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SERVICE DATE - MAY 1, 1997

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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 564]

Service Obligations Over Excepted Track.

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Board seeks comments from all interested persons on the circumstances under which it should require a railroad to operate over excepted track that does not meet Federal Railroad Administration (FRA) class 1 track safety standards, and that the operating railroad deems to be unsafe.

DATES: Notices of intent to participate are due by May 27, 1997. Shortly thereafter, a list of participants will be issued. Comments are due by July 7, 1997. Replies are due by August 5, 1997.

ADDRESSES: Send an original and 10 copies of notices of intent to participate and pleadings referring to STB Ex Parte No. 564: Office of the Secretary, Case Control Unit, Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423.

Also, send one copy to each party on the list of participants.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: In a decision in *GS Roofing Products Company, Inc., Beazer West, Inc., D/B/A Gifford Hill & Company, Bean Lumber Company and Curt Bean Lumber Company v. Arkansas Midland Railroad and Pinsly Railroad Company, Inc.*, Docket No. 41230 (STB served Mar. 11, 1997)

(*GS Roofing*),<sup>1</sup> we reviewed a fact-specific complaint concerning whether a railroad's embargo of certain "excepted" track that had been operated at less than FRA "class 1" operating standards was unlawful so as to support a request for damages for failure to provide service during the period of the embargo. We found that it was not unlawful.

In our *GS Roofing* decision, we addressed, in general terms, the relationship between the common carrier obligation and a railroad's determination to impose an embargo. We pointed out (at 2 n.5) that a carrier's common carrier obligation is not extinguished by its imposition of an embargo. We also noted (at 8) that, "under its common carrier obligation, a railroad's primary responsibility is to restore safe and adequate service within a reasonable period of time over any line as to which it has not applied for abandonment authority." Nevertheless, in the *GS Roofing* case, we concluded that the carrier's initial determination to embargo the track was reasonable, as the track had been damaged by flooding and the carrier thus had reasonably concluded that the track was unsafe. We also found that the carrier's continuation of the embargo for approximately two months, before it determined whether to repair the track or instead to seek to abandon or sell it, was not unreasonable.

We recognize that, in some circumstances, excepted track may be safe, if it is operated at appropriate speeds and under appropriate operating conditions. For that reason, and because an embargo does not extinguish the common carrier obligation, the Interstate Commerce Commission (ICC), our predecessor with respect to railroad regulation, found a carrier liable for not repairing excepted track and resuming operations over it in *Louisiana Railcar, Inc. v. Missouri Pacific R.R.*, 5 I.C.C.2d 542, 546 (1989), a case that we cited in our *GS Roofing* decision.

Nonetheless, a railroad may be of the view that certain excepted track – even track that has not been expressly condemned by the FRA – is not safe. In light of the implications of the Government forcing a carrier to operate over track that the carrier may reasonably believe is unsafe, the ICC historically used class 1 standards as the

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<sup>1</sup> Petition for review pending, *GS Roofing Products Company, Inc., et al. v. Surface Transportation Board*, No. 97-107 (8<sup>th</sup> Cir.).

minimum level of safety compliance at which a railroad would be required to operate.

Because our *GS Roofing* decision was fact-specific, we did not address, beyond the general principles noted earlier, the circumstances under which a railroad's refusal to provide service over excepted track would be deemed to be unreasonable. Nevertheless, our decision has apparently generated some confusion, and indeed has been characterized as having held that railroads can, as a matter of course, avoid their common carrier obligation simply by declaring their track to be excepted track.

Those questions -- although they go well beyond any matter addressed in the fact-specific *GS Roofing* decision itself, are significant, and of broad interest. Accordingly, we are initiating *sua sponte* this proceeding to address the circumstances under which we should require a railroad to provide service to shippers over track that does not meet FRA class 1 track safety standards, and that the carrier has concluded is not safe. We seek the views not only of the operating railroads and their shippers, but also of rail labor, whose members operate over the track at issue; the FRA, which is responsible for administering the railroad track safety program; state and local governments that are involved with rail transportation planning and programs; and any other interested persons. Depending on the nature of the submissions presented, we will determine at a future date whether to propose formal rules, issue a policy statement, or continue to proceed on a case-by-case basis, as we and the ICC have done in the past.

Decided: April 28, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary