

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 282 (Sub-No. 21)

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PETITION FOR RULEMAKING – RAILROAD CONSOLIDATION PROCEDURES –
EXEMPTION FOR EMERGENCY TEMPORARY TRACKAGE RIGHTS

PETITION FOR RULEMAKING OF THE
ASSOCIATION OF AMERICAN RAILROADS

Pursuant to 49 C.F.R. §1110.2(b), the Association of American Railroads (“AAR”), on behalf of its freight railroad members, respectfully petitions the Surface Transportation Board (“STB” or “Board”) to initiate a rulemaking proceeding to establish a new emergency temporary trackage rights class exemption that would apply only in specific emergency situations and would allow emergency temporary trackage rights to take effect immediately without need for the 30-day notice requirement under 49 C.F.R. §1180.4. This proposal would not affect any substantive labor protection rights and would benefit shippers and railroads by providing a streamlined and simple approach to obtain temporary trackage rights in emergency situations, ensuring the continued flow of commerce.

INTRODUCTION

The AAR is a trade association representing the interests of North America’s railroads, and includes the seven U.S. Class I freight railroads, scores of U.S. short line and regional freight railroads, Amtrak and several major U.S. commuter railroads. AAR’s freight railroad members account for the vast majority of U.S. freight rail mileage, employees, traffic, and revenue. Because it is an outdoor plant, the nation’s railroad network is subject to severe weather, flooding, and other unexpected events that can disrupt the free flow of goods and people by rail.

While the railroads work diligently to mitigate operational disruptions from emergencies and unforeseen events, sometimes it is necessary to utilize the trackage of other rail carriers to ensure shippers experience minimal disruptions. AAR's railroad members have an interest in developing a streamlined process to ensure trackage rights can be obtained on an emergency temporary basis and service can be restored as quickly and efficiently as possible.

BACKGROUND

In 2003, on its own motion, the Board created a new class exemption for authorization of temporary trackage rights, on which this proposal is now based. *See Railroad Consolidation Procedures—Exemption for Temporary Trackage Rights*, 6 S.T.B. 910 (2003) (“*2003 Trackage Rights*”). The Board noted that rail carriers were often seeking authorization for trackage rights of finite duration because rail carriers were “about to perform extensive maintenance over portions of their heavily used track.” *Id.* at 911. However, the Board recognized the rail carriers were forced to use a two-step process, “first filing a notice of exemption under section 1180.2(d)(7) for authorization of the trackage rights and subsequently filing a request that we allow that authorization to expire on a specific date the Board proposed.” *Id.* Concluding that rail carriers, shippers, and the general public would benefit from a class exemption that eliminated these inefficiencies, the Board adopted a single new class exemption, found at 49 C.F.R. §§1180.2(d)(8), 1180.4(g)(2)(iii), for temporary trackage rights of a limited duration. *See 2003 Trackage Rights* at 915-17.

AAR is filing this proposal for a new class exemption because carriers face an analogous, and similarly inefficient, two-step process for obtaining temporary trackage rights in emergency

situations.¹ Periodically rail carriers experience emergency conditions, be it flooding, a bridge outage, or another exigent condition in which quick access to trackage rights is necessary to maintain service. In those circumstances, rail carriers currently are required to file a notice of exemption under 49 C.F.R. §1180.2(d)(8) to obtain temporary overhead trackage rights, and simultaneously file a petition to waive the 30-day notice requirement under 49 C.F.R.

§1180.4(g), allowing the exemption to take effect immediately.² This double filing allows rail carriers to obtain emergency temporary trackage rights without having to wait out the regulatory 30-day notice. In every recent instance of which AAR is aware, the Board has granted the petition for waiver without any objections, nor were any petitions to revoke the exemption filed.

¹ See *Terminal Railway Alabama State Docks—Temporary Trackage Rights Exemption—Norfolk Southern Railway Company*, FD 36190 (STB served May 11, 2018) (“*TASD*”); *Kansas City Southern Railway Company—Temporary Trackage Rights Exemption—Norfolk Southern Railway Company*, FD 36314 et al. (STB served June 13, 2019) (“*KCS*”); *Norfolk Southern Railway Company—Temporary Trackage Rights Exemption—Kansas City Southern Railway Company*, FD 36359 (STB served Oct. 11, 2019) (“*NS*”); *Alabama & Gulf Coast Railway LLC—Temporary Trackage Rights Exemption—The Kansas City Southern Railway Company*, FD 36418 (STB served July 2, 2020) (“*AGR*”); *Union Pacific Railroad Co.—Temporary Trackage Rights Exemption—BNSF Railway Company*, FD 36424, et al. (STB served Aug. 10, 2020) (“*UP*”).

