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June 6, 2007



BY FEDERAL EXPRESS

Honorable Vernon A Williams, Secretary
U S Surface Transportation Board
395 E Street, S W
Washington, DC 20024

Re: STB Ex Parte No 673 -- BNSF Railway Company, et al -- Petition to Institute a Rulemaking

Dear Mr Williams

Please find enclosed for filing an original and ten (10) copies of a Petition to Institute Rulemaking in the above captioned-proceeding Thank you for your assistance

Sincerely,

John M Scheib

Enclosures

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Public Record

219475

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 673



PETITION TO INSTITUTE A RULEMAKING

**BNSF RAILWAY COMPANY, CANADIAN NATIONAL RAILWAY COMPANY,
CANADIAN PACIFIC RAILWAY COMPANY, CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN RAILWAY COMPANY, AND UNION PACIFIC RAILROAD
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Dated June 6, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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PETITION TO INSTITUTE A RULEMAKING

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NORFOLK SOUTHERN RAILWAY COMPANY, AND UNION PACIFIC
RAILROAD COMPANY**

BNSF Railway Company, Canadian National Railway Company,
Canadian Pacific Railway Company, CSX Transportation, Inc , Norfolk Southern
Railway Company, and Union Pacific Railroad Company (collectively, the "Coalition")
hereby petition the Surface Transportation Board to initiate a rulemaking to amend the
Board's regulations at Section 1150.33, 1150 34, 1150 43, and 1150.44 of Title 49 of the
Code of Federal Regulations to increase modestly the information required in a notice of
exemption and overrule the bright-line test of Effingham Railroad Co – Petition for
Declaratory Order – Construction at Effingham, IL.¹

¹ Docket No 41986, Effingham Railroad Co – Petition for Declaratory Order – Construction at Effingham, IL, served September 18, 1998 ("Effingham") The reference to the "bright-line" test in Effingham is a reference to the rule arising out of that case to the effect that, because the acquired track constituted the company's entire operation, the acquired track by definition became a jurisdictional line of railroad notwithstanding other characteristics that made it a spur or siding or other non-jurisdictional track while operated by the seller The effect of this "bright-line" test is that the acquirer then

In its decision in Finance Docket No 34986, Ashland Railroad, Inc – Lease and Operation Exemption – Rail Line in Monmouth County, and in Finance Docket 34987, G David Crane – Lease and Operation Exemption – Ashland Railroad, Inc , served on April 30, 2007, the STB said the following

“Norfolk Southern Railway Company (NSR) filed a comment on March 5, 2007 NSR claims that [Ashland Railroad’s] notice and the resulting concerns about the nature of its operations demonstrate why the agency should require more information from noncarriers seeking to use the notice of exemption process to acquire rail lines NSR maintains that greater disclosure will avoid situations where more information is necessary to ensure that a transaction is legitimate and will lessen the need for last-minute stay requests. NSR asks that the Board institute a rulemaking wherein the Board proposes the new requirements If NSR advocates that Board action, it may pursue that request in a separate proceeding”²

Although Norfolk Southern advanced in these Finance Dockets the idea of a rulemaking to require additional information in notices of exemption, many parties who are members of the Coalition and other parties have similarly advanced or endorsed similar ideas³

becomes a common carrier railroad upon the acquisition of the property and a proclamation by the acquirer that it holds itself out to serve the public

² Finance Docket No 34986, *Ashland Railroad, Inc – Lease and Operation Exemption – Rail Line in Monmouth County*, and Finance Docket 34987, *G David Crane – Lease and Operation Exemption – Ashland Railroad, Inc* , at n 2 (served April 30, 2007)

³ See Ex Parte 659, *Public Participation in Class Exemption Proceedings*, Comments of the Association of American Railroads, at 9-13 (May 15, 2006) (“AAR Comments”), see also e.g., Finance Docket 34797, *New England Transrail, LLC D/B/A Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption-- In Wilmington and Woburn, MA*, Comments of CSXT, at 6-8 (April 16, 2007); Finance Docket 34797, *New England Transrail, LLC D/B/A Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption-- In Wilmington and Woburn, MA*, Comments of Norfolk Southern Railway Company, at 9 (April 16, 2007), Finance Docket 34797, *New England Transrail, LLC D/B/A Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption-- In Wilmington and Woburn, MA*, Response of New York Susquehanna and

These parties may differ slightly on exactly what additional information the Board should require. All these parties agree, however, that the Board simply must require sufficient information in a Notice of Exemption to permit the Board to determine, and the public to decipher, whether the entity filing the notice is a rail carrier providing transportation.

