

**Before the
Surface Transportation Board**

JR - 15 B

240732
240733
240734

STB DOCKET NO. AB-167 (Sub-No. 1189X)

**CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION –
IN HUDSON COUNTY, NJ**

**ENTERED
Office of Proceedings
May 20, 2016
Part of
Public Record**

STB DOCKET NO. AB-55 (Sub-No. 686X)

**CSX TRANSPORTATION, INC. – DISCONTINUANCE OF SERVICE EXEMPTION –
IN HUDSON COUNTY, NJ**

STB DOCKET NO. AB-290 (Sub-No. 306X)

**NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE OF SERVICE
EXEMPTION – IN HUDSON COUNTY, NJ**

**ATTACHMENTS FOR
JAMES RIFFIN’S SUPPLEMENT TO HIS REPLY TO
CHARLES MONTANGE’S MOTION TO COMPEL**

1. James Riffin failed to append his attachments to his JR-15 filing. Those attachments are appended hereto. Copies of JR-15 served on the parties of record, had the attachments appended.

Respectfully,

James Riffin
P. O. Box 4044
Timonium, MD 21094
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on or before the 20th Day of May, 2016, a copy of the foregoing JR-15 B was served on all of the parties in this proceeding, either via e-mail, or via U.S. Postal Service, postage prepaid, including Ms. Ferster, co-counsel for the Rails to Trails Conservancy.

James Riffin



KeyCite Yellow Flag - Negative Treatment

Case Reopened by [CLASS EXEMPTION FOR THE ACQUISITION AND OPERATION OF RAIL LINES UNDER 49 U.S.C. 10901](#), I.C.C.,
September 30, 1987

1 I.C.C.2d 810, 1985 WL 56040

SURFACE TRANSPORTATION BOARD (S.T.B.)

CLASS EXEMPTION FOR THE ACQUISITION AND OPERATION OF RAIL LINES UNDER 49 U.S.C. 10901

Decided December 19, 1985

****1 *810** The Commission adopts final rules exempting from regulation all acquisitions and operations under [49 U.S.C. 10901](#), except where a class I railroad abandons a line and another class I railroad then acquires the line where the transaction results in a major market extension.

EX PARTE NO.

392 (

SUB-NO.

1)

DECISION

BY THE COMMISSION:

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Taylor, Sterrett, Andre, Lamboley, and Strenio. Vice Chairman Simmons concurred with a separate expression. Commissioner Lamboley concurred in part, and dissented in part with a separate expression.

On August 28, 1985, we published a Notice of Proposed Rules ([NPR](#)) ([50 F.R.34880](#)) to exempt from regulation acquisition and operations ¹ under [49 U.S.C. 10901](#). ² Noncarriers require Commission approval under [section 10901](#) to acquire or operate a rail line in interstate commerce. Existing carriers require approval under [section 10901](#) to acquire or operate a line owned by a noncarrier and to acquire and operate previously abandoned lines of an existing carrier. ³ *Application Proc.—Construct., Acq. or Oper. R. Lines*, 365 I.C.C. 516, 518 (1982) (*Application Proc.*), and [49 CFR 1150.1](#). [Section 10901](#) also governs a change in operators. The regulations governing [section 10901](#) transactions are set forth at [49 CFR 1150](#).

The NPR expanded a proposal filed by Anacostia & Pacific Corp. (APC) seeking exemption for noncarrier acquisitions and operations, where the noncarrier would be a class III carrier after completion of the transaction. With one exception, the NPR proposed to exempt from regulation all acquisitions and operations under [49 U.S.C. 10901](#), including: (1) acquisition of trackage rights governed by [10901](#); (2) acquisition by a noncarrier of rail property that would be operated by a third party; (3) operation by a new carrier of rail property acquired by a third party; and (4) a change in operators on the line. The exemption would not apply when another class I railroad abandons a line and a class I railroad then acquires the line in a transaction that would result in a major market extension as defined at [49 CFR 1180.3\(c\)](#).

The NPR proposed to amend the regulations at [49 CFR 1150](#) by adding Subpart D, *Exempt Transactions*. The proposed regulations required the filing of a notice of exemption that would be effective 7 days after it is filed. The Commission would publish the notice in the Federal Register within 30 days of the filing. The NPR states that the exemption would be revoked if the notice contained false or misleading information.

***811** We noted in the NPR that in recent years most requests for authority under [section 10901](#) have been exemptions rather than applications, and that virtually all of the exemption requests have been granted. We concluded tentatively that a case-by-case handling of these exemptions involved a burdensome and unnecessary expenditure of resources both by individual petitioners and by the Commission. We invited comments on both APC's exemption request and the expanded exemption proposal.

****2** Twenty-two comments were filed,⁴ the overwhelming majority in support, because those parties concluded that the exemption would expedite and reduce the costs of entry, help maintain service, and eliminate any uncertainty in negotiations with potential purchasers, especially those unfamiliar with the regulatory process. Some State agencies request that they be served with a copy of the notice, and argue that there be a longer comment period and that more financial and operational information should be filed. The opposing unions argue that this exemption is a drastic change in railroad regulation without adequate support in the record. They also argue that the Commission should impose employee protective conditions.