² See *TASD* at 1 (explaining the need for the waiver was “to accommodate *TASD*’s emergency detour operations while repairs are made to its out-of-service bridge, and to effectuate the cooperative arrangements with NSR and rail labor that allowed those emergency operations to commence immediately”); *KCS* at 1-2 (explaining the need for the waiver was “significant flooding and weather-related impacts in Missouri that have shut down portions of their respective routes...and temporary trackage rights [would] accommodate their emergency need to operate over portions of each other’s lines...and minimize...the impacts to customers while working through these weather-created disruptions”); *NS* at 1 (explaining the need for the waiver that the rail carrier was “forced to suspend train service over the Grand River Bridge in Brunswick, Mo., following a debris strike and washout...and the purpose of the temporary trackage rights is to accommodate its emergency need to operate over a portion of *KCS*’s line in order to create an accessible route...and minimize, as much as possible, the impacts to customers while working through these weather-created disruptions”); *AGR* at 1 (explaining the need for the waiver was a “train derailed and damaged a bridge...rendering the bridge inoperable...[and]*AGR* has been forced to suspend service...[and] anticipates that the bridge will remain inoperable for several weeks”); *UP* at 2 (explaining that “on July 29, 2020, a train derailed on a bridge over the Tempe Town Lake in Tempe, Ariz., and the bridge was subsequently taken out of service for repairs...[and] due to the bridge outage, [UP] is currently rerouting trains over BNSF’s rail lines using BNSF crews pursuant to detour agreements between UP and BNSF.”).

AAR's proposed emergency temporary trackage rights class exemption would streamline an inefficient process for both the filers and the Board, without any decrease in regulatory oversight.

PROPOSAL

The AAR proposal is modeled after the temporary trackage rights class exemption adopted in 2003 and found at 49 C.F.R. §1180.2(d)(8). *See 2003 Trackage Rights* at 915-17; *Appendix* (setting forth the proposed amendments to the Code of Federal Regulations, hereinafter the "proposal"). The proposal would allow for a rail carrier to obtain temporary trackage rights for up to 6 months over the line of another rail carrier, as long as (1) the trackage rights are based on written agreements, (2) the trackage rights are not sought in responsive applications in rail consolidation proceedings, (3) the trackage rights are overhead only, and (4) the applicant rail carrier certifies that the rights are sought in response to an outage expected to last more than seven days and that there is no reasonable alternative to maintain pre-outage service levels. *See Appendix* at proposed 49 C.F.R. §1180.2(d)(9). Every 30 days during the initial period of the exemption, the rail carrier would be required to file a recertification that the outage continues to exist and the temporary trackage rights continue to be necessary to maintain service. *See Appendix* at proposed 49 C.F.R. §1180.2(d)(9). The proposal would allow the temporary emergency trackage rights to take effect immediately upon publication of the notice by the Board and without the need for the 30-day notice required by 49 C.F.R. §1180.4(g). *See Appendix* at proposed 49 C.F.R. §1180.4(g)(5). However, as with other grants of trackage rights, approval of the emergency temporary trackage rights would be conditioned on inclusion of the employee protective conditions set forth in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653

(1980), *aff'd sub nom. Railway Labor Executives' Association v. ICC*, 675 F.2d 1248 (D.C. Cir. 1982). *See Appendix* at proposed 49 C.F.R. §1180.2(d)(9); §1180.4(g)(5)(ii).

Also, as is the case with class exemptions under section 1180.2(d)(8), rail carriers utilizing this new emergency temporary trackage rights class exemption would not be required to file for discontinuance authority at the end of the authorized period. *See Appendix* at proposed 49 C.F.R. §1180.2(d)(9). Authority to exercise the emergency temporary trackage rights would implicitly include the authority to discontinue service on a date certain. The discontinuance of operations would also be subject to the employee protective conditions established in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979), as required by *Railroad Consolidation Procedures*, 7 S.T.B. 587 (2004). *See Appendix* at proposed 49 C.F.R. §1180.2(d)(9); §1180.4(g)(5)(ii). At its core, the AAR's proposed emergency temporary trackage rights class exemption is a modified version of the already-existing class exemption found at 49 C.F.R. §1180.2(d)(8). *Compare* 49 C.F.R. §1180.2(d)(8), *with Appendix* at proposed 49 C.F.R. §1180.2(d)(9). The differences include a shorter timeframe for the temporary trackage rights, that the trackage rights are limited to emergency circumstances, and that the trackage rights have an immediate effective date. *See Appendix*.

