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SERVICE DATE – MAY 28, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 282 (Sub-No. 21)

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

Decided: May 28, 2021

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (Board) grants a petition filed by the Association of American Railroads (AAR) to initiate a rulemaking proceeding to establish a new class exemption for emergency temporary trackage rights. The Board also proposes certain other related changes to the class exemptions for trackage rights and temporary trackage rights.

DATES: Comments are due by July 12, 2021. Reply comments are due by August 11, 2021.

ADDRESSES: Comments and replies may be filed with the Board via e-filing and will be posted to the Board's website at www.stb.gov.

FOR FURTHER INFORMATION CONTACT: Nathaniel Bawcombe at (202) 245-0376. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: On October 9, 2020, AAR filed a petition requesting that the Board initiate a rulemaking proceeding to establish a new emergency temporary trackage rights class exemption that could be invoked in specific 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(g)(1). On November 4, 2020, Samuel J. Nasca, for and on behalf of SMART-Transportation Division-New York State Legislative Board (SMART/TD-NY), filed a reply in opposition to AAR's petition.

On February 5, 2020, after considering the petition and reply, the Board granted AAR's petition to initiate a rulemaking proceeding to establish a new emergency temporary trackage rights class exemption. The rule proposed here, which is set forth in the Appendix to this decision, differs in some respects from AAR's request, as explained below. The Board also proposes certain other related changes to the class exemptions for trackage rights and temporary trackage rights, also explained below.

BACKGROUND

Pursuant to 49 U.S.C. § 11323(a)(6), prior Board approval is required for a rail carrier to acquire trackage rights over a rail line owned or operated by another rail carrier. Under 49 U.S.C. § 11324(d), the Board is required to approve trackage rights applications unless it finds that: (1) as a result of a transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Under 49 U.S.C. § 10502, the Board is directed, to the maximum extent consistent with 49 U.S.C. subtitle IV part A, 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 (RTP) of 49 U.S.C. § 10101; 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 also an entire class of transactions that meets the exemption criteria of 49 U.S.C. § 10502. A class exemption for transactions otherwise subject to Board licensing does not place those transactions beyond the Board's jurisdiction; rather, it is a means by which a carrier may obtain Board authorization without going through the otherwise-applicable full licensing process.¹

In 2003, the Board adopted a class exemption at 49 C.F.R. § 1180.2(d)(8) for temporary overhead trackage rights of not more than one year in duration. See R.R. Consolidation Procs.—Exemption for Temp. Trackage Rts., EP 282 (Sub-No. 20) (STB served May 23, 2003), modified (STB served May 17, 2004). Under 49 C.F.R. § 1180.4(g)(1), exemptions sought under § 1180.2(d)(8) (and various other class exemptions under § 1180.2(d)) cannot become effective until at least 30 days after a railroad files a verified notice of the transaction. As a result, when a railroad seeks to have a temporary trackage rights exemption become effective in less than 30 days, the railroad must petition for waiver of the 30-day period. In such cases, in addition to serving and publishing the notice of the exemption in the Federal Register, the Board also issues a separate decision acting on the waiver request and setting the effective date of the exemption. See, e.g., Union Pac. R.R.—Temp. Trackage Rts. Exemption—BNSF Ry., FD 36424 et al. (STB served Aug. 10, 2020) (granting a waiver of the 30-day notice period for a trackage rights exemption under § 1180.2(d)(8) and setting effective date); Ala. & Gulf Coast Ry.—Temp. Trackage Rts. Exemption—Kan. City S. Ry., FD 36418 (STB served July 2, 2020) (same).

AAR's Requested Exemption. AAR asks the Board to initiate a rulemaking to create a new emergency temporary trackage rights class exemption. Under AAR's request, the 30-day notice requirement under 49 C.F.R. § 1180.4(g)(1) would not apply to individual exemptions sought under the new exemption provision; the temporary trackage rights would take effect immediately upon publication of a notice of the transaction by the Board in the Federal Register, which, according to AAR, would take place within 5 days of a party's filing of a verified notice

¹ Exemptions may be revoked, in whole or in part, pursuant to 49 U.S.C. § 10502(d).

of exemption. (Pet., App. A at §§ 1180.2(d)(9), 1180.4(g)(5)(ii).) As requested by AAR, the temporary trackage rights could be requested for a period of no more than six months; however, the requestor could, prior to expiration of that period, seek a renewal for up to six additional months. (*Id.* at App. A at § 1180.2(d)(9).)