As discussed below, we will adopt the proposal. The new rules are set forth in the appendix.

DISCUSSION AND CONCLUSIONS

Under [49 U.S.C. 10505](#), the Commission must exempt transactions when regulation is unnecessary to implement the rail transportation policy and the matter is of limited scope or will not result in an abuse of market power.⁵ Congress clearly intended that we grant exemptions and rely on “after the fact” remedies, including revocation,⁶ to correct any abuses of market power. The fundamental purpose of the exemption process was to allow the Commission to grant exemptions from those requirements of the Act where deregulation would be consistent with the policies of Congress.⁷

The use of exemption here fulfills this legislative directive. This class exemption is designed to merely codify existing practice: exemption is presently the standard method used to acquire Commission approval for acquisitions and operations. It is designed to meet the need for expeditious handling of a large number of requests that are rarely opposed. In most instances, the transactions under this proposal will involve resumed or continued rail service with no change in operations. This exemption is designed to reduce regulatory delay and costs.

***812** Several protestants argue that the findings needed to grant an exemption under [section 10505](#) cannot be made of *all*, or substantially all, acquisitions and operations normally governed by [section 10901](#). They cite two cases to support this proposition, citing [Finance Docket No. 30663](#), *Chicago Cen. & P.R.R. Co.—Purchase (Portion), Trackage Rights, and Securities Exemption (Chicago)*, set for modified procedure in decision (not printed) served September 17, 1985; and [Finance Docket No. 30439](#), *Gulf & Miss. R.R. Corp.—Purchase (Portion)—Exemption—I.C.G. R.R. Co., (Gulf)* (not printed), served January 2, 1985. However, in *Gulf* and *Chicago* the Commission made the required findings and granted an exemption. The Commission has yet to decide a single case involving the type of limited transactions included here, in which it could not make the required findings. However, the fact that in the future there may be a few proposals out of hundreds that require an investigation does not preclude us from concluding that regulation of *substantially all* of these transactions is not necessary to carry out the national rail transportation policy. This conclusion is completely consistent with the legislative directive concerning the Commission's exemption power.

****3** Under the new rule, class exemptions may still be reviewed by the Commission. Any affected party can file a petition to revoke under [section 10505\(d\)](#) and attempt to show that regulation is necessary to carry out the rail transportation policy. In light of the explicit legislative directive to grant exemptions and then rely on after-the-fact remedies, including revocation, the potential for total or partial reimposition of regulation is always present. Accordingly, we reject protestants' argument that an after-the-fact remedy is not satisfactory. Transactions under this class exemption involve the transfer of discrete, defined property that would not be “lost” in the property of the acquirer. Thus, any transaction could be reversed in whole or in part,

and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accord with the provisions of the rail transportation policy.

Some protestants fear that this proposal will be used by class I railroads to divest themselves of marginally profitable lines. They are concerned that this will result in a transfer of ownership to a party who is not financially viable or lead to inferior service. The three cases cited to support this concern involved purchases of lines that were being abandoned.⁸ In these cases, if it were not for the operations by the shortline, rail service would have ended at an earlier date, and there was no negative impact on service to the public as a result of the transactions. Additionally, insolvency by three small railroads attempting to improve unprofitable lines of class I railroads that were to be abandoned is not indicative of the financial stability of numerous other shortlines.

Commentors' concerns about the financial viability of new carriers are not supported by any specific evidence. Illinois Department of Transportation ***813** states that its records show that the Commission has approved 10 exemption petitions in Illinois. Six have resulted in apparently viable operations; the two carriers that failed (Prairie Trunk and Prairie Central) acquired lines that were being abandoned; and two did not consummate the transactions. While some new operators may, of course, not succeed in revitalizing unprofitable or marginal lines, we are not aware of many that have failed.

Moreover, we do not agree that the transfer of an active rail line under this exemption would result in a "de facto" abandonment, as argued by some protestants. Transfer of a line to a new carrier that can operate the line more economically or more effectively than the existing carrier serves shipper and community interests by continuing rail service, and allows the selling railroad to eliminate lines it cannot operate economically. Transfer before a financial crisis (with attendant plans for abandonment) helps assure continued viable service.

Finally, we note that shortlines are dependent on local traffic for their survival, and thus have a greater incentive than class I carriers to provide local shippers with service tailored to their needs. Notably, no shipper opposes this class exemption. Shortlines frequently are able to reduce operating costs and thus keep rates competitive. No evidence was submitted to refute the tentative conclusion in the NPR at page 4 that:

****4** The transfer of abandoned or underused rail property for more efficient use by a railroad can be beneficial to the shippers on the line, to the community that the line runs through, and to the selling railroad. When a transfer occurs, shippers receive continued, if not enhanced service, while the selling railroad continues to receive the feeder traffic generated by the line at its junction point with the new operator.

