFR Part 1105), in every abandonment exemption case, the carrier must also publish a notice in a newspaper of general circulation in each county in which the line is located and certify to the Board that it has done this by the date its notice of exemption is filed. The notice must alert the public to the proposed abandonment, to available reuse alternatives, such as trail use and public use, and to how it may participate in a Board proceeding. Sample newspaper notices are provided in the Appendix to 49 CFR §1105.12.

Also under the environmental rules, at least twenty days prior to the filing of a Notice of Exemption the applicant must file copies of its environmental report with:

- (1) the State Clearinghouse of each State involved (or other State equivalent agency if the State has no clearinghouse);
- (2) the State Environmental Protection Agency of each State involved;
- (3) the State Coastal Zone Management Agency for any state where the proposed activity would affect land or water uses within that State's coastal zone;
- (4) the head of each county (or comparable political entity including any Indian reservation) through which the line goes;
- (5) the appropriate regional offices of the Environmental Protection Agency;
- (6) the U.S. Fish and Wildlife Service;
- (7) the U.S. Army Corps of Engineers;
- (8) the National Park Service;
- (9) the U.S. Soil Conservation Service;

¹ See p infra describing the full abandonment process

- (10) the National Geodetic Survey (formerly known as the Coast and Geodetic Survey) as designated agent for the National Geodetic Survey and the U.S. Geological Survey; and
- (11) any other agencies that have been consulted in preparing the report.

For information regarding the names and addresses of the agencies to be contacted, interested parties may wish to use the contact list now available on the Board's website, under Environmental Matters and then Environmental Contact List. Users are cautioned, however, that addresses listed thereon should be verified to be sure they are up-to-date.

All of this must be completed before filing the Notice of Exemption with the Board. The Notice of Exemption itself has to be filed at least 50 days prior to the intended date of finalization (legally referred to as a "consummation") of the abandonment or discontinuance. After the carrier has filed a letter of consummation, its legal obligation to provide service over the line ceases. Notices of exemption and the letters of consummation are posted on the STB's web site under "E-Library" and "Filings". See more specific instructions on how to use the Board's website in Appendix I. Letters of consummation must be filed within one year of the publication of the Notice in the Federal Register or the abandonment authority will expire. See 49 CFR §1152.29(e).

The Notice itself will include the proposed consummation date along with the other information required by 49 CFR §1152.50(b) (described above) and §1152.22 (a).

1152.22 (a) requires the following things to be filed with Notices of Exemption.

- (1) The exact name of applicant.
- (2) Whether the applicant is a common carrier by railroad subject to the STB's jurisdiction.
- (3) Whether the carrier is seeking abandonment of a line or just a discontinuance of service.
- (4) A detailed map of the subject line on a sheet not larger than 8×10½ inches, drawn to scale, and with the scale shown on it. The map must show, in clear relief, the exact location of the rail line to be abandoned or over which service is to be discontinued and its relation to other rail lines in the area, highways, water routes, and population centers.
- (5) The name, title, and address of any representative of applicant to whom correspondence should be sent.
- (6) A list of all United States Postal Service ZIP Codes that the line proposed for abandonment traverses.
- (4) A statement of whether the properties proposed to be abandoned are appropriate for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the applicant is aware of any restriction on the title to the property, including any reversionary interest, which would affect the transfer of title or the use of property for other than rail purposes, this shall be disclosed.

20 days after receiving the Notice of Exemption, the Board will publish the Notice in the Federal Register. 30 days after that date, the carrier may file its letter of consummation of the abandonment or discontinuance unless the Board stays the exemption or an Offer of Financial Assistance has been received (explained in Chapter 3) or unless a Public Use or Trail Use Condition has been imposed (explained in Chapter 4).

Types of Opposition filed to Notices of Exemption.

Parties who wish to oppose a Notice of Exemption may file a Petition for Stay or a Petition to Reject or to Revoke the Exemption. Petitions for Stay based on transportation concerns must be filed at the Board within 10 days after the Notice of Exemption is published in the Federal Register. Petitions for Stay based on environmental or historic preservation concerns may be filed at any time but should be filed sufficiently in advance of the proposed effective date of the discontinuance or abandonment to allow the Board time to consider and act on the Petition.²

Petitions to Reject or Reconsider the Exemption can be filed within 20 days after the Federal Register notice has been published. After the exemption has taken effect, parties may file a Petition to Revoke the Exemption at any time.

The STB will revoke the exemption if the information contained in the Notice of Exemption filed by the carrier is false or misleading. Therefore, if local traffic has moved on the line within the last 2 years, the exemption will be rejected.

Although environmental concerns, public need for continued service, and other issues can be raised in a petition to reconsider or revoke, the Board will disallow the exemption only in extraordinary cases.

If use of the class exemption is disallowed for a line, the railroad is still free to apply for abandonment or discontinuance of the line under the regular application procedures or to seek an individual petition under procedures discussed below.

A time table setting out the deadlines in Notice of Exemption cases is attached as Appendix II.

Individual Exemptions

Sometimes individual lines may not have been out of service for the required 2 years, but may have seen very little traffic and so the carrier may want to abandon the line because providing continued service at a very low volume is not economically feasible. In that situation a carrier may file a Petition for an Exemption - Discontinuance, thus signaling that while it does not qualify for the automatic class exemption described above, it nevertheless believes that the abandonment or discontinuance can be exempted from the extensive evidentiary requirements needed for a full abandonment application.

