

SERVICE DATE - AUGUST 15, 1997

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Ex Parte No. 392 (Sub-No. 2)

CLASS EXEMPTION  
FOR THE  
CONSTRUCTION OF CONNECTING TRACKS UNDER 49 U.S.C. 10901

Decided: August 6, 1997

By petition filed July 3, 1996, Joseph C. Szabo, Illinois Legislative Director for the United Transportation Union (UTU-IL) seeks reopening of our decision served June 13, 1996, and published at 1 S.T.B. 75 (1996), adopting a class exemption for the construction of connecting track subject to 49 U.S.C. 10901. No reply to this petition has been filed. UTU-IL's petition will be denied.

UTU-IL appears to argue that we should reopen this proceeding because we should have issued a new notice separately soliciting public comments on the proposed class exemption in this proceeding (Ex Parte No. 392 (Sub-No. 2)). The ICC had requested public comments on two exemptions for rail constructions proposed in separate sub-numbered proceedings under Ex Parte No. 392--one proposing to exempt construction of connecting tracks in Ex Parte No. 392 (Sub-No. 2) and one proposing to exempt all other rail construction under former 49 U.S.C. 10901 in Ex Parte No. 392 (Sub-No. 3)<sup>2</sup>--by a single decision served September 15, 1992, and notice of proposed rulemaking (NPR) published in the *Federal Register* on September 16, 1992 (57 FR 42633). But UTU-IL does not explain how it or anyone else was prejudiced by the Board's or the ICC's handling of these cases. The ICC's procedures gave rail labor interests and all other interested parties adequate notice of the two exemption proposals and a full and fair opportunity to participate.<sup>3</sup> Moreover, our decision adopting the class exemption for connecting track shows that the agency gave careful consideration to the parties' comments and concerns. As we can identify no problem of any sort with the agency's procedures, we will not reopen on that basis.<sup>4</sup>

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901. While section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA, the action at issue here--the adoption of new rules with application to future transportation and future tariff filings--necessitates analysis under the new law, and, therefore, this decision applies the law in effect after enactment of the ICCTA. Citations are to the current section of the statute, unless otherwise indicated.

<sup>2</sup> We terminated the proceeding in Ex Parte No. 392 (Sub-No. 3). *See* 1 S.T.B. at 83-84.

<sup>3</sup> Patrick W. Simmons, former Illinois Legislative Director for the United Transportation Union, filed comments in response to the NPR.

<sup>4</sup> As we found in our decision adopting the class exemption (1 S.T.B. at 79-80), it was appropriate for the Board to go forward with the (Sub-No. 2) proceeding and not request additional comments before adopting final rules. While the comments here were filed some time before Congress enacted the ICCTA, sections 10901 and 10502 of the new Act support the decision to adopt a class exemption to facilitate and expedite construction proposals involving connecting track. Moreover, our experience with individual exemption cases indicates that the exemption process  
(continued...)

UTU-IL also argues that we should have confined this exemption specifically to “short” segments of track. UTU-IL argues that we were obliged to confine the exemption in this fashion because the ICC’s 1986 decision originally noticing the proposal defined the exemption as applying to “short connections between a current line of the constructing railroad and the line of another railroad.”

We disagree. Our exemption reasonably defines “connecting track” as track on “existing rail rights-of-way, or on land owned by the connecting railroads,” without specifically using the word “short” or limiting the exemption to track of not more than a specified length.<sup>5</sup> This definition was the definition proposed in the ICC’s 1992 decision re-noticing the proposal. None of the parties commenting in response to the 1992 notice (including Patrick W. Simmons) argued that the language should be modified to include the word “short” to define “connecting track,” or to limit the exemption to construction of connecting track of not more than a specified length. Thus, if UTU-IL objected to our definition, it should have raised its concerns following the issuance of the NPR in 1992.

In any event, even if the class exemption regulations do not specifically contain the word “short,” it is clear that, typically, construction projects involving connecting track within existing rights-of-way or on land owned by connecting railroads will involve short segments of track, not major changes in operations or major alterations in competitive relationships between railroads. *See* 1 S.T.B. at 81. An incorporation of the word “short” into our definition of connecting track in 49 CFR 1150.36(a) would add nothing to the definition unless the term “short” was itself defined (perhaps in terms of a specific maximum length). The only purpose of such a limitation would be to ensure that projects raising potentially serious competitive impacts are regulated where regulation is warranted. That purpose, however, is best furthered by consideration of individual petitions to revoke or to limit the use of the class exemption for particular projects under 49 U.S.C. 10502(d) (or petitions for stay under 49 CFR 1150.36(c)(6)), where the specific nature and impact of the construction can be considered.<sup>6</sup> Adopting an arbitrary length limitation, on the other hand, could block the railroads’ ability to use the exemption for construction of connection projects that have little or no competitive significance.

For similar reasons, we disagree with UTU-IL’s contention that we should reopen the proceeding to provide specifically that the exemption does not apply to “major market extensions.” Our decision makes it clear that the exemption normally does not apply to major market extensions and that it was approved in part because it would not so apply.<sup>7</sup>

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<sup>4</sup>(...continued)

works well in construction cases and that environmental requirements can be satisfied under procedures similar to those adopted in this class exemption.

<sup>5</sup> *See* 1 S.T.B. at 87, where we adopted a new 49 CFR 1150.36(a), which reads, in pertinent part, as follows:

(a) *Scope*. This class exemption applies to proceedings involving the construction and operation of connecting lines of railroad within existing rail rights-of-way, or on land owned by connecting railroads, under 49 U.S.C. 10901(a), (b), and (c). (See the reference to connecting track in 49 CFR 1105.6(b)(1).)

<sup>6</sup> As our decision adopting the class exemption and the regulations explained, there will be a full environmental review of each project. *See* 49 CFR 1150.36(c)(1)-(5), (8)-(10). Moreover, under 49 CFR 1150.36(c)(4), if we conclude that a particular project will result in serious adverse environmental consequences that cannot be adequately mitigated, we may deny authority to proceed with the construction under the class exemption. In that event, persons believing that they can show that the need for a particular project outweighs the adverse environmental consequences can file an application for approval under 49 U.S.C. 10901.

<sup>7</sup> At 1 S.T.B. at 81, we stated:

(continued...)

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

*It is ordered:*

1. UTU-IL's petition to reopen is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

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<sup>7</sup>(...continued)

The construction of connecting track that would be allowed in (Sub-No. 2) would be of limited scope under section 10502(a)(2)(A). The exemption would not result in major changes in operations or major alterations in competitive relationships between railroads because it would allow the construction of connections only over existing rights-of-way or on land owned by connecting railroads.

In the unlikely event that a particular connection project could effect a major change in competitive relationships, we would entertain a petition to revoke based on the argument that regulation of the particular project under 49 U.S.C. 10901 is warranted.