We affirm this conclusion.

The NPR, at page 5, also contained a clear statement that employee protection would not be imposed on this class of transactions:

We have consistently rejected these requests [for labor protection], reaffirming our longstanding, and judicially approved policy of not imposing labor protective conditions on acquisitions and operations under [section 10901](#). We have stated that the policy of supporting continued operation of abandoned lines or abandonable rail lines is so strong that we will not impose labor protection even on established carriers acquiring or operating such lines. See, e.g., *Tennessee Central Ry. Co.—Abandonment*, 334 I.C.C. 235 (1969); and *Finance Docket No. 29923, Acq. of Line of Chicago, R.I. & P. Ry. Co.—Ft. Worth-Dallas, TX* (not printed), served June 3, 1982. It is our established policy that the imposition of labor protective conditions on acquisitions and operations under 10901 could seriously jeopardize the economics of continued rail operations and result in the abandonment of the property with the attendant loss of both service and jobs on the line. [Footnote omitted.] In conclusion, we would not impose protective conditions if an application or individual exemption were filed. We propose to follow that policy should this class exemption be adopted. * * *

The Commission's well established discretion to impose labor protection under 49 U.S.C. 10901 was recently confirmed in *Black v. ICC*, 762 F. 2d 106, 111 (D.C. Cir. 1985), citing *Railway Labor Executives' Ass'n v. United States*, 697 F.2d 285, 286 (10th Cir. 1983); *Simmons v. ICC*, 697 F. 2d 326, 340 (D.C. Cir. 1982); and *814 *In re Chicago, Milwaukee, St. P. & P.R.R.*, 658 F.2d 1149, 1169 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). The Railway Labor Executives' Association (RLEA) and United Transportation Union (UTU) offer no persuasive argument that employee protection under 10901 is mandatory. Instead, they argue that the Commission cannot exercise its discretion by making a class-wide finding that employee protection will not be imposed. If discretion could not be exercised by a class finding, it would be virtually impossible for an agency to use rulemaking instead of individual adjudication in dealing with a particular category of cases. "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Accord, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524-525 (1978); *National Small Shipments Traffic Conf. v. ICC*, 725 F. 2d 1442, 1447-48 (D.C. Cir. 1984).

**5 Exercising our discretion to not impose employee protection on this class of transactions in consistent with congressional intent.⁹ In drafting the Staggers Act, Congress chose not to burden certain new operators with labor protection costs. For example, the acquirer of a rail line under 49 U.S.C. 10910, the feeder rail program, can elect to be exempt from nearly all provisions of the Interstate Commerce Act, including the labor protection provisions of 49 U.S.C. 10903.¹⁰

Additionally, 49 U.S.C. 10905, the provision governing offers of financial assistance, is silent on the issue of employee protection. After an analysis of congressional intent, the Commission exercised its discretion and did not impose employee protection on section 10905 transactions. *Illinois Central Gulf R. Co.—Abandonment*, 366 I.C.C.911 (1983) affirmed, *Simmons v. I.C.C.* 760 F. 2d 126 (7th Cir. 1985), *pending cert.*, No. 85-438. We concluded at page 914:

When this statute[10905] was enacted, Congress stated that one of its goals was to assist shippers who are sincerely interested in improving rail service. [citation omitted]. [Employee protective] conditions are inconsistent with these goals since they will render acquisition more costly and, therefore, deter efforts which otherwise are to be encouraged. [Footnote omitted.]

Employee protection is also inconsistent with our goals in granting this class exemption and would discourage acquisitions and operations that should be encouraged. The record supports a conclusion that the acquirer would not be able to complete the transaction if those conditions were imposed.¹¹ RLEA and UTU have not demonstrated a need for employee protection either in past individual exemption requests or in this class exemption. There is no reason to impose the potential expense and burden of employee protection on an acquirer where there is not likely to be a demonstrated need.

To date most exemptions have involved abandoned lines, and employee protective conditions had already been imposed on the abandoning-selling *815 carrier in the abandonment proceeding. In those instances not involving abandoned lines, labor has on occasion requested that conditions be imposed on a selling carrier. Prior to the late 1970's, the Commission did not have a clear policy concerning imposing employee protective conditions on a seller. With the bankruptcy of Chicago, Rock Island and Pacific Railway Company, Debtor (William M. Gibbons, Trustee), (Rock Island) and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, many shortlines sought to acquire marginal or abandoned lines. Faced with the need to encourage continuation of rail service, the Commission adopted the present policy of not imposing conditions on the buyer or the seller.¹² We reasoned that there are costs associated with labor protection, and these costs would result in an increased selling price. Thus, the acquirer would indirectly bear these costs. In addition, in transactions under section 10901, operations are continuing and jobs for rail employees will continue to be available. Thus, railroads seeking to rid themselves of marginal lines should be encouraged to sell to shippers, shortlines, communities, and other mainline carriers who seek to continue operations over these lines. If labor protective conditions are imposed, the economic justification for transfer of a line is diminished if not negated. Accordingly, for these reasons and the reasons discussed above, no conditions will be imposed as a matter of course on the seller in a proposal using this class exemption.