The only prior notices that the carrier who files a Petition for Exemption must file are those set out in the Board's Environmental Rules (49 CFR Part 1105). Thus, in every abandonment exemption case, the carrier must publish a notice in a newspaper of general circulation in each county in which the line is located and certify to the Board that it has done so when its Petition for Exemption is filed. The notice must alert the public to the proposed abandonment, to available reuse alternatives, such as trail use and public use, and to how it may participate in a Board proceeding. Sample newspaper notices are provided in the Appendix to 49 CFR §1105.12.

Also under the environmental rules, at least twenty days prior to the filing of a Petition for Exemption the applicant must file copies of its environmental report with:

² The criteria for a successful petition for stay are set out on page 9 below.

- (1) The State Clearinghouse of each State involved (or other State equivalent agency if the State has no clearinghouse);
- (2) The State Environmental Protection Agency of each State involved;
- (3) The State Coastal Zone Management Agency for any state where the proposed activity would affect land or water uses within that State's coastal zone;
- (4) The head of each county (or comparable political entity including any Indian reservation) through which the line goes;
- (5) The appropriate regional offices of the Environmental Protection Agency;
- (6) The U.S. Fish and Wildlife Service;
- (7) The U.S. Army Corps of Engineers;
- (8) The National Park Service;
- (9) The U.S. Soil Conservation Service;
- (10) The National Geodetic Survey (formerly known as the Coast and Geodetic Survey) as designated agent for the National Geodetic Survey and the U.S. Geological Survey; and
- (11) Any other agencies that have been consulted in preparing the report.

For information regarding the names and addresses of the agencies to be contacted, interested parties may wish to use the contact list now available on the Board's website, under Environmental Matters and then Environmental Contact List. Users are cautioned, however, that addresses listed thereon should be verified to be sure they are up-to-date.

A petitioner for an abandonment exemption must serve a copy of the petition on the persons receiving notices under §1152.50(d). So while no Notice of Intent to abandon or system diagram map or narrative notice is required,³ the railroad must notify the affected State's Public Service Commission or equivalent agency, the U.S. Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program), The National Park Service, Recreation Resources Assistance Division and the U.S. Department of Agriculture, Chief of the Forest Service.

The Board must publish a notice of the proposed exemption in the Federal Register 20 days after it is filed. No further public notice is given even if the petition is denied. Carriers frequently will serve a copy of their petition on any shippers on the line but are not required to give notice when the petition is granted or denied. Interested persons can be notified individually by the Board, if they ask that their names be placed on the Board's service list⁴ in a particular case. Such requests should be e-mailed to barbara.saddler@stb.dot.gov. Those without access to e-mail may mail requests to the Section of Administrative Services, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, D.C. 20423 or fax them to the Section of Administration at 202-245-0464 or 202-245-0465. All requests must contain the appropriate docket number.

A petition for exemption generally will include only a brief description of the relevant facts. It need not be, and typically is not, accompanied by detailed financial or other information. It must, of course, identify the line to be abandoned or discontinued with specificity and include a map showing, in clear relief, the exact location of the rail line to be abandoned or over which service is to be discontinued and its relation to other rail lines in the area, highways,

³ See p infra describing the full abandonment process

⁴ See Appendix I for instructions as to how to use the Board's web site to access service list information.

routes, and population centers. It must also clearly identify the applicant and its representative and explain why the applicant believes this particular line qualifies for an individual exemption. The application must also contained a draft federal register notice using the sample set out in 49 CFR §1152.60.

Petitions for Exemption are normally decided by the Board within 90 days of being filed.

Letters of Consummation of the abandonment or discontinuance must be filed within a year of the date of a grant of a petition for exemption or the abandonment authority will expire. See 49 CFR §1152.29(e).

Opposition to Petitions for (Individual) Exemption

Persons opposing an exemption must file a response in opposition within 20 days after publication of the Federal Register notice. Offers to purchase or subsidize the line (see Chapter 3, Offers of Financial Assistance) must be filed 120 days after the filing of a petition for exemption or 10 days after the service of the Board's decision granting the exemption, whichever occurs sooner. To receive an individual copy of that decision you must have asked to be put on the service list as instructed, *supra*. (See page 8) You may also look for the decision to be published on the Board's website. Decisions and Notices are posted on the STB website at 10:30 a.m. each weekday morning.

Petitions to stay the effective date of the decision may be filed in either Petition (Individual) or Notice (Class) exemption cases. It should be noted that administrative agencies, like the Courts, have developed firm criteria for staying administrative action. To justify a stay, a petitioner must demonstrate that:

- (1) there is a strong likelihood that it will prevail on the merits;
- (2) it will suffer irreparable harm in the absence of a stay;
- (3) other interested parties will not be substantially harmed by the issuance of a stay; and
- (4) the public interest supports the granting of the stay.

The Board, as do the Courts, gives very careful consideration to each of the above criteria and has required a strong substantive showing on all of the four factors. While the showing of irreparable injury may vary from case to case, in general, injuries that can be corrected later may not be enough to justify a stay. Similarly, in determining the public interest factor, the interests of private litigants must give way to the realization of public purposes. The burden of making a strong showing on all four of the factors rests with the petitioner.

Where possible, parties opposed to the exemption should file a protest with the Board before it acts on the exemption request. Even in the absence of a formal notice requirement, community leaders and shippers often are aware of a railroad's plan to seek an exemption before the carrier files its petition.

Protests and petitions for reconsideration of individual exemptions should include a detailed statement of facts. For example, rail consumers should explain their business operations, quantify their use of the involved rail line, discuss the availability and costs of alternative transportation service and explain the impact loss of the rail service would have on their businesses and the community. To the extent possible, protestants should also try to evaluate critically any financial information and traffic projections submitted by the railroad.