Under AAR's request, to qualify for the new exemption, a rail carrier would be required to provide certain information regarding the transaction that is required for other notices of exemption under 49 C.F.R. part 1180 and the trackage rights would have to be: (1) based on written agreements; (2) not filed or sought in responsive applications in rail consolidation proceedings; (3) for overhead operations only; and (4) as certified by the rail carrier, sought in response to a track outage expected to last more than seven days and where there is no reasonable alternative for maintaining pre-outage service levels. (*See id.*, App. A at §§ 1180.2(d)(9), 1180.4(g)(5)(i).) Every 30 days during the initial exemption period, the rail carrier would be required to recertify to the Board that the outage continues to exist and the temporary trackage rights continue to be necessary to maintain service. (*Id.*, App. A at § 1180.2(d)(9).) AAR further requests that, as under the existing class exemption for temporary trackage rights, rail carriers availing themselves of the proposed class exemption would not need to file for discontinuance authority at the end of the authorized period, (*Id.*, App. A at § 1180.2(d)(9)), and would be subject to applicable statutory labor protective conditions.²

AAR argues that the current two-step approach for obtaining temporary trackage rights without having to wait 30 days for them to become effective is inefficient, and asserts that its proposed class exemption would benefit shippers, railroads, and the Board by providing a streamlined and simple approach for obtaining temporary trackage rights in emergency situations, ensuring the continued flow of commerce without any decrease in regulatory oversight. (Pet. 1-4.)

As noted above, on November 4, 2020, SMART/TD-NY filed comments opposing AAR's petition. SMART/TD-NY argues that the Board should deny AAR's petition and decline to institute a rulemaking proceeding because an emergency temporary trackage rights exemption is unwarranted given the existing trackage rights exemptions and because the proposed exemption would threaten rail safety. (SMART/TD-NY Reply 3-4.) SMART/TD-NY states that detour arrangements in the railroad industry provide for pilot employees from the landlord carrier to provide guidance for the tenant carrier's operation in emergency situations. (*Id.* at 4.) According to SMART/TD-NY, the proposed exemption would allow for the "immediate cessation of detour operation[s]" or even the avoidance of detour operations altogether and thereby allow operation solely by tenant carrier personnel unfamiliar with the line over which the trackage rights have been granted. (*Id.*)

² Specifically, the grant of the trackage rights would be subject to the employee protective conditions in Norfolk & Western Railway—Trackage Rights—Burlington Northern, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980), and the discontinuance of operations would be subject to the employee protective conditions in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979). (Pet. 4-5.)

THE STATUTORY EXEMPTION CRITERIA

As noted above, 49 U.S.C. § 10502 directs the Board 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 RTP; 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 agrees that the current process for obtaining temporary trackage rights in emergency situations can be inefficient, and notes that petitions for waiver of the 30-day notice requirement are routinely granted. See, e.g., Union Pac. R.R., FD 36424 et al., slip op. at 2 (granting a waiver of the 30-day notice period); Ala. & Gulf Coast Ry., FD 36418, slip op. at 2 (same). A class exemption for emergency temporary trackage rights, as proposed below, would meet the requirements of § 10502 and would advance the RTP in several ways. It would provide for the expeditious handling and resolution of proceedings, 49 U.S.C. § 10101(15), and encourage the efficient management of railroads, 49 U.S.C. § 10101(9), by making the process of obtaining temporary trackage rights in emergencies more efficient by eliminating the need for a waiver of the 30-day notice period under 49 C.F.R. § 1180.4(g)(1) and more predictable by requiring the Board to act within a set number of days. It would also promote the continuation of a sound rail system, 49 U.S.C. § 10101(4), and coordination between carriers, 49 U.S.C. § 10101(5), by facilitating the process of line repair and approval of trackage rights agreements.