****6** In view of labor's lack of demonstrated need, the availability of revocation, congressional and Commission policies encouraging continued rail operations, and the likelihood that labor conditions would jeopardize the transaction and the economics of continued operations, we will exercise our discretion and not impose employee protective conditions on this class of transactions.

In an extraordinary case, a protesting labor union may seek protection by way of a petition to revoke under 10505(d). If an exceptional showing of circumstances justifying the imposition of labor protection is made, the Commission is empowered to revoke the exemption, in whole or in part, and impose labor protection. However, we will respond summarily to unsupported or otherwise *pro forma* requests for labor protection.

Several railroads argue that the Commission's authority to impose labor protection is limited by the plain language of [section 10901\(e\)](#) to situations where a rail "carrier propose[s] both to construct and operate a new railroad line pursuant to this section." [Emphasis added.] In view of our general holding, we need not and will not resolve this here. We note only that, while amendments to the Interstate Commerce Act reflect a disinclination towards routinely—imposed labor protection, our regulatory authority is both express and implied and early cases on the subject find implied authority to impose labor protection. See *United States v. Lowden*, 308 U.S. 225, 239-40 (1939).

RLEA and UTU also argue that it is "premature" to adopt an exemption that is at odds with legal arguments made by RLEA and UTU in several cases ***816** pending review. However, pending court cases cannot restrict an agency's docket in the manner advocated; settled principles of administrative law preclude that. The Administrative Orders Review Act ("Hobbs Act"), [28 U.S.C.2342, et seq.](#), confers "exclusive jurisdiction" on a single court of appeals to enjoin or set aside a particular Commission rule or order, [28 U.S.C. 2349](#), and to stay the agency's order *pendente lite* or permanently. *Id.* That jurisdiction does not extend to other Commission proceedings, even those premised on the validity of an order under judicial challenge. Thus, the Commission is under no legal obligation to stay its present administrative proceeding until various court cases are decided. Additionally, the argument advanced in the cases cited by RLEA and UTU do not persuade us that the legal positions adopted in this exemption proceeding are in error. ¹³

RLEA and UTU further challenge the inclusion of "incidental trackage rights" in this class exemption. For clarity, we define "incidental trackage rights" as a grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party, that occurs at the time of the acquisition or operation. For the reasons noted above, the pending case cited by RLEA, *RLEA v. ICC, et al.*, D.C. Cir., No. 85-1443, does not make our action premature (RLEA has now moved for voluntary dismissal). Recently, in *Black v. ICC, supra*, at 110-11, 114-15, the D.C. Circuit reaffirmed two Seventh Circuit decisions that section 11343 governs only transactions between two or more carriers (*In Re Chicago, Milwaukee St. P. & P.R.R., supra*, and *Illinois v. United States, supra*). Thus, trackage rights involving only one carrier or an abandoned line are properly included in this class exemption.

****7** A few States are concerned that this proposal will result in a shortened time period for comment before the proposal becomes effective. Generally, exemptions have a 30-day effective date; however, many exemptions include a request for an immediate effective date that is usually granted. Our experience has shown that there is generally strong support for individual exemption requests to be handled expeditiously so that rail service will not be interrupted. It has been our experience that affected shippers and communities *do not seek* a longer period for comment, even when the decision is effective immediately. Although the comment period is rarely used to oppose individual exemptions, a few State agencies nevertheless seek to have the proposed rules modified to include a notice and comment period. We conclude that there has been no showing of a benefit from a notice and comment period that outweighs the benefit of expeditious handling. Doing so would be inconsistent with the intent of this class exemption—to streamline current procedures. We note that, as a practical matter, State and local governments receive actual notice well before the proposal is filed. Local interests and government entities are often involved in the early stages of these proposals and frequently provide funding and loan guarantees. Additionally, no notice is given today before an individual exemption request is filed, and experience has shown that no hardship results.

***817** Finally, we will clarify a statement in the NPR that if the notice of exemption contains false or misleading information it will be revoked. Consistent with other class exemptions, if the notice contains false or misleading information it is void *ab initio* [See [49 CFR 1152.50\(d\)\(3\)](#)]. Revocation, as discussed above, is a remedy available under 10505(d). These petitions may be filed pursuant to 49 CFR Part 1115 or Part 1117. This minor modification is included in the final rule.

We also clarify that this exemption includes a change in operators, either carrier or noncarrier, if the lease remains a 10901 transaction.

A number of parties suggested that the information required in the notice be broadened to include more detailed financial and operating data. Others request that we require, among other things, negotiation between competing carriers. We have reviewed our experience under the many individual exemptions proceedings we have decided to date. The vast majority of these cases have been processed with far less financial and operating information, to the apparent satisfaction of the affected shipper and carrier parties. Moreover, those directly involved (including the State) are, in fact, well aware of the financial condition of the potential acquirer, expected traffic revenues, volume and commodities, as well as intended operation.