If the Board denies a carrier's request for an exemption, the carrier is free to file for authority to abandon or discontinue the line under the regular application procedures discussed below.

Abandonment Applications

The ICC Termination Act of 1995 (the Act) retains strict filing and procedural requirements for abandonment applications that do not meet the exemption criteria discussed above. Once an abandonment application is filed, however, interested persons have only 45 days to file protests. Since an effective opposition to abandonment may require substantial preparation, the Act requires carriers to give communities and rail consumers advance notice of future abandonment plans for lines that are in active use.

System Diagram Maps

The earliest indication that a railroad intends to abandon a line comes from the carrier's system diagram map. The Act requires a rail carrier to maintain a map of all its rail lines. A Class III carrier⁵ may choose to prepare a narrative description of its lines instead of a map. On this system diagram map or in its narrative report, the carrier must identify separately (category 1) any line for which it expects to file an abandonment application (but not a Notice or Petition for Exemption) within the next three years and (category 2) any line that it considers to be a potential candidate for abandonment. The Board will reject an abandonment application if any part includes a line that has not been identified as a category 1 line for at least 60 days before the carrier filed the abandonment application. A carrier must publish its system diagram map or narrative in a newspaper of general circulation in each county containing a rail line in category 1, and publish all subsequent changes to its system diagram map. (See 49 U.S.C. 10903(c)(2) and 49 CFR §1152.10-13.) System diagram maps are updated only when the carrier wishes to change the category for a particular line. Despite their name, however, system diagram maps are not an easy resource to check for a diagram of a carrier's entire system. The original map filed may be large, e.g. 3' x 6'. They are available for viewing in the STB library and you can ask the STB librarian for information on recent updates at STB.Library@stb.dot.gov, telephone (202) 245-0406.

When rail consumers and affected communities see the notice of a system diagram map change in the local newspaper legal notices, they are presented with an opportunity to meet to weigh possible opposition to abandonment and to consider alternative means of continuing rail operations by the current railroad or by another operator. For example, rate and service changes which might permit the railroad to operate more efficiently or profitably may be negotiated.

A line need not have been listed in category 2 prior to abandonment, so no weight should be attached to the fact that a line was or was not listed in category 2.

⁵ Class III carriers are the smallest railroads with gross operating revenues of less than approximately \$25,000,000 per annum.

Notice of Intent

In addition to the system diagram map requirement, the STB requires the railroad to file a “Notice of Intent” to file an abandonment application. The railroad must publish this notice once a week for three consecutive weeks in general circulation newspapers in each county where the line is located⁶, send it to each of the significant shippers on the line, send it to the State agency responsible for rail transportation planning, and post it at each agency station and terminal on the line. All these notice requirements must be fulfilled 15-30 days before the application is filed at the STB.

The complete form and all the information this Notice must contain are set out in section 1152.21 of the regulations. These regulations apply only to abandonment applications, not exemptions. The notice describes when and how to file a protest against the proposed abandonment. It also explains how to obtain information on possible subsidy or purchase of the line. Once the Notice of Intent to abandon is received, rail consumers, communities and interested citizens should organize their activities concerning the abandonment and prepare to present their position to the STB and the railroad. For help in preparing a Notice of Intent or in preparing an opposition to an abandonment please contact the STB’s Office of Governmental and Public Affairs at (202) 245-0230.

Labor Issues in Abandonment Cases

The ICC Termination Act provides certain protection for employees of railroads engaging in major changes in operations. It requires railroads to protect their employees from financial loss for a period of up to 6 years and to provide other protection relating to benefits and seniority. Labor issues may arise in any rail transaction. The STB imposes labor protection conditions in most abandonment cases.

The terms of those conditions are set out in Oregon Short Line R. Co. – Abandonment – Goshen, 360 ICC 91 (1979). But those conditions are not imposed in forced sales under the offer of financial assistance provisions of the statute and are imposed only on the seller when there is a forced sale under the Feeder Railroad Development Program.

The Board is not permitted to use its broad exemption power set out in 49 U.S.C. 10502 to excuse carriers from providing employees with the labor protective conditions they are due.

It is important at the beginning of any abandonment to determine what position, if any, rail labor intends to take. There are some abandonments which will have minimal or no effect on rail jobs. In those cases, rail labor often decides not to participate. There are other situations in which labor witnesses play an active role, challenging railroad costing testimony and providing conflicting data in such areas as labor costs, track maintenance, and the current condition of the line and the rolling stock.

⁶ Note the distinction. In exemption cases the newspaper notice requirement is contained in the Board’s environmental rules and only requires publication once.

Chapter 2

ALTERNATIVES TO ABANDONMENT Forced Sales and Subsidies

Users and interested parties should consider alternatives to abandonment at the first sign a carrier may be contemplating abandonment. The fact that the existing railroad believes the line is no longer economically viable does not necessarily mean the line cannot continue operations under other arrangements. There are many examples of small short line railroads operating on lines that the main line railroad sought to abandon. Congress and the STB have made it easier to preserve rail service by acquiring or subsidizing rail lines. These options will be briefly outlined below.

To encourage continued service, Congress and the STB have adopted procedures that make it possible to force the sale or subsidy of lines slated for abandonment where the parties cannot agree on the price of a sale or terms of a subsidy.

