

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 659

PUBLIC PARTICIPATION IN CLASS EXEMPTION PROCEEDINGS

Decided: October 19, 2006

In a notice of proposed rulemaking (NPRM) served by the Board on March 10, 2006, and published in the Federal Register on March 16, 2006 (71 FR 13563-5), we proposed to extend the notice period for ten class exemptions – the “Ten Class Exemption Types”¹ – to provide for publication in the Federal Register before the exemption takes effect. We have received comments on the proposal, some supporting it and some objecting. We have decided to adopt the proposed rules.

We proposed to change the notice of exemption procedures for the Ten Exempt Transaction Types as follows: (1) notice of the proposed transaction would be published in the Federal Register within 16 days of filing; (2) stay petitions would be due at least 7 days prior to the effective date of the exemption; and (3) the exemption, if not stayed, would take effect 30 days after the notice is filed. The proposed changes were intended to ensure that the public is given notice of a proposed transaction before the exemption becomes effective, and that the Board may process such notices of exemption, and related petitions for stay, if any, in an orderly and timely fashion.

In addition, we proposed to change the timeframes for transactions involving the creation of a Class I or Class II carrier (49 CFR 1150 subparts D and E) as follows: (1) notice of a covered transaction would be published in the Federal Register within 16 days of filing; (2) petitions for stay would be due no later than 14 days prior to the effective date of the

¹ The Ten Exempt Transaction Types, described in the NPRM, are: rail line acquisitions and similar transactions involving the creation of a Class III carrier (49 CFR 1150 subpart D); rail line acquisitions and similar transactions involving a Class III carrier (49 CFR 1150 subpart E); acquisitions of a line authorized for abandonment that do not entail major market extensions (49 CFR 1180.2(d)(1)); acquisitions or continuances in control of a nonconnecting carrier or multiple nonconnecting carriers (49 CFR 1180.2(d)(2)); corporate family transactions (49 CFR 1180.2(d)(3)); renewals of a lease or operating agreement previously authorized (49 CFR 1180.2(d)(4)); joint projects involving a rail line relocation (49 CFR 1180.2(d)(5)); reincorporations in a different state (49 CFR 1180.2(d)(6)); acquisitions or renewals of trackage rights (49 CFR 1180.2(d)(7)); and acquisitions of temporary trackage rights (49 CFR 1180.2(d)(8)).

exemption; and (3) the exemption would take effect 45 days after filing (the 14-day advance notice of intent to file requirements currently in place for such transactions would not change).

For each of the Ten Exempt Transaction Types, the Board's regulations currently provide that the exemption will become effective – and that the transaction may be consummated – 7 calendar days after a notice invoking the class exemption is filed at the Board. See 49 CFR 1150.32(b), 1150.42(b), and 1180.4(g). Notice of the exemption is published in the Federal Register within 30 days of the filing except for acquisitions of trackage rights or temporary trackage rights, in which case notice is published within 20 days. See 49 CFR 1150.32(b), 1150.42(b), 1180.4(g)(1)(ii), 1180.4(g)(2)(ii), 1180.4(g)(2)(iv). Consequently, Federal Register notice of a transaction is published after the exemption has become effective and often after the transaction has been consummated.

The regulations at 49 CFR Part 1150 governing the creation of Class I and II carriers presently require that the Board be notified of the applicant's intent to file a notice of exemption at least 14 days before the notice of exemption is filed. See 49 CFR 1150.35(a), 1150.45(a). These exemptions become effective 21 days after the notice of exemption is filed. Publication in the Federal Register takes place within 30 days after the notice is filed. See 49 CFR 1150.35(e), 1150.45(e). Once again, formal public notice of the transaction might not occur until after the transaction has been consummated.

We have received comments in response to the NPRM, with interested parties expressing differing views on the changes we have proposed.² After considering the comments, we have decided to adopt the rules proposed in the NPRM.