We have considered the proposed rules with these conclusions in mind, and will eliminate proposed rules 1150.33(f) and (h) as unnecessary and potentially misleading. We also do not think it would be productive to impose a negotiation requirement in all cases despite the fact that only the very rare case rises any competitive issues. While we do not minimize these concerns, we believe the revocation procedure is adequate and appropriate to handle the few unique cases, and a petition for stay can also be filed in the exceptional case. We have and will continue to handle these cases expeditiously.

****8** We conclude that exemption of these transactions will foster the rail transportation policy of [49 U.S.C. 10101a](#) by minimizing the need for Federal regulatory control over the rail transportation system, ensuring the development and continuation of a sound rail transportation system, fostering sound economic conditions in transportation, reducing regulatory barriers to entry, and encouraging efficient rail management. Therefore, we find that the continued regulation of acquisitions and operations under [49 U.S.C. 10901](#) is not necessary to carry out the national rail transportation policy.

We further find that these transactions will not result in an abuse of market power. Proposals under this class exemption generally will maintain the *status quo* and will not change the competitive situation. The vital interests of shippers, communities, and carriers will be served by this exemption because it will result in the continuation of service that might otherwise be lost. Accordingly, we adopt the NPR.

Other exemptions that may be relevant to a proposal under this Subpart are the class exemption for control at [49 CFR 1180.2\(d\) \(1\) and \(2\)](#), and the exemption from securities regulation at [49 CFR 1175](#).

We find:

1. Regulation of acquisitions and operations of railroads under [49 U.S.C. 10901](#) is not necessary to carry out the rail transportation policy and is not necessary to protect shippers from the abuse of market power.

***818** 2. We affirm the conclusions expressed in the NPR that this action will not have a significant economic impact on a substantial number of small entities, because it imposes no new requirements on them.

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

Authority: [49 U.S.C. 10321](#), [10505](#), and [10901](#); and [5 U.S.C. 553](#).

VICE CHAIRMAN SIMMONS, concurring:

I would have granted the notice requirement proposed by some States. I cannot agree with the majority's conclusion that there has been no showing of a benefit from a notice and comment period. Recently, State Governments have become actively involved in attracting new businesses and helping marginal businesses already there. New railroads may still have to comply with certain State laws or regulations dealing with such matters as incorporation, and some may need help in financing new operations or locating new shippers to their lines. A simple, inexpensive notice provision directed toward designated State agencies may ease and expedite matters for new and struggling rail operations.

Except for the small disagreement expressed above, I approve this class exemption. As the decision states, it will encourage and enhance several goals for the national rail policy. This exemption is designed to encourage *viable* new class III railroads. In order to make the system work, however, large railroads must help. They must consider the special financial needs of the new short lines and the efficiencies they may produce. To promote the national rail policy and the public interest, large railroads should, when possible, quote and participate in joint rates which provide fair divisions to their new short line connections.

****9** COMMISSIONER LAMBOLEY, concurring in part, dissenting in part:

I believe exemption is appropriate for the class of transactions generally associated with the establishment, or continuation of short line rail service. Such integrated transactions have customarily included proposals for acquisition or substitution, operation, and control combined with incidental trackage rights agreements, as well as necessary financing arrangements. Recognizing the need to facilitate continued, even competitive, rail service, we have in the past customarily granted exemption from relevant statutes on a case-by-case basis to achieve that purpose based on appropriate findings under [section 10505](#).

The class exemption here granted flows from the aggregate of those cases, but should *not* be read to encompass those more expansive situations which are not of limited scope, nor otherwise without concern for potential market abuse.¹⁴

***819** Moreover, while exemption is appropriate, I am persuaded by certain comments that it should include service of notice on State authorities together with relevant financial and operational information. Such informational notice would provide knowledge to aid those economically interested in evaluating the impact and viability of the proposed transactions.

Finally, I do not share the majority's analysis of employee protection issues. Although [section 10901](#), employee protective conditions are matters within the Commission's discretion, this exemption fails to either articulate the criteria or identify the circumstances upon which such discretion is exercised in favor of these conditions. Rather, the Commission in essence finds that it has not imposed such conditions in the past, and holds that it anticipates no need to do so in the future, although it does allude to the possibility in an "extraordinary case."

Precedent other than that historically recalled in the decision, evidences recent Commission and judicial approval for the imposition of protective conditions in [section 10901](#) cases.¹⁵

Moreover, this exemption presumes that all relevant transactions fall within [section 10901](#). However, prior cases evidence that [section 11343](#) may apply to aspects of the integrated transactions generally proposed. Thus labor protection is required.¹⁶

The majority seems to view the labor protection issue only in the context of employees as being represented by a labor organization and an assessment of the cost impact based on negotiated labor agreements.

This exception expressly includes the substitution of one operator for another, which may merely involve the replacement of one short line operation by another, neither of which may necessarily have employees represented by any labor organization or working under a labor agreement.¹⁷ Consequently, assumptions regarding cost impact based solely on collective bargaining agreements are inaccurate.

