

DEPARTMENT OF TRANSPORTATION**Surface Transportation Board****49 CFR Part 1180**

[STB Ex Parte No. 282 (Sub-No. 20)]

**Railroad Consolidation Procedures—
Exemption for Temporary Trackage
Rights****AGENCY:** Surface Transportation Board, DOT.**ACTION:** Notice of proposed exemption and rulemaking.

SUMMARY: The Surface Transportation Board (Board) is proposing to adopt a new class exemption and related regulations that would be available for trackage rights agreements that by their terms expire on a date certain and would permit their authorization for a limited period of time. Carriers utilizing this new class exemption would not be required to file for discontinuance authority at the end of the authorized period. The temporary trackage rights would automatically terminate on the date specified.

DATES: Comments must be submitted by March 12, 2003.

ADDRESSES: Send an original and 10 copies of any comments referring to STB Ex Parte No. 282 (Sub-No. 20) to: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600. [Federal Information Relay Service (FIRS) for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION:**Trackage Rights**

Acquisition by a rail carrier of trackage rights over a railroad line owned or operated by another rail carrier may be carried out only with the approval and authorization of the Board. See 49 U.S.C. 11323(a)(6). Under 49 U.S.C. 11324(d), the Board is required to approve trackage rights applications unless we find 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.

Use of Exemption Authority

The Staggers Rail Act of 1980 substantially broadened the authority of

our predecessor, the Interstate Commerce Commission (ICC), and hence our authority, to exempt transactions from regulation. Under 49 U.S.C. 10502, we are directed to exempt a person, class of persons, or a transaction or service from our regulation whenever we find 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. We may exempt not only a single transaction, but an entire class of transactions, as the ICC did when adopting the existing class exemption at 49 CFR 1180.2(d)(7). A class exemption does not mean that a particular transaction is beyond our reach. Rather, it is a means by which a carrier may obtain an authorization without going through a full regulatory process, in the types of cases to which the class exemption applies.

Existing Class Exemption for Trackage Rights

In *Railroad Consolidation Procedures*, 1 I.C.C.2d 270 (1985), the ICC adopted a class exemption for trackage rights based on written agreements and not sought in responsive applications in rail consolidation proceedings. See 49 CFR 1180.2(d)(7).¹ In adopting those procedures, the ICC found that exempting trackage rights proposals as a class would promote the RTP and competition generally because trackage rights facilitate operating efficiencies. The ICC also found that the exemption was limited in scope because the class of exempted transactions was limited and, typically, trackage rights transactions either involved modifications in operations that promoted efficiency for the operator and maintained the status quo, or involved the addition of a competing carrier to a line through trackage rights that increased the number of carriers on the line and increased competition for traffic. For these reasons, the ICC also found that regulation of this class of trackage rights is not necessary to protect shippers from an abuse of market power.

Proposed Class Exemption

Our reason for instituting this proceeding is that authorization of trackage rights approved under the current class exemption remains in effect indefinitely, regardless of any durational contract provision. However,

in recent years parties have sought authorization for temporary trackage rights that were to expire on a certain date. On a number of occasions, those requests have involved carriers that were about to perform extensive maintenance over portions of their heavily used track. Other requests for temporary trackage rights have involved the need to accommodate the short-term storage of rail cars or the need to make provision for local service, line relocation and rehabilitation projects, as well as a variety of freight, intercity passenger and commuter operations.

Generally, a carrier seeking such a time-limited authorization has first filed a notice of exemption under 1180.2(d)(7), thereby acquiring authority to exercise trackage rights indefinitely over a particular line. Subsequently, it has filed a request that we allow the authorization to expire on a certain date. In the past, we have analyzed these subsequent filings on a case-by-case basis under 49 U.S.C. 10502, and have routinely granted the requested petition to allow the authorization to expire on a specific date.² In those individual cases, having found the time-limited authorization to be consistent with the statutory limited scope criterion, we have not found it necessary to examine whether full regulation of a temporary trackage rights arrangement is necessary to protect shippers from an abuse of market power.

Given our experience in those cases, we believe that both rail carriers and the public would benefit from a rule that expressly provides a class exemption from 49 U.S.C. 11323 to permit authorization, for a limited period of time, of trackage rights that by their terms expire on a date certain. We further believe that this proposal is consistent with the exemption criteria at 49 U.S.C. 10502, as next discussed.

Individual approval of trackage rights transactions for which the carriers seek authorization for a limited period of time does not appear to be necessary to carry out the goals of the RTP. Rather, exempting such proposals as a class would promote the RTP by eliminating the need to file a second pleading seeking discontinuance when the agreement expires, thereby minimizing regulation of the rail system (49 U.S.C. 10101(2)), promoting the continuation of a sound rail system by facilitating the

² This second filing has often taken the form of a petition seeking a partial revocation of the class exemption, or a petition seeking an exemption to permit the trackage rights operations to remain in effect only on a temporary basis. Regardless of the form, we have generally dealt with each request as a request that the Board permit the authorization to expire on a particular date.