ARGUMENT

I. The Proposal Satisfies the Requirements of the Statute for Exemption.

Under 49 U.S.C. §10502, the Board is directed to exempt a person, class of persons, or a transaction or service from regulation whenever it finds that (1) regulation is not necessary to carry out the Rail Transportation Policy, and (2) either the transaction or service is of limited scope or regulation is not needed to protect shippers from an abuse of market power. The Board may exempt not only a single transaction but an entire class of transactions, as it did when

adopting the existing class exemption at section 1180.2(d)(8). A class exemption does not mean that a particular transaction is beyond the Board's reach, but is rather a means by which a rail carrier may obtain an authorization without going through a full regulatory process. Such is the case here, and the Board should institute a proceeding and adopt the AAR's proposal.

A. The Proposal Carries Out the Rail Transportation Policy.

Continued regulation in this instance is not necessary to carry out the Rail Transportation Policy ("RTP"); indeed, adoption of the proposal would serve the RTP. The proposal would streamline several existing steps into a single, more efficient process for the Board and rail carriers. *See* 49 U.S.C. §10101(2), (15). In addition, the procedure will promote the continuation of a sound rail system (and a safe and efficient system generally) by facilitating the process of line repair and maintenance in emergencies. *See* 49 U.S.C. §10101(3), (4). Because the exemption requires an agreement between rail carriers, it will promote coordination between rail carriers in their service of their customers. *See* 49 U.S.C. §10101(5). The proposal will also encourage the efficient management of railroads, by providing a simplified process to maintain service levels when there is an outage on one carrier's tracks. *See* 49 U.S.C. §10101(9).

B. The Proposal is Limited in Scope.

The proposed class exemption is limited in both duration and the circumstances in which it would apply. First, the proposal allows for temporary trackage rights only up to six months, making it shorter than the class exemption under section 1180.2(d)(8). Shortening the duration of the trackage rights will minimize the impacts, if any, from elimination of the 30-day waiting period before the temporary trackage rights are effective. However, six months should be sufficient time for the emergency to pass and repairs or maintenance to be conducted, and in any event the rail carrier will be required to keep the Board apprised of the situation through the recertification filing process. If a longer timeframe is needed, the rail carrier could apply for an

extension of the temporary trackage rights for up to an additional six months. In this respect, the proposal's extension is similar to the structure of the temporary trackage rights exemption under section 1180.2(d)(8), albeit with shorter timeframes.

Second, the proposal requires that the applicant rail carrier certify certain conditions exist to qualify for the exemption. Specifically, the proposal requires that a rail carrier certify the trackage rights are needed in response to an outage that is expected to last more than seven days, and that there is no reasonable alternative to maintain pre-outage levels of service. The requirement that there be an outage of more than seven days ensures the trackage rights are utilized only when circumstances like a bridge or track is out of service, not to re-route traffic for other more fleeting exigencies. Furthermore, the exemption would apply only if trackage rights are the only reasonable alternative to maintain service levels. This provision focuses on the need to ameliorate impacts of the outage on shippers and service. And the rail carrier also is required to recertify that the outage continues to exist and that temporary trackage rights continue to be necessary to maintain service every thirty days during the six-month period. These provisions ensure the class exemption is utilized only in the most exigent circumstances so that the level of rail service will not be significantly impacted.

Finally, like sections 1180.2(d)(7) and 1180.2(d)(8), the trackage rights must be based upon a written agreement filed with the Board, and not be filed or sought in rail consolidation proceedings. Requiring filing of a written agreement ensures that an agreement exists and the Board has accurate records of operations.³ In addition, as the ICC has recognized in the past,

³ See *Railroad Consolidation Procedures*, 1 I.C.C.2d 670, 1985 ICC LEXIS 466, *5 (1985) (requiring written trackage rights agreements be filed when the ICC adopted a class exemption for acquisition of trackage rights or renewal of trackage rights found at 49 C.F.R. §1180.2(d)(7)).

excluding trackage rights proposals filed or sought in rail consolidation proceedings ensures there are no anticompetitive impacts.⁴ These requirements track the two current exemptions for trackage rights and renewal of trackage rights found at section 1180.2(7), and temporary trackage rights found at section 1180.2(8). These requirements promote accountability and will give the Board and interested stakeholders the appropriate insight into the nature of the arrangement.