The class exemption proposed in this decision is limited in scope, in terms of both the duration of the rights and the circumstances in which the exemption would apply. Indeed, the proposed exemption is a more limited form—in terms of both duration and circumstances—of the existing temporary trackage rights exemption, which the Board in 2003 found to be of limited scope. See R.R. Consolidation Procs.—Exemption for Temp. Trackage Rts., 6 S.T.B. 910, 913 n.8 (2003).

Regulation is not needed to protect shippers from an abuse of market power. The proposed class exemption would not reduce competition because the temporary trackage rights would be for overhead operations only, and therefore the competitive status quo would not be altered with respect to service to shippers on the affected lines. In addition, the exemption would benefit shippers by enhancing the ability of carriers to maintain service in emergency situations.

SMART/TD-NY's arguments in opposition to the proceeding here are unpersuasive. The proposed class exemption is warranted because it would make the process of obtaining temporary trackage rights in an emergency more efficient and predictable. Moreover, based on the record to date, the Board does not see merit in SMART/TD-NY's claim that the proposed class exemption would threaten rail safety. This proposal would not alter or impact the existing rail safety operating regulations administered by the Federal Railroad Administration, which is the Federal agency with primary responsibility over rail safety matters. See, e.g., 49 C.F.R. § 240.229 (prohibiting a carrier in control of operations on a line from allowing an engineer of a foreign carrier to operate a train on that line without a pilot engineer from the controlling carrier unless the engineer of the foreign carrier has the necessary knowledge of the controlling carrier's operating rules and the necessary familiarity with the physical characteristics of the line).

THE PROPOSED CLASS EXEMPTION

For the reasons discussed above, and as set forth in Appendix A, the Board proposes to establish a new class exemption for emergency temporary trackage rights. As explained further below, the Board's proposed rule differs in various respects from AAR's request and includes certain related changes to the existing class exemptions for trackage rights and temporary trackage rights.

Circumstances in which the proposed rule would apply. AAR's requested new class exemption would apply where there is a track outage that is expected to last more than seven days and there is no reasonable alternative to maintain pre-outage levels of service. (Pet., App. A at § 1180.2(d)(9).) The Board finds that further clarification is needed to ensure that use of the class exemption would be restricted so that it applies only to emergency situations and not to situations where routine temporary trackage rights authority was not sought in a timely manner. Specifically, the Board proposes to require that the new exemption be available only for "unforeseen" track outages expected to last more than seven days and there is no reasonable alternative to maintain pre-outage levels of service. Examples of emergency situations that result in such unforeseen track outages include, but are not limited to, natural disasters and accidents or derailments. This clarification appears consistent with AAR's intent. (Pet. 1-3, 9 (describing the need for the exemption in cases of "unpredictable" or "unexpected" events such as accidents or natural disasters).) The Board also proposes a requirement that, when railroads certify that trackage rights are needed for an unforeseen track outage, the verified notice should provide a description of the situation that includes, to the extent possible, the following information:

1. The nature of the event that caused the unforeseen outage;
2. The location of the outage;
3. The date that the emergency situation occurred;
4. The date the track outage was discovered; and
5. The expected duration of the outage.

Duration of the exemption. AAR requests that the temporary trackage rights would be approved for an initial period of no longer than six months, with the option to request a renewal for an additional six months. The Board's proposal limits the emergency temporary trackage rights to an initial period not to exceed three months, with the option to request a renewal for an additional three months. A review of recent cases in which the Board waived the 30-day notice requirement for temporary trackage rights in emergency situations suggests that trackage rights would rarely be needed for a period longer than three months.³

³ See, e.g., Union Pac. R.R., FD 36424, slip op. at 2 (granting waiver of 30-day notice period for trackage rights agreement with a term of a little over one month); Ala. & Gulf Coast Ry., FD 36418, slip op. at 1 n.3 (granting waiver of 30-day notice period for trackage rights agreement with a term of just less than two months); Norfolk Southern Railway Company Petition for Waiver 3, Norfolk S. Ry.—Temp. Trackage Rts. Exemption—Kan. City S. Ry., FD 36359 (railroad anticipates that need for trackage rights operations would last for several weeks or months); Kan. City S. Ry.—Temp. Trackage Rts. Exemption—Norfolk S. Ry.,

Certification every 30 days. AAR's request would require a rail carrier to certify every 30 days that the track outage continues to exist and that the temporary trackage rights continue to be necessary to maintain service. However, the Board's proposal would not require such certifications. Rather, the Board would only require that the carrier file a notice stating that the outage has been resolved and that trackage rights are no longer needed, as well as the date on which use of the trackage rights ceased, should the track outage be resolved and use of the trackage rights become unnecessary prior to the expiration of the exemption period. Any such notice should be filed within 5 business days of the date on which use of the trackage rights ceased. The Board finds that the reduction of the exemption period from six months to three months, combined with the requirement for parties to inform the Board if use of trackage rights has ceased prior to when the exemption period would have otherwise expired renders the 30-day certifications affirming the continued need for the trackage rights unnecessary.

Effective date of the exemption. AAR requests that exemptions under the new provision become effective immediately upon publication of the Board's notice in the Federal Register, which would be required within five days after a verified notice of exemption is filed. However, due to requirements of the Federal Register publication process that are outside the Board's control, publication within five days may not be possible in certain situations. For that reason, the Board proposes that the exemption would become effective not upon publication in the Federal Register but rather upon service of the Board's notice, which would occur within five days of filing of the railroad's verified notice of exemption.⁴ The Board's notice would be published in the Federal Register concurrently with service if possible, or as soon thereafter as practicable.

Caption summary. Under AAR's request, parties seeking an exemption under the new § 1180.2(d)(9) would include in its verified notice a caption summary suitable for publication in the Federal Register containing certain information regarding the proposed transaction.⁵ This

FD 36314 et al., slip op. at 1-2 (STB served June 13, 2019) (providing notice of exemption for trackage rights agreement with a term of less than three months); Terminal Railway Alabama State Docks Verified Notice of Exemption at 2, Apr. 27, 2018, Terminal Ry. Ala. State Docks—Temp. Trackage Rts. Exemption—Norfolk S. Ry., FD 36190 (seeking exemption for trackage rights agreement with a term of six months but stating that trackage rights likely only needed for approximately one month).

⁴ Under § 1180.4(g), stay petitions for notices filed under § 1180.2(d) must be filed at least 7 days before the exemption becomes effective. The Board proposes to specify that, for notices filed under § 1180.2(d)(9), stay petitions be filed as soon as possible before the exemption becomes effective. Under 49 U.S.C. § 10502(d), petitions to revoke the exemption can be filed at any time.

⁵ AAR requests to include the caption summary and other requirements under new § 1180.4(g)(5). Many of the requirements in new proposed § 1180.4(g)(5) are duplicative of requirements already contained in § 1180.4(g)(1), which is applicable to all exemptions under § 1180.2(d), including the new proposed § 1180.2(d)(9). Rather than proposing a new

requirement mirrors the requirement of a caption summary for exemptions sought under § 1180.2(d)(7) and (d)(8). Originally, the purpose of this requirement was to facilitate Federal Register publication by providing the Board with a document that could be published as the Board's notice.⁶ However, in practice, caption summaries have not routinely been used for that purpose. Accordingly, the Board proposes not to require a caption summary for exemptions under § 1180.2(d)(9) and to eliminate the existing caption summary requirements for exemptions under § 1180.2(d)(7) and § 1180.2(d)(8). Pursuant to the Board's proposal, the caption summary requirements would be replaced by a requirement that the parties provide in their notices the same information currently required in caption summaries.

Certification regarding interchange commitments. Under § 1180.4(g)(4), parties seeking Board approval for transactions under 49 C.F.R. part 1180 must certify "whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means." On its face, this provision could be read to require such a certification in connection with the emergency temporary trackage rights exemption proposed here.⁷

The Board adopted the interchange commitment certification requirement in Information Required in Notices & Petitions Containing Interchange Commitments, EP 714 (STB served Sept. 5, 2013). In the notice of proposed rulemaking (NPRM) in that proceeding, the Board did not specifically address the applicability of the interchange certification to trackage rights transactions, though it did cite one previous trackage rights exemption proceeding. Info. Required in Notices & Pets. Containing Interchange Commitments, EP 714, slip op. at 4-5, nn.17, 18, 20 (STB served Nov. 1, 2012) (citing Jackson & Lansing R.R.—Trackage Rts. Exemption—Norfolk S. Ry., FD 35418 et al. (STB served Sept. 27, 2011)).⁸

Nor did the final rule in Docket No. EP 714 specifically address the applicability of the interchange commitment certification to railroads obtaining trackage rights. The NPRM refers only to the interchange commitment certification requirement applying to a "purchaser" or

§ 1180.4(g)(5), as suggested by AAR, the Board proposes to incorporate the requirements of this section into the existing § 1180.4(g)(1) to the extent they are not already contained therein.