Offer of Financial Assistance (OFA)

Filing Due Dates

Under the offer of financial assistance (OFA) procedures, any financially responsible party seeking to continue service on a line approved for abandonment whether by full application or by class or individual exemption may compel the railroad to sell or conduct subsidized operations over the line. The statutory requirements and STB regulations concerning offers of financial assistance are contained at 49 U.S.C. 10904 and 49 CFR §1152.27. Note that in each type of abandonment docket, the rules for OFA's are different so be sure to note the type of docket involved.

In abandonment application cases (see page 10) or in cases where the applicant has filed a Petition for (Individual) Exemption, parties may request data on subsidy and acquisition costs from applicant as soon as Petition or the Notice of Intent to abandon is filed.

In class exemption cases, after the Notice of Exemption is filed, anyone who wishes to file an OFA must first file a formal expression of his/her intention to file an OFA 10 days after the Federal Register publication, stating whether the intention is to purchase the line or to subsidize the current carrier's operations.

The due dates for OFA's to be submitted to the Board are different in each type of abandonment docket.

In class exemption (Notice) cases, OFA's are due 50 days after the publication of the Notice of Exemption in the Federal Register. Note that there are only 20 days between the date the formal expression of intent to file an OFA is due and the date the OFA is due. Since the carrier does not have to provide the data needed to prepare an OFA until after it receives the formal notice of intent, by the time the data is received the potential offeror has very little time to prepare the Offer. It is important to let the Board know if the potential offeror needs additional time by filing a Motion for Extension of Time and serving a copy of that motion on the carrier, especially if the carrier has been slow to produce the required data.

In individual exemption cases (Petitions) and in full abandonment application cases, OFA's are due 10 days after the service of a Board decision granting the exemption or 120 days after the Petition for Exemption is filed whichever is sooner.

Bona Fide Offer

The OFA statute in 49 U.S.C. 10904(d) requires that the offeror be financially responsible. The Board has delegated to the Director of the Office of Proceedings the authority to determine whether an OFA comes from a financially responsible person or entity and that the offer is therefore *bona fide*. In abandonment application cases and in Petition (Individual) exemption cases, that decision may not be made until after the actual Offer comes in, but in Notice of (Class) Exemption cases, that decision is usually made after the formal notice of intent to file an OFA comes in. Therefore, it is important for the filer of a formal notice of intent in a Notice of (Class) Exemption case to file an informative financial statement with the notice of intent. The STB assumes a State or local government entity to be financially responsible.

Information provide by the Carrier to the Offeror

In abandonment applications, the potential offeror may request subsidy and acquisition data as soon as the Notice of Intent is filed. In Notice of (Class) Exemption cases, the carrier must provide this information as soon as the formal notice of intent to file an OFA is received. In Petition for (Individual) Exemption cases, the potential offeror may request the information as soon as the Petition is filed with the Board.

Information received from the carrier should include (1) an estimate of the minimum purchase price or annual subsidy needed to keep the line in operation, (2) reports on the physical condition of the line, and (3) traffic and other data necessary to determine the amount of annual financial assistance needed to continue service.

This should be enough information for the potential offeror to begin a thorough feasibility study.

Contents of Offer and Filing Fee

The offer must identify the line or portion of the line it wishes to subsidize or purchase. It must also show that the offer to subsidize or purchase the line is reasonable. A subsidy should cover the railroad's avoidable operating losses on the line, plus a reasonable return on the value of the line. An offer to purchase should equal the acquisition cost of the line (the net liquidation or going concern value of the line, whichever is higher). The offeror should explain how its offer was calculated and explain any disparity between its offer and the carrier's estimate. If the offeror is found to be *bona fide* and the offer is reasonable, the Board will postpone the effective date of the abandonment and give the parties a short opportunity to negotiate.

When the Offer is submitted to the Board it must be accompanied by a filing fee. At the time this information bulletin is being revised, the filing fee is \$1,300.00. Filing fees are updated annually, so the offeror should check the Board's current fee for filing OFA's at 49 CFR 1002.2(f) (25).

When Negotiations are Successful

If negotiations are successful and the parties voluntarily enter into a purchase of subsidy agreement which will result in continued rail service, the Board is required to approve the transaction and dismiss the abandonment application.

Request to Set Terms and Conditions and Filing Fee

Should the parties fail to agree on the amount or terms of subsidy or purchase, either party may ask the STB (within 30 days after the offer is filed) to establish terms and conditions. The Board must issue a decision setting the terms and conditions within 30 days after the request is made. The offeror then has 10 days to accept or reject the STB's terms and conditions. If the offeror chooses to accept them, then the railroad by law is forced to comply with them.

Note that the Request to Set Terms and Conditions carries a substantial filing fee so every effort should be made to come to an agreement with the carrier. At the time this information bulletin is being revised, the filing fee is \$19,300.00. Filing fees are updated annually, so the offeror should check the Board's current fee for filing a Request to Set Terms and Conditions at 49 CFR 1002.2(f)(26).

Feeder Line Applications

The Feeder Railroad Development Program was designed as an alternative to abandonment. The statutory procedures for this program are found at 49 U.S.C. 10907 and the Board's regulations are set out at 49 CFR §1151. Congress envisioned this program as a method of allowing rail consumers, communities or other interested parties to acquire rail lines *before* an abandonment application is filed. If a rail line has been listed on a carrier's system diagram map in category 1 or category 2 (see System Diagram Maps page 11 above) and the railroad has not yet filed an application or a Petition for or Notice of Exemption for abandonment it is eligible for a feeder line application. Even if a line is not shown on the carrier's system diagram map as a candidate for potential abandonment, rail users and communities may apply to the Board to compel the railroad to sell the line by proving that the "public convenience and necessity" requires or permits the sale. This test, however, is more difficult to satisfy. The price for such a sale is either agreed to by the parties or set by the Board.