In my view, the decision on the employee protection issue is overbroad and without substantial evidentiary support for this conclusion.¹⁸ The class exemption need not include a blanket prospective finding that employee protective conditions are unnecessary. This approach does little to reduce the prospects of future litigation and jeopardizes the benefits this exemption otherwise seeks to provide by facilitating continued rail transportation service.¹⁹ I would have preferred disposition of this issue on *820 a basis that allows a time limited submission and decision on employee protection prior to the effective date of exemption.²⁰ This, I believe would avoid the more complex revocation proceedings or problems similar to those experienced in the handling of the *Maryland Midland* case, *supra*, n. 5.

****10** *It is ordered:*

1. We adopt the Notice of Proposed Rulemaking and amend Part 1150 of the Code of Federal Regulations as set forth in the appendix to this decision.
2. This decision is effective February 17, 1986.

APPENDIX

Title 49, Subtitle B, Chapter X, Part 1150 of the Code of Federal Regulations will be amended as follows:

Subpart D—Exempt Transactions

Sec.

1150.31 Scope of exemption.

1150.32 Procedures and relevant dates.

1150.33 Information to be contained in notice.

1150.34 Format for caption summary.

Subpart D Exempt Transactions

§1150.31 *Scope of exemption.*

Except as indicated below, this exemption applies to all acquisitions and operations under [section 10901](#) (See 1150.1, *supra*). This exemption also includes: (1) acquisition by a noncarrier of rail property that would be operated by a third party; (2) operation by a new carrier of rail property acquired by a third party; (3) a change in operators on the line; and (4) acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined as [49 CFR 1180.3\(c\)](#).

Other exemptions that may be relevant to a proposal under this Subpart are the exemption for control at [49 CFR 1180.2\(d\)\(1\) and \(2\)](#), and the exemption from securities regulation at [49 CFR 1175](#).

§1150.32 *Procedures and relevant dates*

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in 1150.34, for publication in the Federal Register.

(b) The exemption will be effective 7 days after the notice is filed. The Commission, through the Director of the Office of Proceedings, will publish a notice in the Federal Register within 30 days of the filing. A change in operators would follow the provisions at [49 CFR 1150.34](#), and notice must be given to shippers.

***821** (c) If the notice contains false or misleading information, the exemption is void ab initio. A petition to revoke under [49 U.S.C. 10505\(d\)](#) does not automatically stay the exemption.

[§1150.33](#) *Information to be contained in notice*

(a) the full name and address of the applicant;

(b) the name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) a statement that an agreement has been reached or details about when an agreement will be reached;

(d) the operator of the property;

(e) a brief summary of the proposed transaction, including (i) the name and address of the railroad transferring the subject property, (ii) the proposed time schedule for consummation of the transaction, (iii) the mile-posts of the subject property, including any branch lines, and (iv) the total route miles being acquired;

****11** (f) a map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

[§1150.34](#) *Caption Summary*

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

Finance Docket No.

(1)—EXEMPTION (2) — (3)

(1) has filed a notice of exemption to (2) (3)'s line between (4). Comments must be filed with the Commission and served on (5). (6).

The notice is filed under [49 CFR 1150.31](#). If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under [49 U.S.C. 10505\(d\)](#) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Commission, Chairman Gradison, Vice Chairman Simmon, Commissioners Taylor, Sterrett, Andre, Lamboley, and Strenio. Vice Chairman Simmons concurred with a separate expression. Commissioner Lamboley concurred in part, and dissented in part with a separate expression.

I.C.C.