⁶ The caption summary regulations originally indicated that caption summaries themselves would be published in the Federal Register. R.R. Consolidation Procs.—Exemption for Temp. Trackage Rts., EP 282 (Sub-No. 20), slip op. at 9 (STB served May 23, 2003); R.R. Consolidation Procs.—Trackage Rts. Exemption, 1 I.C.C. 270, 283 (1985). See also 49 C.F.R. §§ 1180.4(g)(2)(i) and (ii) (requiring caption summaries to be "suitable for publication in the Federal Register").

⁷ AAR's request does not address the issue of certification of interchange commitments.

⁸ The Jackson & Lansing decision, which embraced three separate proceedings, addressed issues related to an interchange commitment disclosed as part of a lease transaction, not the trackage rights transaction. Further, that decision in several instances referred to interchange commitments being part of lease and sale transactions. Jackson & Lansing, FD 35418 et al., slip op. at 6, 7 n.23, 8.

“lessee” railroad. Info. Required in Notices & Pets. Containing Interchange Commitments, EP 714, slip op. at 4-6 (STB served Nov 1, 2012). Further, the Board has generally interpreted this requirement as not applying to trackage rights agreements under § 1180.2(d)(7)⁹ or § 1180.2(d)(8).¹⁰

Therefore, the Board proposes to clarify that § 1180.4(g)(4) would not apply to transactions under the proposed new § 1180.2(d)(9). In addition, the Board proposes to clarify that § 1180.4(g)(4) also does not apply to trackage rights transactions under § 1180.2(d)(7) or § 1180.2(d)(8), an issue that has been the cause of some confusion among parties in the past.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a “significant impact on a substantial number of small entities,” § 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities “whose conduct is circumscribed or mandated” by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

The Board’s proposed changes to its regulations here are intended to make the process of obtaining Board approval of temporary trackage agreements in emergency situations more efficient and predictable and do not mandate the conduct of small entities. For the purpose of RFA analysis for rail carriers subject to the Board’s jurisdiction, the Board defines a “small business” as only including those rail carriers classified as Class III rail carriers under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regul. Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting).¹¹ Currently, if small entities

⁹ See, e.g., Grand Trunk W. R.R.—Trackage Rts. Exemption—Norfolk S. Ry., FD 36267 (STB served May 16, 2019); Ind. Rail Road—Trackage Rts. Exemption—CSX Transp., Inc., FD 36068 (STB served Oct. 14, 2016); Ind. Rail Road—Amended Trackage Rts. Exemption—CSX Transp., Inc., FD 35283 (Sub-No. 1) (STB served Apr. 28, 2017).

¹⁰ See, e.g., Ala. & Gulf Coast Ry.—Temp. Trackage Rts. Exemption—Kan. Cty. S. Ry., FD 36418; Union Pac. R.R.—Temp. Trackage Rts. Exemption—Kan. Cty. S. Ry., FD 36135 (STB served July 26, 2017); Allegheny Valley R.R.—Temp. Trackage Rts. Exemption—Norfolk S. Ry., FD 36015 (STB served May 6, 2016).

¹¹ Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars or \$40,384,263 or less when adjusted for inflation using 2019 data. Class II rail carriers have annual operating revenues of less than \$250 million or \$504,803,294 when adjusted for inflation using 2019 data. The Board calculates the revenue deflator factor annually and publishes the