¹ Published in the *Federal Register* at 50 FR 15751. These rules were subsequently amended in 1986, 1993, and 1997.

process of line repair and maintenance (49 U.S.C. 10101(4)), and promoting coordination between rail carriers (49 U.S.C. 10101(5)). The proposed class exemption would also reduce the regulatory uncertainty of the parties, facilitate the parties' ability to reach agreement on temporary trackage rights, reduce the filing fees required of carriers seeking such rights, and encourage more use of trackage rights in general and temporary trackage rights in particular. 49 U.S.C. 10101 (7), (15).

The proposed exemption also appears to be of limited scope because we are limiting the class of exempted transactions. And the authorization for trackage rights will be limited in duration.

In addition, it appears that regulation of this class of temporary trackage rights is not necessary to protect shippers from an abuse of market power. Providing temporary trackage rights authorization would not reduce competition, and temporary trackage rights authorizations that add no service on the line (e.g., overhead, or bridge, traffic) merely maintain the status quo among carriers and shippers on the line. Public comments are invited on all of these conclusions, as well as on possible negative consequences, if any, that could result from such a class exemption.

Implementation of the Class Exemption

If the proposed class exemption is adopted, an eighth category of exempt transactions would be added to our rail consolidation regulations. We would amend 49 CFR part 1180 by adding new sections 1180.2(d)(8), and 1180.4(g)(2)(iii) and (iv). Consistent with the regulations in part 1180, carriers seeking to use the proposed exemption would be required to submit the information required by 49 CFR 1180.4(g)(1)(i). This includes the names of the applicants, a summary of the nature of the proposed transaction, a contact person, the proposed time schedule for consummation, the purpose to be accomplished, any other supporting statements deemed material by applicants, the level of labor protection to be imposed, a list of the states in which any part of the property of each applicant carrier is located, and a map showing the involved lines. In addition, the caption summary required in connection with this proposed class exemption must specify the date the authorization will expire. 49 CFR 1180.4(g)(2)(iii). An executed copy of the written trackage rights agreement must also be submitted.

As noted, section 1180.4(g)(1)(i) requires that the exemption notice filed

with the Board indicate the level of employee protection to be imposed.³ As with other grants of trackage rights, approval of temporary trackage rights agreements under 49 U.S.C. 11323 must include 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). Accordingly, all temporary trackage rights exemptions would be so conditioned.

As previously discussed, under 49 U.S.C. 10903, after a carrier begins trackage rights operations, even when conducted under an exemption, discontinuance of the service may not occur absent a certificate of discontinuance, or exemption therefrom, issued by the Board. This requirement would continue to apply to carriers utilizing the current trackage rights class exemption, 49 CFR 1180.2(d)(7). Although we normally require that a carrier seeking to terminate trackage rights operations file a separate request for discontinuance authority, this requirement of a separate filing would be unnecessary under the proposed new 49 CFR 1180.2(d)(8) class exemption. In these cases, the authority to exercise trackage rights temporarily, only until a particular date, would implicitly include the authority to discontinue service on that date. Therefore, we would not require separate discontinuance authority to terminate temporary trackage rights operations authorized under the proposed class exemption. Finally, we note that the proposed class exemption would be limited to temporary trackage rights transactions and would not operate to exempt any other regulated activities conducted on that track or exempt any associated transactions of the involved carriers.

Conclusion

We propose under 49 U.S.C. 10502 to add a new category to the specific categories of exempt transactions listed at 49 CFR 1180.2(d). This new category, to be set forth, if adopted, at 49 CFR 1180.2(d)(8), would be for temporary trackage rights proposals under 49 U.S.C. 11323 that are: (1) Based on written agreements, (2) not filed or sought in responsive applications in rail consolidation proceedings, and (3) scheduled to expire on a specific date.

³ Under 49, U.S.C. 10502(g), in granting exemptions, we may not relieve a carrier of its obligations to protect employees.

We also propose to add new subsections (iii) and (iv) to 49 CFR 1180.4(g)(2), regarding the caption summary to be provided by applicant and published in the **Federal Register**. The exemption as proposed would embrace temporary trackage rights sought for any purpose. Public comments on this specific proposal, its scope, and its limits are invited.

Standard labor protective conditions would be imposed on any carrier using this class exemption. Carriers using this class exemption could discontinue service without the need to obtain a certificate or exemption from the Board. Comments on these proposals are also invited.

Regulatory Flexibility Analysis

The Director of the Office of Proceedings has certified, by decision served concurrently with this notice and to be published in the **Federal Register**, that the proposed exemption will not have a significant impact on a substantial number of small entities. Exemption should not affect small shipper or carrier entities because the result of the temporary trackage rights proposed for exemption would not affect rail operations except to increase efficiency. No shipper would lose service and other shippers might receive more efficient service under the proposal. No carrier's operations would be significantly affected by the temporary trackage rights proposed for exemption.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1180

Administrative practice and procedure, Railroads.