A proceeding begins upon the filing of a feeder line application with the Board. The applicant must show, among other things, that it (1) can pay the net liquidation value of the line or its going concern value, whichever is greater, and (2) has the ability to provide service and cover such costs as operating expenses, rents, and taxes for a least 3 years. The applicant must provide the dates it intends to operate the line and an operating plan that identifies the proposed operator. The operating plan should be detailed, showing what customers will be served, and it should include all proposed interline connections. It should include copies of any agreement between the proposed new owner and the proposed new operator. Applicant should also provide evidence of liability insurance coverage it carries. If the application includes a request for trackage rights over the line, insurance coverage must be at a level sufficient to indemnify the owning railroad against all personal and property damage that may result from negligence on the part of the operator.

The Board has 15 days from the date of filing to reject the application if it does not contain the required information, or 30 days from the date of filing to accept it by filing a Notice in the Federal Register.

Other interested persons have 30 days from the date the application is accepted to file a competing application. The owning carrier and others who wish to protest the application have 60 days after the application is accepted to file their evidence, and applicants have 20 days to respond to those protests.

The STB will publish its decision in the Federal Register. If the Board has accepted the application and agreed to force the sale, the applicant has 10 days from the service date of that decision to accept or reject the Board's terms. If there are competing applications and two or more applicants agree to accept the Board's terms, the owning railroad must select the offeror with whom it wishes to transact business and it must notify the Board and the offerors of its selection. The parties may then agree to a final sale price.

The program is designed to allow the owning carrier to avoid the expense of an abandonment application and enables a new operator to take over the line before it has fallen into serious disrepair. There is a caveat, however, especially in filing feeder line applications for the lines that the carrier has not signaled it is ready to abandon on its system diagram map. It could place the new short line owner and the railroad in an adversarial relationship from the outset because it may force the railroad to sell the line at a price that it may feel is unfair. This is especially problematic if the new carrier will have to establish interchange agreements with the old, selling carrier.

Abandoned Lines Acquired by States

There are special rules for operations over abandoned lines that have been acquired, whether by purchase or lease, by a State. They are located at 49 CFR 1150.21 – 1150.24. In that case the operator can apply for a Modified Certificate of Public Convenience and Necessity. If granted, a copy of the authority granting the Modified Certificate must be served on the Association of American Railroads (www.aar.org). In this circumstance only the operator (not the State) acquires a common carrier obligation. By notifying the shippers, the operator may choose to provide service only under certain conditions. The operator need only serve those shippers that comply with the pre-conditions. The operator may commence operations immediately upon filing a notice with the Board, and may cease operations after giving 60 days' notice to the State and the Board. A copy of the notice must be mailed to all users of the line. A list of what must be included in the notice is contained in 49 CFR 1150.23.

Voluntary Sales and Operations

Parties interested in preserving rail service need not wait until abandonment is approved to negotiate a voluntary purchase of a line proposed for abandonment or, for that matter, any active rail line. To make purchases of lines that might otherwise be abandoned more attractive to potential buyers, the STB has exempted these purchases from many regulations. More about these sales options are contained in the booklet entitled "So You Want to Start A Small Railroad" available for downloading from the STB's website.

Chapter 3. Alternative Uses for Rail Rights-of-Way

The ICC Termination Act (49 U.S.C. 10101 et. seq.) (ICCTA) and the National Rails to Trails Act (16 U.S.C.1247 (d)), along with the STB's regulations (49 CFR 1152.28 and 49 CFR 1158.29), give interested parties the opportunity to negotiate *voluntary* agreements to use a railroad right-of-way, that otherwise would be abandoned, for recreational or other public use, such as a commuter rail service or a highway. These methods of preserving a railroad corridor are known as "rail banking" meaning that the right-of-way is preserved for potential future use as a railroad. Many railroads do not own the land on which their tracks lie. Rather, they have easements or some other type of land use rights over the land of property owners. Unless those easements are "rail banked" by converting them to a trail or other public use, they are extinguished.

States differ in how the land of abandoned railroads is treated if the abandoning carrier does not own the land. But in any case, and even if the carrier does own the land in "fee simple" or outright, the corridor may still be rail banked. Some rights of way that have been rail banked have been reactivated as rail lines. Other lines that have been banked at first have had trail or public use conditions removed and are now abandoned.

The rules for filing a request for public use condition and a trail use condition differ. The sample request that appears as Appendix IV to this booklet is a request for both types of conditions. Proponents often ask for both conditions in the same request in order to take advantage of the benefits of each type of condition. The disadvantage of this approach is that the request for a trail use condition carries a filing fee, while a request for a public use condition does not. The filing fee is currently \$200. Please check the STB's website as per the instructions in Appendix I to access the current fee schedule. (Schedule Item No. 27)

Public Use Conditions

Under the terms of ICCTA, when the Board approves or exempts an abandonment it must determine whether the rail line is suitable for alternative public use, such as highways, other forms of mass transit, conservation, energy production or transmission or recreation. If it is, the Board may prohibit the railroad from selling or otherwise disposing of the rail corridor for up to 180 days after the effective date of the decision or notice authorizing abandonment. During the 180 day period, interested persons may negotiate with the rail road to acquire the property for public use. The railroad's consent is unnecessary for the imposition of this negotiating period. If the parties fail to reach an agreement within the 180 day period, the Board must allow the railroad to fully abandon the line and dispose of its property. It cannot require the railroad to sell its property for public use. It cannot extend the public use condition beyond the initial 180 days.