wish to receive temporary trackage rights in emergency situations, they must file for a notice of exemption in addition to filing a petition for waiver. The proposed rule, if promulgated, provides a more expedited procedural mechanism for carriers to quickly obtain approval for trackage rights in emergency situations without having to obtain a waiver of the 30-day notice period under § 1180.4(g)(1). The regulations require the carrier utilizing the trackage rights to file a notice if the carrier ceases to use the trackage rights prior to when the exemption period would have otherwise expired. However, because such notices would consist of a brief statement that use of the trackage rights has ceased and the date on which use of the trackage rights ceased, the Board does not believe that the burden associated with these notices would outweigh the reduction in burden associated with eliminating the requirement to file a petition for waiver of the 30-day notice period under § 1180.4(g)(1). The Board, therefore, expects the impact of the proposed rule would slightly reduce the paperwork burden for small entities. Accordingly, the economic impact of the proposed rule, if any, would be minimal as the burdens associated with obtaining approval of temporary trackage rights agreements in emergencies would be slightly reduced and the rule would likely provide some economic benefit by expediting, in some cases, the process of approving trackage rights agreements necessary to restore service at pre-outage levels. Therefore, the Board certifies under 5 U.S.C. § 605(b) that these proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. This decision will be served upon the Chief Counsel for Advocacy, Offices of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3521, Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3), and Appendix B, the Board seeks comments about the impact of the revisions in the proposed rule to the currently approved collection of Statutory Licensing Authority (OMB Control Number: 2140-0023), concerning: (1) whether the collection of information, as modified or added in the proposed rule, and further described in Appendix A, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

The Board estimates that the proposed requirements would save a total hourly burden of 54 hours per year as compared to the current procedures for obtaining emergency temporary trackage rights involving the filing of verified notice of exemption and a petition for waiver of the 30-day notice period. The new emergency temporary trackage rights notice would incorporate additional language, resulting in approximately 5% more burden hours to prepare than the average notice of exemption, and it is estimated that two notices regarding the cessation of trackage rights would be filed annually. There are no changes to the estimated non-hourly burdens associated with this collection. The Board welcomes comment on the estimates of

railroad revenue thresholds on its website. 49 C.F.R. § 1201.1-1; Indexing the Annual Operating Revenues of R.R.s., EP 748 (STB served June 10, 2020).

actual time and costs of the collection of the proposed emergency trackage rights notices of exemptions, as detailed below in Appendix B. Other information pertinent to this collection is also included in Appendix B. The proposed rule will be submitted to OMB for review as required under 44 U.S.C. § 3507(d) and 5 C.F.R. § 1320.11. Comments received by the Board regarding these information collections will also be forwarded to OMB for its review when the final rule is published.

List of Subjects

49 C.F.R. part 1180

Administrative Practice and Procedure, Railroads, Reporting and Recordkeeping Requirements.

It is ordered:

1. Comments are due by July 12, 2021. Reply comments are due by August 11, 2021.
2. Notice of this decision will be published in the Federal Register.
3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

Appendix A Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend part 1180 of title 49, chapter X, of the Code of Federal Regulations as follows:

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

1. The authority citation for part 1180 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 1321, 10502, 11323-11325.

2. Amend § 1180.2 as follows:

- a. Revise the first sentence of paragraph (d) introductory text;
- b. In paragraph (d)(8), remove the words “49 CFR 1180.4(g)(2)(iii)” and add in their place the words “49 CFR 1180.4(g)(1)(ii)”;
- c. In paragraph (d)(8), remove the words “these rules” and add in their place the words “this paragraph (d)(8)”;
- d. Add paragraph (d)(9).

§ 1180.2 Types of transactions.

* * * * *

(d) A transaction is exempt if it is within one of the 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 three months from the effective date of the exemption, and (v) sought in response to an unforeseen track outage and expected to last more than seven days where there is no reasonable alternative to maintain pre-outage levels of service. If during the exemption period, the outage is resolved and use of the temporary emergency trackage rights ceases to be necessary to maintain service at pre-outage levels, the rail carrier must file a notice stating that the outage has been resolved and that use of the trackage rights has ceased and identifying the date on which use of the trackage rights ceased. Such a notice should be filed within 5 business days of the date on which use of the trackage rights ceased. The emergency temporary trackage rights authority expires upon the official filing date of the notice. If the operations contemplated by the exemption will not be concluded within the initial exemption period, the rail carrier may, prior to expiration of the period, file a request for a renewal of the temporary rights for an additional period of up to 3 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 § 1180.4(g)(1)(ii). All transactions under this paragraph (d)(9) will be subject to applicable statutory labor protective conditions.