Each of the above provisions are designed to limit the scope of the class exemption. Doing so will ensure the new class exemption is used in narrowly tailored circumstances, similar to those instances in which rail carriers utilized, and the Board approved, the current process.⁵

C. Regulation is Not Needed to Protect Shippers from an Abuse of Market Power.

Given the restrictions placed on the use of the proposed class exemption, shippers will remain fully protected from any abuses of market power. Indeed, the point of the procedure is to try to expedite the ability of a carrier experiencing emergencies to maintain its service levels. Additionally, as is the case with sections 1180.2(d)(7) and 1180.2(d)(8), the proposal maintains that the trackage rights must not be filed or sought in rail consolidation proceedings, so as to ensure there are no anticompetitive impacts.

In prior instances where rail carriers have utilized the current process for obtaining emergency trackage rights, the Board has not found it necessary to examine whether full regulation of the arrangements is needed to protect shippers from an abuse of market power.⁶ There is no reason to believe that streamlining the procedure would change that assessment. And

⁴ See *id.* at 16, fn.9.

⁵ See, *supra*, fn.1.

⁶ See *TASD* at 1-2; *KCS* at 1-3; *NS* at 1-3; *AGR* at 1-3; *UP* at 1-3.

shippers retain the right to petition to revoke an exemption, in the event they are concerned about impacts on competition. When the Board adopted the temporary trackage rights class exemption upon which this proposal is modeled, it found regulation was not necessary to protect shippers from an abuse of market power, instead noting that shippers would benefit from a rule that expressly provides a class exemption.⁷ The same is true here, as shippers on the impacted line would benefit from being able to maintain their rail service through the emergency trackage rights.

II. The AAR Proposal Enhances Efficiencies for Rail Carriers and the Board.

The AAR's proposal creates an efficient regulatory process for use in only the most exigent circumstances. The Board and its staff have worked diligently to grant petitions for waiver in prior emergency circumstances, but this streamlined approach will conserve Board resources and time. And by allowing a rail carrier to file a notice of exemption that would be effective immediately upon publication of the notice, rail carriers and their customers will have certainty that service can be maintained when an unexpected event occurs. Prior examples include damaged bridges, washouts, significant flooding, and severe weather events.⁸ These situations are unpredictable, creating unsafe operating conditions on the railroad. Allowing greater procedural efficiency and certainty in such times of need will promote safety and reduce interruptions in service.

⁷ See *Railroad Consolidation Procedures—Exemption for Temporary Trackage Rights*, Ex Parte No. 282 (Sub-No. 20), at 3 (STB served Feb. 10, 2003).

⁸ See *TASD* at 1 (an out-of-service bridge); *KCS* at 1-2 (a significant flooding and weather-related impacts); *NS* at 1 (a bridge debris strike and washout); *AGR* at 1 (a damaged bridge); *UP* at 2 (derailment that damaged a bridge).

III. A Rulemaking Proceeding is Appropriate.

The Board's rules provide that it will commence a notice-and-comment rulemaking proceeding upon a petition that presents "adequate justification" for doing so. 49 C.F.R. §1110.2(b), (e). The Board has long relied on such notice-and-comment rulemaking to develop rules of industrywide significance: "In our judgment, rulemaking is the proper vehicle to tackle ...issues of industrywide import." *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1), 2006 STB LEXIS 250, at *8 (STB served Apr. 14, 2006); *see also E.I. DuPont De Nemours & Co. v. Norfolk S. Ry. Co.*; *Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry. Co.*, NOR 42125 & NOR 42130, 2012 STB LEXIS 419, at *14 (STB served Nov. 29, 2012) ("In general, more significant changes with broader application should be made through rulemaking rather than adjudication.").

The proposal is of broad application within the industry, as it would apply to any rail carrier experiencing an emergency situation. The proposal is modeled on petitions and waivers filed by both large and small railroads. As noted above, in many instances, the Board has granted the petition and waived the 30-day notice requirement, recognizing the significance of continued railroad operations, which benefits railroads, shippers, and the general public. As such, the Board should institute a rulemaking to adopt AAR's proposed emergency temporary trackage rights class exemption.

CONCLUSION

For the foregoing reasons, AAR respectfully requests that the Board institute a rulemaking proceeding to adopt the proposed emergency temporary trackage rights class exemption found in the Appendix.