The Board will only impose a public use condition when it has received a request to do so pursuant to 49 CFR 1152.28. The request must:

1. State the condition sought;
2. Explain the public importance of the condition;
3. State the period of time for the condition (which cannot exceed 180 days); and
4. Provide justification for the requested period of time.

As with all pleadings filed at the STB, a "Certificate of Service", indicating that a copy of the public use request has been served on the carrier seeking abandonment at its address of

record or with its attorney's address of record, must appear at the bottom of the request and must be separately signed.

Timing is important. In an application for abandonment, the public use proponent must file the request within 45 days of the filing of the abandonment application which is 25 days after the notice appears in the Federal Register. In exemption cases, whether the exemption is a class exemption (notice) or an individually sought exemption (petition), the public use request must be filed within 20 days after the Federal Register publication appears.

Request for Trail Use Condition

To begin the trail use process, a trail proponent must file a trail use request in the proceeding initiated by the railroad to abandon the line. A trail use request has no effect on the Board's decision whether to give a railroad permission to abandon. It is considered only after the Board has decided to permit abandonment, and there has been no consummated Offer of Financial Assistance to buy or subsidize the line.

Under 49 CFR 1152.29, the trail use request must include:

1. A map which clearly identifies the rail corridor which is proposed for trail use even if the request will cover the entire line that is to be abandoned.

2. A statement of willingness to accept financial responsibility which indicates the trail proponent's willingness to manage the trail, to pay property taxes on the trail and to accept responsibility for any liability arising from the use of the rail corridor as a trail, and

3. An acknowledgement that trail use is subject to the user's continuing to meet the above obligations, and the possibility of future reactivation of rail service on the line.

As with all pleadings filed at the STB, a "Certificate of Service", indicating that a copy of the public use request has been served on the carrier seeking abandonment at its address of record or with its attorney's address of record, must appear at the bottom of the request and must be separately signed.

A sample public use/trail use condition request appears at Appendix V. An original and 10 copies of the request must be filed with the Board along with the proper filing fee.

Unlike the public use condition, the trail use condition will only be imposed if the railroad consents. If the railroad does agree, then a condition is imposed which prohibits the rail carrier from otherwise disposing of the rail corridor for 180 days while the parties negotiate an agreement. The Board has granted extensions of the 180-day negotiating period. Both parties must agree to the request and a filing fee must accompany the request for an extension.

As with the public use condition, timing is very important. In an abandonment application, trail use requests must be filed within 45 days of the filing of the application which is 25 days after the publication of the application in the Federal Register. The rail carrier seeking abandonment authority then has 15 days to notify the Board whether and with whom (if more than one proponent has submitted a request) it intends to negotiate a trail use agreement. In class exemption cases a trail use request must be filed within 10 days of the appearance of the notice in the Federal Register. Note that this is 10 days earlier than a public use condition is due. In an individual exemption case (petition), a trail use request must be filed within 20 days of the appearance of the Federal Register notice. In both types of exemption cases the carrier has 10 days after the trail use request is received to notify the Board whether and with whom it intends to negotiate a trail use agreement.

Appendix I

How to Use the Board's Web Site

The address of the STB website is www.stb.dot.gov. Please enter this in the address line of your browser. You will then be able to view 8 dark blue tabs spread across the top of the home page underneath the seal.

E-Filing is where you can file all formal filings (protests, petitions, oppositions, motions, notices) that do **not** require a filing fee. To file a formal filing you must create a log-in account. There is no charge to do that. To file comments you will not have to create a log-in account. When you file a formal filing you will become an official Party of Record, meaning that you will receive copies of all filings, decisions and notices in the case and other Parties of Record must serve you with copies of what they file. When you file Comments, you do not become a party of record, but your comments will become party of the public record in the case.

E-Library reveals a drop-down menu, the choices are

Service Lists: When you select this tab, you will be asked for the docket number of the case that interests you. You will be given a list of all of the Parties of Record in that case along with their addresses. These are the people you must "serve" with a copy of your filing.

Decisions & Notices: When you select this tab you will see a listing of all of the decisions and notices the Board has issued. On the first page they are in date order with the most recent first. All decisions and notices for the day are posted on this page at 10:30 a.m. weekdays (excluding holidays). To view decisions and notices in a particular abandonment docket, click on the small phrase "Full Text Search" that appears underneath the yellow shaded area. You can then feed in the docket number of the abandonment you are looking for in the appropriate search boxes and then hit the "Submit" button at the bottom of the page. A list of decisions and notices in your docket will appear. Click on the blue document id number and you will get access to a PDF version of the decision.

STB Reports: Significant decisions of the Surface Transportation Board are printed in bound volumes (STB Reports), available in the STB's library. The STB Reports can also be viewed electronically. There are currently six published volumes, one for each of the years 1996 through 1998, one for the year 1999 and the first six months of the year 2000, one for the last four months of the year 2000 through the year 2001, and one for year 2002 and the first five months of year 2003.