Footnotes

- 1 The terms “acquire” and “operate” include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate.
- 2 This proposal does not include railroad construction, which is also governed by [section 10901](#).
- 3 Acquisition of an active rail line where both buyer and seller are carriers is governed by [49 U.S.C. 11343](#).
- 4 Comments were filed by: Association of American Railroads; Southern Pacific Transportation Company and St. Louis Southwestern Railway Company; Tuscola & Saginaw Bay Railway Company, Inc.; Railtex Inc.; Indiana Hi-Rail Corporation; Rail Management and Consulting Corporation; Illinois Central Gulf Railroad Company; L. B. Foster Company; Jackson & Jessup; Iowa Northern Railway Company; Consolidated Rail Corporation; American Short Line Railroad Association; New York Department of Transportation; Michigan Department of Transportation; Pinsky Railroads; General Electric Credit Corporation; Railway Labor Executives' Association; BOARD (S.T.B.) of Trade of the City of Chicago; Illinois Department of Transportation; Alabama Public Service Commission; Illinois Commerce Commission; and United Transportation Union.
- 5 For a discussion of the legislative history of the Commission's exemptive power, see [Simmons v. ICC, 697 F.2d 326, 334-342 \(D.C. Cir. 1982\)](#)
- 6 H.R. Rept. 1430, 96th Cong., 2d sess. 105 (1980).
- 7 *Id.*
- 8 [Prairie Trunk Railway—Acquisition and Operation, 348 I.C.C. 832 \(1977\)](#); [Finance Docket No. 30039, Prairie Central Railway Company—Abandonment Exemption—Between Paris and Mt. Carmel, IL](#) (not printed), served October 27, 1982; and [Finance Docket No. 29158, Seattle North Coast Railroad Company—Acquisition and Operation of a Line of Railroad in the State of Washington](#) (not printed), served March 26, 1981.
- 9 The legislative history of the Staggers Act reflects a deliberate congressional option for “discretionary” rather than “mandatory” labor protection in [section 10901](#). H.R. Rept. 1430, *supra* n. 6, at 115-16.
- 10 Discussed in detail in [Simmons v. I.C.C., supra](#) n. 5, at 341.
- 11 See comments filed by: Pinsky Railroads, Association of American Railroads (AAR) at 12; Indiana HI-Rail at 3; Rail Tex at 2; Tuscola & Saginaw Bay at 2; and General Electric Credit Corporation at 2.
- 12 See [Knox and Kane R. Co.—Petition for Exemption, 366 I.C.C. 439, 441-444 \(1982\)](#); and [Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 136 \(1980\)](#).
- 13 In the cases cited by RLEA, the challenge centers on the statutory classification of the transactions. RLEA claims that the various transactions should have been processed under [section 10903](#) (abandonments) or [section 11343](#) (consolidations, acquisitions and trackage rights involving more than one carrier).
- 14 See *e.g.*, [F.D. No. 30439, Gulf & Miss. R.R. Corp.—Purchase Exemption I.C.G. R.R.](#); (not printed) served January 2, 1985 and [F.D. No. 30663 Chicago Cent. & Pac. R.R. Co.—Purchase Trackage Rights and Securities Exemption I](#), (not printed) served September 17, 1985 and II (not printed) served December 24, 1985. In both cases the Commission ultimately granted exemptions. However, it did so in each instance, only after commencing investigation and discovery coupled with the subsequent withdrawal of opposition reflecting negotiated settlement of market issues allowing the Commission to find and conclude that the proposed transactions were essentially free from potential market abuse. Indeed, had those circumstances not occurred, exemption would not have been appropriate in light of fact patterns involving substantial numbers of multi-state rail miles, shippers and employees, all of which removed the cases from being fairly considered as “limited in scope” or easily remedied after-the-fact by revocation of exemption.
- 15 See *e.g.*, [Durango & Silverton N.G.R. Co.—Acquisition & Operations, 363 I.C.C. 292 \(1979\)](#), affirmed [RLEA v. U.S. F. 2d 285 \(10th Cir. 1983\)](#); [Prairie Trunk Railway—Acquisition and Operation, 348 I.C.C. 832 \(1977\)](#) affirmed [People of State of Illinois v. U.S., 604 F. 2d 519 \(7th Cir. 1979\)](#); see also [Cadillac & Lake City Ry. Co.—Acquisition & Operation, 320 I.C.C 617 \(1964\)](#).
- 16 See *e.g.*, [F.D. No. 30682, Hammermill Paper Co.—Exemption](#), (not printed) served August 21, 1985 and [F.D. No. 30657, Green Hills Rural Development, Inc. & Chillicothe Southern Railroad Co. supra](#).
- 17 See *e.g.*, [F.D. No. 30657 Green Hills Rural Development, Inc. & Chillicothe So. Ry. Co.—Exemption](#), (not printed) served January 10, 1986, [F.D. No. 30457 San Diego & Imperial Valley R.R. Co.](#), (not printed) served October 7, 1985; [F.D. No. 30709, Canonic Atlantic Co. and Canonic, Inc.—Exemption](#), (not printed) served September 11, 1985.
- 18 The decision also fails to address remedial procedures and burden of proof in the event revocation is sought in any particular instance to which the class exemption may arguably apply.

- 19 See e.g., No. 30237, *Maryland Midland Group, Inc.—Exemption*, (not printed) served September 19, 1983, reopening denied (not printed) served March 14, 1985, review filed May 17, 1985, *UTU v. ICC* Case No. 85-1304 (D.C. Cir.), voluntarily reopened by Commission (not printed served October 3, 1985).
- 20 Cf. Motor Carrier Exemption at 49 CFR 1186.1 *et seq.*, codifying [Ex Parte No. 55 \(Sub-No. 57\)](#), *Exemption of Certain Transactions Under 49 U.S.C. 11343*, 133 M.C.C. 449 (1984).

Key to symbols:

- (1) Name of entity acquiring or operating the line, or both.
- (2) The type of transaction, *e.g.*, to acquire, operate, or both.
- (3) The transferor.
- (4) Describe the line.
- (5) Petitioners representative, address, and telephone number.
- (6) Cross reference to other class exemptions being used.

1 I.C.C.2d 810, 1985 WL 56040

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50 FR 34880-01, 1985 WL 124595(F.R.)
PROPOSED RULES
INTERSTATE COMMERCE COMMISSION
49 CFR Part 1150
[Ex Parte No. 392 (Sub-1)]

Class Exemption for the Acquisition and Operation of Rail Lines Under [49 U.S.C. 10901](#)

Wednesday, August 28, 1985

***34880** AGENCY: Interstate Commerce Commission.

ACTION: Notice of Proposed Exemption and Rules.