New Jersey supports the proposed changes, but urges us to require notice filers to give “actual notice” of their intent to engage in an exempt transaction by serving the notice upon potentially interested parties, including, among others, the governor of the state involved, the state department of transportation, and municipalities in which the subject rail lines are located. AAR supports the proposed changes for transactions under 49 CFR 1150 subparts D and E, but opposes the changes for transactions under 49 CFR 1180.2(d). AAR urges the Board to allow temporary trackage rights notices under 49 CFR 1180.2(d)(8) to take effect immediately upon filing. AAR also proposes that the Board require additional information from parties invoking the class exemptions at 49 CFR 1150 subparts D and E. Rail Conference and RLD support the proposed rule changes, as does Fitzgerald, who also supports New Jersey's “actual notice” proposal and AAR's proposal to require part 1150 exemption seekers to include additional information in their notices of exemption.

ASLRRRA raises concerns that increasing the notice period would raise the costs of acquiring rail lines (“thirty days...quadruples the costs of holding funds awaiting operating

² We have received comments from the American Short Line and Regional Railroad Association (ASLRRRA); Association of American Railroads (AAR); John D. Fitzgerald (Fitzgerald); Genesee & Wyoming Inc. (GWI); the State of New Jersey (New Jersey); Rail Conference, International Brotherhood of Teamsters (Rail Conference); Rail Labor Division, Transportation Trades Department, AFL-CIO (RLD); and Watco Companies, Inc. (Watco).

authorization...”), delay the consummation of such transactions, and “have a debilitating effect on smaller railroads.” ASLRRRA Comments at 4. This would happen, ASLRRRA claims, by weakening “the one competitive advantage that class II and III railroads do have – speed of responsiveness to both crisis and opportunity” *Id.* ASLRRRA argues that “. . . class I carriers are just as good as class II and III carriers at responding *slowly* to opportunities, but Congress has in effect created an environment where smaller carriers can thrive in the commercial nooks and crannies where quick response and agility give them their one competitive edge.” *Id.* Both GWI and Watco hold similar views, while ASLRRRA and Watco take particular exception to AAR’s proposal (discussed below) to impose new informational requirements on entities seeking to use the class exemptions at part 1150.

The speed and agility that are typical of shortlines lie in their ability to serve their customers. The transactions that produce shortlines are often the product of a process initiated by a Class I railroad to divest itself of a line or service. That may be a prolonged process because of the need for the acquiring shortline and the divesting Class I carrier to agree on mutually acceptable terms. A Class I carrier that has decided to sell a line will not likely be deterred because the notice invoking the class exemption will take effect in 30 days rather than 7. Nor do we think that the additional transaction costs that might result from our procedural change – primarily, the cost of holding funds for 30 days rather than 7 days – will deter shortlines from bidding on lines that are available for sale. Rather, the commercial benefits of the transaction for both the buyer and the seller are the principal factors that determine whether the transaction will take place.

In adopting the proposed rules, the Board would adhere to the well-established process of setting a date certain by which an exempt transaction should be able to be consummated. With such a process in place, an entity seeking to invoke a class exemption would be able to structure its transaction knowing the earliest available consummation date. As now, a notice filer would have a reliable process and could predict with reasonable certainty when it should be able to consummate a transaction.

Pursuant to the existing rules, hundreds of new Class II and Class III carriers have been created and have successfully operated during the past two decades. The proven success of the shortline industry offers an inducement to the creation of new carriers that did not exist 20 years ago. We do not believe that affording the public greater advance notice of impending transactions will deter interested parties from entering into them. Accordingly, we conclude that the proposed modifications should be adopted as final rules, as set forth in the Appendix.

New Jersey’s argument that we should require “actual notice” would go beyond our limited objective of adjusting the notice timeframes. The Federal Register has been consistently viewed by the courts as adequate notice of actions by federal agencies, and, as ASLRRRA has noted, it is widely and easily available on the Internet. Accordingly, we will not adopt New Jersey’s suggestion.

We will not adopt the changes that AAR recommends making to the class exemptions at part 1150 because AAR proposes substantive changes and the scope of this rulemaking encompasses only procedural modifications. Finally, we will not adopt AAR’s suggestion to

exclude the class exemptions under 49 CFR 1180.2(d) from our new timeframes. AAR's suggestion is based on an asserted lack of controversy involving these transactions. Our reasons for changing the time frames for these class exemptions are not based on how controversial they tend to be. Rather, our purpose here is to improve notice to the public and to allow the Board to process petitions for stay in a more orderly fashion.