Respectfully submitted,



Kathryn D. Kirmayer
Timothy J. Strafford
J. Frederick Miller Jr. (*admitted in MD*)
Association of American Railroads
425 Third Street, SW
Washington D.C. 20024
(202) 639-2100

*Counsel for the Association
of American Railroads*

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PART 1180—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION
PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES.

1. Amend §1180.2 by revising the first sentence of paragraph (d) introductory text and by adding a new paragraph (d)(9) to read as follows:

§1180.2 Types of Transactions.

* * * * *

(d) A transaction is exempt if it is within one of the following nine categories described in paragraphs (d)(1) through (9). * * *

* * * * *

(9) Acquisition of emergency temporary trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are: (i) based on written agreements, (ii) not filed or sought in responsive applications in rail consolidation proceedings, (iii) for overhead operations only, (iv) scheduled to expire on a specific date not to exceed six months from the effective date of the exemption, and (v) that, as certified in the application by an employee of the applicant(s): (A) is in response to a track outage expected to last more than seven days; and (B) there is no reasonable alternative to maintain pre-outage levels of service. Thirty days after the effective date of the exemption and every 30 days thereafter during the initial period of the exemption, the rail carrier must file a recertification that the outage continues to exist and the temporary trackage rights continue to be necessary to maintain service. If the operations contemplated by the exemption will not be concluded within the 6-month period, the parties may, prior to expiration of the period, file a request for a renewal of the temporary rights for an additional period of up to 6 months, including the reason(s) therefor. Rail carriers acquiring temporary trackage rights need not seek authority from the Board to discontinue the trackage rights as of the expiration date specified under section 1180.4(g)(5). All transactions under these rules will be subject to applicable statutory labor protective conditions. All transactions under these rules take effect immediately upon publication of the notice by the Board, so long as the notice requirements under section 1180.4(g)(5) is met.

2. Amend §1180.4 by adding a new paragraph (g)(5) to read as follows:

§1180.4 Procedures.

(g)* * * * *

(5) Notwithstanding the 30-day notice timeframe contained in (g)(1), to qualify for an exemption under section 1180.2(d)(9), a railroad shall file a verified notice of the transaction with the Board for temporary trackage rights exemption pursuant to section 1180.2(d)(9). Before a notice is filed, the railroad shall obtain a docket number from the Board's Office of Proceedings.

(i) The notice shall contain the information required in §1180.6(a)(1)(i)-(iii), (a)(5)-(6), and (a)(7)(ii), and indicate the level of labor protection to be imposed.

(ii) The Board shall publish a notice in the Federal Register within 5 days of the filing of the notice of exemption. The publication will indicate the labor protection required. If the notice of exemption contains false or misleading information which is brought to the Board's attention, the Board shall summarily revoke the exemption for that carrier and require divestiture.

(iii) The filing of a petition to revoke under 49 U.S.C. §10502(d) does not stay the effectiveness of an exemption. Stay petitions must be filed no later than 7 days after the exemption becomes effective.

(iv) To qualify for an exemption under section 1180.2(d)(9) (acquisition of emergency temporary trackage rights), in addition to the notice, the railroad must file a caption summary suitable for publication in the Federal Register. The caption summary must be in the following form:

Surface Transportation Board

Notice of Exemption

STB Finance Docket No.

(1)—Emergency Temporary Trackage Rights—(2)

(2) has agreed to grant overhead emergency temporary trackage rights to (1) between (3). The emergency temporary trackage rights are necessary because (4). The emergency temporary trackage rights will be effective immediately upon publication of the notice. The authorization will expire on (5).

As a condition to this exemption, any employees affected by the acquisition of the emergency temporary trackage rights will be protected by the conditions imposed in (6), and any employees affected by the discontinuance of those trackage rights will be protected by the conditions set out in (7).

If the verified notice contains false or misleading information, the exemptions are void ab initio. This notice is filed under §1180.2(d)(9). Petitions to revoke the exemption under 49 U.S.C. §10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:

By the Board.

[Insert name]

Director, Office of Proceedings.

The following key identifies the information symbolized in the summary.

(1) Name of the tenant railroad.

(2) Name of the landlord railroad.

(3) Describe the emergency temporary trackage rights.

(4) State the reasons for the emergency temporary trackage rights, including those contained in 49 C.F.R. §1180.2(d)(9)(v).

(5) State the date the authorization will expire (not to exceed 6 months from the date the trackage rights will become effective).

(6) State the appropriate labor protective conditions for acquisition of trackage rights.

(7) State the appropriate labor protective conditions for discontinuance of trackage rights.