SUMMARY: The Commission proposes to exempt, under [49 U.S.C. 10505](#), acquisitions and operations under [49 U.S.C. 10901](#) (see [49 CFR 1150.1](#)). This exemption would also include: (1) Acquisition of trackage rights governed by 10901; (2) acquisition by a noncarrier of rail property that would be operated by a third party; (3) operation by a new carrier of rail property acquired by a third party; and (4) a change in operators on the line. This exemption would not apply when a Class I railroad abandons a line and a Class I railroad then acquires the line in a proposal that would result in a major market extension as defined at [49 CFR 1180.3\(c\)](#). The regulations at 49 CFR Part 1150 would be amended and a Subpart D, Exempt Transactions, would be added. This expands a proposal filed by Anacostia & Pacific Corp. (APC) seeking exemption for noncarrier acquisitions and operations, where the noncarrier would be Class III carrier after completion of the transaction. We invite comment on both APC's exemption request and the expanded exemption proposal.

DATES: An original and 15 copies of comments should be filed by September 27, 1985.

ADDRESS: Comments referring to Ex Parte No. 392 (Sub-No. 1) should be addressed to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Louis E. Gitomer, (202) 275-7245.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write T.S. InfoSystems, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423, or call 289-4357 (DC Metropolitan area) or toll free (800) 424-5403.

List of Subjects in 49 CFR Part 1150

Administrative practice and procedure, Railroads.

Decided: August 16, 1985.

By the Commission, Chairman Taylor, Vice Chairman Gradison, Commissioners Sterrett, Andre, Simmons, Lamboley, and Strenio. Commissioner Simmons concurred in the issuance of the notice. Commissioner Lamboley concurred in the notice.

James H. Bayne.

Secretary.

Appendix

***34881** Title 49, Subtitle B, Chapter X, Part 1150 of the Code of Federal Regulations will be amended by adding a new Subpart D to read as follows:

PART 1150—[AMENDED]

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

Authority: [49 U.S.C. 10321](#), [10326](#), [10901](#), [10903](#), and [10505](#); [5 U.S.C. 553](#) and [559](#).

2. New Subpart D is added as follows:

Subpart D—Exempt Transactions

Sec.1150.31 Scope of exemption.1150.32 Procedures and relevant dates.1150.33 Information to be contained in notice.1150.34 Format for caption summary.

Subpart D—Exempt Transactions

[49 CFR § 1150.31](#)

§ 1150.31 Scope of exemption.

This exemption applies to all acquisitions and operations under [section 10901](#) (See [§ 1150.1](#), supra). This exemption also includes: (a) Acquisition of trackage rights governed by 10901; (b) acquisition by a noncarrier of rail property that would be operated by a third party; (c) operation by a new carrier of rail property acquired by a third party; and (d) a change in operators on the line. This exemption does not apply when a Class I railroad abandons a line and a Class I railroad then acquires the line in a proposal that would result in a major market extension as defined at [49 CFR 1180.3\(c\)](#).

[49 CFR § 1150.32](#)

§ 1150.32 Procedures and relevant dates.

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in [§ 1150.34](#), for publication in the Federal Register.

(b) Before filing the notice, applicant must obtain a docket number from the Commission's Office of Secretary. The exemption will be effective 7 days after the notice is filed. Notice will be published in the Federal Register within 30 days of the filing. A change in operators would follow the provisions at [49 CFR 1150.24](#), and notice must be given to shippers.

[49 CFR § 1150.33](#)

§ 1150.33 Information to be contained in notice.

(a) The full name and address of the applicant.

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

(d) The operator of the property;

(e) A brief summary of the proposed transaction, including (1) the name and address of the railroad transferring the subject property, (2) the proposed time schedule for consummation of the transaction, (3) the mile-posts of the subject property including any branch lines and (4) the total route miles being acquired;

(f) A brief description of the amount and type of traffic expected to be handled on the line;

(g) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties and States; and

(h) The amount of projected revenues that will be generated in the first year by operations on the property to be acquired.
[49 CFR § 1150.34](#)

§ 1150.34 Format for caption summary.

The document submitted as a caption summary must be submitted in the following form:

Interstate Commerce Commission

Notice of Exemption

Finance Docket No.

(Name of entity
acquiring--EXEMPTION or
operating the line, or both) (The
transaction--acquisition
or operation, or both) (The
transferor)

(Name of entity acquiring or operating the line, or both) has filed a notice of exemption to (The transaction, acquisition or operation, or both) a line of (The transferor)'s between (Describe the line).

[49 CFR § 1150.31](#)

The notice is filed under [49 CFR 1150.31](#). Petitions to revoke the exemption under [49 U.S.C. 10505\(d\)](#) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

[FR Doc. 85-20523 Filed 8-27-85; 8:45 am]

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