Filings: When you select this tab you will see a listing of all of the filings and pleadings the Board has received at least since 2002. On the first page they are in date order with the most recent first. All filings for the day are posted within 24 hours of receipt (excluding weekends and holidays), although you may see the filing listed before the actual PDF version is scanned in and attached. To view filings and pleadings in a particular abandonment docket, click on the small phrase "Full Text Search" that appears underneath the yellow shaded area. You can then feed in the docket number of the abandonment you are looking for in the appropriate search boxes and then hit the "Submit" button at the bottom of the page. A list of filings in your docket will appear. Click on the blue document id number and you will get access to a PDF version of the filing. Older filings than 2002 are being loaded as staff is able to do so.

Recordations: Are filings by banks and lenders to record their security interest in rolling stock. This tab is not relevant for abandonments.

Correspondence: This tab gives access to the environmental correspondence filed in each docket at the STB. The search system for this tab is different. When you click on Full Text Search, only one search window will open. You must feed in the docket number with an underscore between each part of the number. For example, you would feed in AB_6_384_X to get the environmental correspondence in AB 6 (Sub-No. 384X).

Research Aids:

Statutes: This tab gives you a connection to the Government Printing Office's (GPO) web site and the STB sections of the United States Code. The U.S.C. contains all the sections of the Board's enabling legislation, The ICC Termination Act of 1995 (ICCTA). The ICCTA is enacted by Congress and cannot be changed by the STB.

Rules: This tab gives you a connection to the GPO website and the STB's rules (regulations). Rules are enacted by the STB and can be changed, but in most instances they can only be changed in a formal rule making procedure that follows the procedures outlined in the Administrative Procedures Act. The STB rules are in Title 49 of the Code of Federal Regulations (CFR), beginning with part 1000. The current **Fees** are part of the rules

and appear in a schedule found at 49 CFR 1002.2. The current **Abandonment Rules** are found at 49 CFR Part 1152. The current **Environmental Rules** are found at 49 CFR Part 1105.

Federal Register: This tab links you to the Federal Register's web site.

Legislation: This tab is a link to Thomas, the Library of Congress's web site that helps you find pending legislation.

Transcripts: This tab links to a list of transcripts and statements by STB Board members made at oral hearings and arguments before the Board. Hearings and Oral Arguments are almost never held in abandonment dockets.

E-Publications: This tab links to this publication as well as others.

Other tabs of interest in abandonment cases are:

Public Information: Choose "Resources" for links to instructions on **How to File** and to the schedule of current **Filing Fees** and to a brief discussion of **Abandonments**.

About STB: will give you links to the STB's organizational chart as well as to the names and bios of current Board members and the Chairman.

To see examples of filings: Go to E-Library, select Filings, then click on Full Text Search. Enter AB in the first search window and then go down to the line marked "Filing Type" and scroll down to the type of filing you want to see, then click Submit

For filing fees: Go to Public Information, then Resources, then Filing Fees

Appendix II

Notice of (Class) Exemption Time Table

D minus 20 days: Notices of Environmental Report must be sent to required agencies. Newspaper notices should be filed.

D minus 10 days: Notices of expectation that Notice of Exemption will be filed must be filed with all of the agencies set out in 49 CFR §1152.50

D: Date of Filing Notice of Exemption at the Board

D + 20 days: Board published Notice of Exemption in the Federal Register

D + 30 days: Notice of Intent to File OFA due, Request for Trail Use due

D + 40 days: Deadline for filing requests for Public Use Conditions.
Deadline for filing Petitions to Stay the exemption.

Anytime between D and D+50 days: Stay requests based on environmental or historic preservation concern due, but should be filed to give the Board enough time to act prior to the proposed effective date of consummation (this date must be identified in the Notice of Exemption).

D + 40 days: Petitions to reject or reconsider the Notice of Exemption due.

D + 50 days: Letter of Consummation of abandonment or discontinuance may be filed with the Board.
Offers to subsidize or purchase the line (OFA's) due

One year after publication in Federal Register: Letter of Consummation of abandonment or discontinuance must be filed with the Board or abandonment/discontinuance authority will expire (this does not apply if a trail use/public use agreement is reached or the Board authorized negotiation period has not expired)

Other Opposition

Opposing parties may file a Petition to Revoke the Exemption at any time after the Notice of Exemption is filed, even after the abandonment has been consummated.

Appendix III

Petition for (Individual) Exemption Time Table

D minus 20 days: Notices of Environmental Report must be sent to required agencies.
Newspaper notices should be filed.

D: Date of Filing Petition for Exemption at the Board

D+20 days: Notice of Petition filed in the Federal Register.

D+40 days: All filings in opposition to Petition are due; Requests for Public Use Condition due; Requests for Trail Use Condition due.

D+120 days or 10 days after service date of Board's granting of Petition, whichever is sooner: Offers of Financial Assistance due

One year after publication in Federal Register: Letter of Consummation of abandonment or discontinuance must be filed with the Board or abandonment/discontinuance authority will expire (this does not apply if a trail use/public use agreement is reached or the Board authorized negotiation period has not expired)

Appendix IV

Abandonment Application Time Table

- D - 60 days: Deadline for identifying line as category 1 on System Diagram Map**
- D - 30 days to D - 15 days: Opportunity to file Notice of Intent (to file)**
- D - 20 days: Due date for railroad to file environmental and/or historic reports on required agencies**
- D: Application filed, including applicant's case in chief**
- D + 10: Due date for Oral Hearing requests**
- D + 15: Due date for Board decision on Oral Hearing requests**
- D + 20: Notice of Application published in Federal Register**
- D + 45: Due date for Protests and comments, including opposition's case in chief.
Due date for Public Use Requests, Trail Use Requests**
- D + 60: Due date for applicant's reply to opposition case and for applicant's response to trail use requests**
- D + 110: Due date for Board to issue decision on the merits**
- D + 120 or 10 after service of Board's decision on merits, whichever is sooner:
Offers of Financial Assistance due⁷**

⁷ Trail use requests will not be granted by the STB until all OFA's have been rejected.