For these reasons, we will adopt the proposed changes to the Code of Federal Regulations as set forth in the attached Appendix.

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

As required under the Regulatory Flexibility Act (RFA), we certified in the March 2006 NPRM that the proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities. We observed then that the proposed changes, while modestly increasing the length of the advance notice required for filers, would continue to benefit individuals and entities potentially affected by these exempt transactions. We have received no comments regarding our RFA analysis. Therefore, we conclude that our action will not have a significant effect on a substantial number of small entities within the meaning of the RFA.

It is ordered:

1. Parts 1150 and 1180 of title 49 of the Code of Federal Regulations are amended as set forth in the Appendix.
2. Notice of this decision will be published in the Federal Register.
3. This decision is effective November 23, 2006.
4. A copy of this decision will be served on the Chief Counsel for Advocacy, Small Business Administration.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary

APPENDIX

For the reasons set forth in the preamble, the Surface Transportation Board amends parts 1150 and 1180 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1150—CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES.

1. The authority citation for Part 1150 continues to read as follows:

AUTHORITY: 49 U.S.C. 721(a), 10502, 10901, and 10902.

2. Amend § 1150.32 as follows:

- A. In paragraph (b), remove the words “30 days” and add, in their place the words “16 days”.

- B. In paragraph (b), remove the words “7 days” and add, in their place, the words “30 days”.

- C. In paragraph (c), add a new sentence to the end of the paragraph as follows:

§ 1150.32 Procedures and relevant dates—transactions that involve creation of Class III carriers.

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(c) * * * Stay petitions must be filed at least 7 days before the exemption becomes effective.

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3. Amend § 1150.35 as follows:

- A. In paragraph (e), remove the words “21 days” and add, in their place, the words “45 days”.

- B. In paragraph (e), remove the words “30 days” and add, in their place, the words “16 days”.

- C. In paragraph (f), revise the third sentence to read as follows:

§ 1150.35 Procedures and relevant dates—transactions that involve creation of Class I or Class II carriers.

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(f) * * * Stay petitions must be filed at least 14 days before the exemption becomes effective. * * *

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4. Amend § 1150.42 as follows:

A. In paragraph (b), remove the words “30 days” and add, in their place, the words “16 days”.

B. In paragraph (b), remove the words “7 days” and add, in their place, the words “30 days”.

C. In paragraph (c), add a new sentence to the end of the paragraph as follows:

§ 1150.42 Procedures and relevant dates for small line acquisitions.

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(c) * * * Stay petitions must be filed at least 7 days before the exemption becomes effective.

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5. Amend § 1150.45 as follows:

A. In paragraph (e), remove the words “21 days” and add, in their place, the words “45 days”.

B. In paragraph (e), remove the words “30 days” and add, in their place, the words “16 days”.

C. In paragraph (f), revise the third sentence to read as follows:

§ 1150.45 Procedures and relevant dates—transactions under section 10902 that involve creation of Class I or Class II rail carriers.

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(f) * * * Stay petitions must be filed at least 14 days before the exemption becomes effective. * * *

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

6. 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.

7. Amend § 1180.4 as follows:

A. In paragraph (g)(1) introductory text, remove the words “one week” and add, in their place, the words “30 days”.

B. In paragraph (g)(1)(ii), remove the words “30 days” and add, in their place, the words “16 days”.

C. Redesignate paragraph (g)(1)(iii) as paragraph (g)(1)(iv) and add a new paragraph (g)(1)(iii).

D. Remove paragraph (g)(2)(ii).

E. Redesignate paragraph (g)(2)(iii) as paragraph (g)(2)(ii).

F. Remove paragraph (g)(2)(iv).

§ 1180.4 Procedures.

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(g) * * *

(1) * * *

(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 at least 7 days before the exemption becomes effective.

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