3. Amend § 1180.4 as follows:

- a. Revise paragraph (g)(1);
- b. Remove paragraph (g)(2);
- c. Redesignate paragraphs (g)(3) and (4) as paragraphs (g)(2) and (3);
- d. Revise newly redesignated (g)(2); and
- e. Revise newly redesignated (g)(3) by removing the heading “*Transactions imposing interchange commitments*” and revising the first sentence of paragraph (g)(3)(i).

§ 1180.4 Procedures.

* * * * *

(g) *Notice of exemption.*

(1) To qualify for an exemption under § 1180.2(d), a railroad must file a verified notice of the transaction with the Board. Except for verified notices filed under § 1180.2(d)(9), all verified notices under § 1180.2(d) must be filed at least 30 days before the transaction is consummated, indicating the proposed consummation date. Verified notices filed under § 1180.2(d)(9) will become effective upon service of notice of the transaction by the Board. Before a verified notice is filed, the railroad shall obtain a docket number from the Board’s Section of Administration, Office of Proceedings.

(i) All notices filed under § 1180.2(d) 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) Notices filed under §§ 1180.2(d)(7), 1180.2(d)(8), or 1180.2(d)(9) shall also contain the following information:

- (A) The name of the tenant railroad;
- (B) The name of the landlord railroad;
- (C) A description of the trackage rights, including a description of the track. For notices under §§ 1180.2(d)(8) and 1180.2(d)(9), the notice must state that the trackage rights are overhead rights. For notices under § 1180.2(d)(7), the notice must state whether the trackage rights are local or overhead;
- (D) The date the trackage rights transaction is proposed to be consummated;
- (E) The date temporary trackage rights will expire, if applicable; and
- (F) For notices under § 1180.2(d)(9), a description of the situation resulting in the outage in sufficient detail to allow the Board to determine an emergency exits, including, to the extent possible, the nature of the event that caused the unforeseen outage, the location of the outage, the date that the emergency situation occurred, the date the outage was discovered, and the expected duration of the outage.

(iii) Except for notices filed under § 1180.2(d)(9), the Board shall publish a notice of exemption in the Federal Register within 16 days of the filing of the notice. For notices filed under § 1180.2(d)(9), the Board shall serve a notice of exemption on parties of record within 5 days after the verified notice of exemption is filed and shall publish that notice in the Federal

Register. The publication of notices under § 1180.2(d) will indicate the labor protection required.

(iv) If the notice contains false or misleading information that is brought to the Board's attention, the Board shall summarily revoke the exemption for that carrier and require divestiture.

(v) The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of an exemption. Except for notices filed under § 1180.2(d)(9), stay petitions must be filed at least 7 days before the exemption becomes effective. For notices filed under § 1180.2(d)(9), stay petitions should be filed as soon as possible before the exemption becomes effective.

(vi) Other exemptions that may be relevant to a proposal under this provision are codified at 49 CFR part 1150, subpart D, which governs transactions under 49 U.S.C. 10901.

* * * * *

(3) (i) Except for notices filed under §§ 1180.2(d)(7), 1180.2(d)(8), or 1180.2(d)(9), the filing party must certify whether a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means ("interchange commitment"). * * *

Appendix B

Information Collected Under the Paperwork Reduction Act

As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. §§ 3501-3521, the Surface Transportation Board (Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the revision and extension of the currently approved information collection, Statutory Licensing Authority (OMB Control Number: 2140-0023), as described below. The requested revision to the existing, approved collection by this notice of proposed rulemaking (NPRM) is expected to (1) provide parties with an emergency temporary trackage rights exemption (to replace the need for submitting both a notice of exemption and a separate petition for waiver) and (2) in the event that the use of the temporary emergency trackage rights ceases to be necessary during the exemption period, require a short notice stating such.

Description of Collection

Title: Statutory Licensing Authority

OMB Control Number: 2140-0023

STB Form Number: None

Type of Review: Revision of a currently approved collection

Respondents: Rail carriers and non-carriers seeking statutory licensing or consolidation authority or an exemption from filing an application for such authority (including, in some circumstances, a certification regarding whether the transaction at issue imposes interchange commitments).