Appendix V

Sample Public Use Condition and Trail Use Request

Below is a sample of a request for both Public Use Condition and Trail Use Request. The blank spaces and items in italics in the brackets are to be completed by the prospective trail or public use agency or group to reflect the specific circumstances. The items in brackets suggest options. The request must be mailed to the railroad and filed with the Surface Transportation Board.

[Date]

Secretary
Surface Transportation Board
395 E Street, S.W.,
Washington, D.C. 20423-0001

Re: [STB Docket Number] [STB Case Name]

Dear Secretary:

This request is filed on behalf of [name of person, group or corporation proposing the trail use and/or public use condition], which is a [political subdivision, government, public/private interest organization, individual] located at [address], hereinafter referred to as “proponent”.

Proponent requests issuance of a Public Use Condition as well as an Interim Trail Use Condition rather than an outright abandonment authorization between [endpoint A, preferably identified by milepost number] and [endpoint B, preferably identified by milepost number].

A. Request for Public Use Condition

Proponent asks the STB to find that this property is suitable for other public use and to place the following conditions on the abandonment:

1. An order prohibiting the carrier from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms. Justification for this condition is [briefly explain how proponent hopes to use the corridor, e.g. the corridor is along a river and would make a beautiful trail, the corridor connects a suburb with a metropolis and would make an excellent commuter line, the corridor is suitable for use by fiber optic cable etc.]. The time period sought is 180 days from the effective date of the abandonment authorization. Proponent needs this much time [explain reasons for the proposed time period such as, to negotiate with the carrier, to complete a trail plan, to obtain title information etc.]
2. An order barring removal of structures such as [bridges, trestles, culverts, tunnels, track, ties, spikes – Include in this request only those things that proponent might need or want for the proposed future use]. The justification for this condition is that these things have considerable value for [describe how proponent will use the structures asked to be preserved]. The time period requested is 180 days from the effective date of the abandonment authorization for the same reason as indicated above.

B. Request for Interim Trail Use

The railroad right-of-way is suitable for railbanking. In addition to the public use conditions sought above, proponent also makes the following request:

Statement of Willingness to Assume Financial Responsibility

In order to establish interim trail use under section 8(d) of the National Trails System Act, 16 U.S.C. §1247(d) and 49 CFR §1152.29, proponent is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of , and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by and operated by the railroad. {NB. This language **must** be included in the request or the STB cannot grant the trail use condition. If the proponent is immune from liability it need only indemnify the railroad against any potential liability.)

The property extends from railroad milepost [#], near [*nearest station, town or village*] to milepost [#] near [*nearest station, town or village*] a distance of [#] miles in [*County, State*]. The right of way is [*part of*] a line proposed for abandonment in the docket referenced above.

A map depicting the portion of the right-of-way to be subject to the public use/trail use condition requested is attached.

[*Full name of proponent*] acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service.

By my signature below I hereby certify that a copy of this notice was served by [*U.S. Mail, postage prepaid or Federal Express or hand delivered etc.*] upon [*legal representative of railroad in this docket, address*], this ____ day of _____, 20__.

Respectfully submitted

[*Name*]

[*address, phone number, email*]

On behalf of:

[*Proponent*]

Appendix VI.

Adverse (Third Party) Abandonments

Subject to establishing a proper interest in an abandonment proposal, any person may institute a proceeding for the issuance of a certificate of public convenience and necessity authorizing abandonment of a rail line.

On occasion, abandonment applications are filed by persons other than railroads. If a line is not currently being used and if the corridor could be used for another public purpose, it might be a good candidate for an adverse abandonment. Since the carrier against whom the abandonment is filed is the owner of the track and, at some point made an investment in it, the Board scrutinizes these types of abandonment applications very carefully.

However, the Board will not allow a carrier to continue a line in embargoed status of no service indefinitely in the face of a national transportation policy that encourages unused rights of way to be utilized for other public purposes.

In deciding an adverse abandonment case the Board will weigh the interests of the carrier or owner of the line, any users of the line or potential users, the interests of the public, the interests of interstate commerce and the interstate rail system.

Adverse parties must file a full abandonment application. They are not permitted to take advantage of the class and individual exemption procedures outlined in this handbook.

The first thing to do in an adverse abandonment case is to file with the STB a Petition for Waiver of the filing requirements because a third party will not have all of the information required to be filed in a full abandonment application. See 49 CFR 1152.22. The petition should specify the sections of §1152.22 for which a waiver is sought and the reasons why it should be granted. The Petition must be served on the carrier at its registered address. To see an example of what kinds of provisions the Board will waive and which ones it will not, see the Board's decision in AB-1014, *Denver & Rio Grande Historical Foundation – Adverse Abandonment- In Mineral Co., CO*, served October 18, 2007. A copy of this decision is available on the STB's website. (See instructions at Appendix I, E-Library, Decisions and Notices). You should wait for the Board's ruling on the Petition before you file an application so you are know what information you must include in the application.

Most adverse abandonments applications are not granted over the carrier's objection. Arguments in favor of the abandonment should be very persuasive and there should be little realistic chance that the railroad will be put back in service.

The filing fee for adverse abandonment cases is quite high, but the fee will be waived where the applicant is a government entity. At this writing the fee is \$18,900.00. You should check item 21 on the fee schedule.