Authority : 49 U.S.C. 10502(b) and 5 U.S.C. 553.

Decided: January 31, 2003.

By the Board, Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan.

Vernon A. Williams,
Secretary.

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. 721, 10502, 11323–11325.

2. Amend § 1180.2 by revising the first sentence of paragraph (d) introductory text and by adding a new paragraph (d)(8) to read as follows:

§ 1180.2 Types of Transactions.

* * * * *

(d) A transaction is exempt if it is within one of the following eight categories. * * *

* * * * *

(8) Acquisition of 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, and
- (iii) Scheduled to expire on a specific date. 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)(2)(iii).

3. Amend § 1180.4 by adding new paragraphs (g)(2)(iii) and (iv) to read as follows:

§ 1180.4 Procedures.

* * * * *

(g) * * *

(2) * * *

(iii) To qualify for an exemption under § 1180.2(d)(8) (acquisition of 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

Finance Docket No.

- (1)—Temporary Trackage Rights—(2).
- (2) (3) to grant (4) temporary trackage rights to (1) between (5). The temporary trackage rights will be effective on (6). The authorization will expire on (7).

This notice is filed under § 1180.2(d)(8). 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]

Secretary.

The following key identifies the information symbolized in the summary.

- (1) Name of the tenant railroad.
- (2) Name of the landlord railroad.

(3) If an agreement has been entered use “has agreed,” but if an agreement has been reached but not entered use “will agree.”

(4) Indicate whether “overhead” or “local” trackage rights are involved.

(5) Describe the temporary trackage rights.

(6) State the date the temporary trackage rights agreement is proposed to be consummated.

(7) State the date the authorization will expire.

(iv) The Board will publish the caption summary in the **Federal Register** within 20 days of the date that it is filed with the Board. The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of an exemption.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 20, 21, and 92

RIN 1018–AI84

Migratory Bird Subsistence Harvest in Alaska; Proposed Spring/Summer Subsistence Harvest Regulations for Migratory Birds in Alaska During the 2003 Subsistence Season

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service or we) is proposing to establish spring/summer migratory bird subsistence harvest regulations in Alaska for the 2003 subsistence season. The proposed regulations prescribe frameworks, or outer limits, for dates when harvesting of birds may occur, species that can be taken, and methods and means excluded from use. These proposed regulations were developed under a new co-management process involving the Service, the Alaska Department of Fish and Game, and Alaska Native representatives. They are not intended to be a complete, all-inclusive set of regulations, but are intended to provide an initial framework to legalize customary and traditional subsistence uses of migratory birds in Alaska. The rulemaking is necessary because the regulations governing the subsistence harvest of migratory birds in Alaska are subject to annual public review. This rulemaking proposes regulations that expire on August 31, 2003, for the spring/summer subsistence harvest of migratory birds in

Alaska. Seasons will open after April 1 and close prior to September 1.

DATES: You must submit comments on the proposed spring/summer harvest regulations for migratory birds in Alaska on or before March 12, 2003.

ADDRESSES: Send your comments on this proposed rule to the Regional Director, Alaska Region, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska, 99503 or fax them to (907) 786–3641.

FOR FURTHER INFORMATION CONTACT: Fred Armstrong, (907) 786–3887 or Donna Dewhurst, (907) 786–3499, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Mail Stop 201, Anchorage, Alaska 99503.

SUPPLEMENTARY INFORMATION:

What Events led to This Action?

In 1916, the United States and Great Britain (on behalf of Canada) signed the Convention for the Protection of Migratory Birds in Canada and the United States (Canada Treaty). The treaty prohibited commercial hunting for, and specified a closed season on the taking of, migratory game birds between March 10 and September 1 of each year. In 1936, the United States and Mexico signed the Convention for the Protection of Migratory Birds and Game Mammals (Mexico Treaty). The Mexico treaty prohibited the taking of wild ducks between March 10 and September 1. Neither treaty took into account and allowed adequately for the traditional harvest of migratory birds by northern peoples during the spring and summer months. This harvest, which had occurred for centuries, was necessary to the subsistence way of life in the north and thus continued despite the closed season.

The Canada treaty and the Mexico treaty, as well as migratory bird treaties with Japan (1972) and Russia (1976), have been implemented in the United States through the Migratory Bird Treaty Act (MBTA). The courts have ruled that the MBTA prohibits the Federal Government from permitting any harvest of migratory birds that is inconsistent with the terms of any of the migratory bird treaties. The more restrictive terms of the Canada and Mexico treaties thus prevented the Federal Government from permitting the traditional subsistence harvest of migratory birds during spring and summer in Alaska. To remedy this situation, the United States negotiated Protocols amending both the Canada and Mexico treaties to allow for spring/summer subsistence harvest of migratory birds by indigenous inhabitants of identified subsistence