Number of Respondents: 80

Total Burden Hours (annually including all respondents): 4,203 (sum of estimated hours per response x number of responses for each type of filing, including the increase and decrease in burdens under the NPRM). The tables below show the burden impact of the NPRM, including the (a) current estimates for the existing collection, (b) reduction in estimates due to the NPRM, and (c) increase in estimates due to the NPRM.

As provided in *Table 1 – Estimated Average Number of Responses* below, the Board maintains its existing, approved collection of three applications, 12 petitions for exemption, 103 notices of exemption, and four certifications regarding interchange commitments annually based on an actual three-year average (FY 2018-2020) of filings. *Table 1* also shows the expected decrease and increase in filings under the NPRM. Similarly, *Table 2 – Estimated Number of Hours Per Response* shows both the existing estimated burden hours for each existing response and provides the estimated burdens for the increase and decrease of responses under the NPRM. When multiplied by the number of hours for each type of filing, as provided in *Table 2*, the estimated annual burden hours for 122 responses are 4,203 hours (sum of estimated hours per

response X number of responses for each type of filing), as shown in *Table 3 – Total Estimated Annual Burden Hours*.

Frequency: On occasion

Table 1 – Estimated Average Number of Responses

Type of filing	Average number of filings per year
Existing filings	
Applications	3
Petitions	12
Notices	103
Interchange commitments certifications	4
Reductions in filings – Proposed	
Notices (previously used)	(2)
Petitions for waiver (no longer necessary)	(2)
Additions in filings – Proposed	
New Notices (emergency trackage rights exemptions)	2
New notices regarding cessation of trackage rights	2
Total estimated filings	122

Table 2 – Estimated Number of Hours per Response

Type of filing	Number of hours per response
Existing filings	
Applications	524
Petitions	58
Notices	19
Interchange commitments certifications	8
Reductions in filings – Proposed	
Notices (previously used)	(19)
Petitions for waiver (no longer necessary)	(29)
Additions in filings – Proposed	
New Notices (emergency trackage rights exemptions)	20
New notices regarding cessation of trackage rights	1

Table 3 – Total Estimated Annual Burden Hours

Type of filing	Hours per response	Annual number of filings	Total annual burden hours
Existing filing			
Applications	524	3	1,572
Petitions	58	12	696
Notices	19	103	1,957
Interchange commitments	8	4	32
Total Existing Annual Burden Hours			4,257
Reductions in filings – Proposed			
Notices (previously used)	(19)	2	(38)
Petitions for waiver (no longer necessary)	(29)	2	(58)
Additions in filings – Proposed			
New Notices (emergency trackage rights exemptions)	20	2	40
New notices regarding cessation of trackage rights	1	2	2
Total new annual burden hours			4,203

Total “Non-hour Burden” Cost: Because Board collections are submitted electronically to the Board, there is no cost for filing with the Board. However, for some filings, respondents may be required to send consultation letters to various other governmental agencies. Copies of these letters are part of an environmental and historic report that must be filed with this collection (unless waived by the Board). Because some of these other agencies may require hard copy letters, there may be some limited mailing costs, which staff estimates in total to be approximately \$1,750.

Needs and Uses: As mandated by Congress, persons seeking to construct, acquire, or operate a line of railroad and railroads seeking to abandon or to discontinue operations over a line of railroad or, in the case of two or more railroads, to consolidate their interests through merger or a common-control arrangement are required to file an application for prior approval and authority with the Board. See 49 U.S.C. §§ 10901-03, 11323-26. Under 49 U.S.C. § 10502, persons may seek an exemption from many of the application requirements of §§ 10901-03 and §§ 11323-26 by filing with the Board a petition for exemption or notice of exemption in lieu of an application. The collection by the Board of these applications, petitions, and notices (including collection of disclosures of rail interchange commitments under 49 C.F.R. §§ 1121.3(d), 1150.33(h), 1150.43(h), and 1180.4(g)(4)) enables the Board to meet its statutory duty to regulate the referenced rail transactions. In cases in which the requests for authority involve agreements with interchange commitments that may limit the future interchange of traffic with third parties, certain information must be disclosed to the Board about those commitments. 49 C.F.R. §§ 1121.3(d), 1150.33(h), 1150.43(h), 1180.4(g)(4). The collection of this information facilitates

the case-specific review of interchange commitments and enables the Board's monitoring of their usage generally.