These parties have reasoned that, even after the adoption in Ex Parte 659 of an extended period of time between submission of the notice of exemption and the effective date of that notice, it remains difficult for the public and the Board to review a notice of exemption unless sufficient information was included in the notice.⁴ Requiring additional information is particularly essential because these class exemptions are being abused by parties whose primary objective is something other than providing rail service.⁵ These parties have cited many examples familiar to the Board in support of this proposition.⁶

Requiring a modest amount of additional information to be submitted in the notice of exemption would have a minimal impact upon those seeking authority, but would have the effect of dramatically increasing the effectiveness of efforts to curb potential abuse of the Board's processes. Further, using that information would allow the Board to conduct a more thorough analysis of the facts and intended use of the facilities.

Western Railway Corp. to the Supplemental Comments of the New Jersey Department of Environmental Protection et al., at 5-6 (March 13, 2007), Ex Parte 659, *Public Participation in Class Exemption Proceedings*, Comments of the State of New Jersey, at 9-13 (May 15, 2006) 8-13 ("NJ Comments"). Copies of these comments are attached for the Board's convenience.

⁴ See e.g., AAR Comments at 10, NJ Comments at 12.

⁵ See e.g., AAR Comments at 6-9, NJ Comments at 9.

⁶ See e.g., AAR Comments at 6-9.

that underlie the proposal advanced by the notice of exemption. Therefore, the bright-line analysis advanced in Effingham must be reconsidered. Unburdened by the dictates of Effingham, the Board will be able to use the additional information in challenged notices to determine whether the proposed transaction will result in a rail carrier providing transportation on a rail line that is a jurisdictional line of railroad in light of the traditional, pre-Effingham analysis. Important in this analysis is the fact that a party acquiring jurisdictional trackage in a transaction acquires a common carrier obligation, whereas the traditional, pre-Effingham analysis is required to make the same determination when the party is acquiring non-jurisdictional track.

Accordingly, for the reasons stated above and in the various pleadings of these individual parties, the Coalition hereby requests that the STB initiate a rulemaking to amend Section 1150.33, 1150.34, 1150.43, and 1150.44 of Title 49 of the Code of Federal Regulations to increase modestly the information required in such notices of exemption. Should the Board institute a rulemaking proceeding, each of the members of the Coalition reserve the right to participate in that rulemaking proceeding on its own right.

Respectfully Submitted,



On Behalf of the Individual Coalition Members

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Dated June 6, 2007

APPENDIX A

**COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS
IN EX PARTE 659,
PUBLIC PARTICIPATION IN CLASS EXEMPTION PROCEEDINGS**

**THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE No 659

PUBLIC PARTICIPATION IN CLASS EXEMPTION PROCEEDINGS

**COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS**

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May 15, 2006

**THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE No 659

PUBLIC PARTICIPATION IN CLASS EXEMPTION PROCEEDINGS

**COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS**

The Association of American Railroads (“AAR”) hereby submits comments in connection with the Surface Transportation Board’s (“STB”) “Notice of Proposed Rulemaking” served March 10, 2006, in the above captioned proceeding. Since 1934, the AAR, a non-profit trade association, has represented the interest of major freight railroads in North America, as well as Amtrak. Over the years, AAR members have participated in many exemption proceedings. As such, the AAR has a keen interest in the nature of this rulemaking and appreciates the opportunity to provide the comments that follow

Comments by the Association of American Railroads in STB Ex Parte 659

I. Overview of the STB Proposal

In this proceeding, the STB has proposed changes in the time frames associated with the handling of various types of class exemptions. For the designated Ten Exempt Transactions Types under 49 U.S.C. §§ 10901, 10902, and 11323, as enumerated in the notice of proposed rulemaking at pages 2 and 3, a notice of the proposed transaction would be published in the Federal Register within 16 days of filing, stay petitions would be due at least 7 days prior to the effective date of the exemption; and the exemption, if not stayed, would take effect 30 days after the notice is filed. *Id.* at 4. For exemptions under 49 U.S.C. §§ 10901 and 10902 involving Class I and Class II carriers, notice would be published in the Federal Register within 16 days of filing, stay petitions would be due no later than 14 days prior to the effective date of the exemption, and the exemption would take effect 45 days after the filing. *Id.* at 5. The STB proposes to modify its rules in this respect to allow for greater public notice in advance of a covered exempt transaction.

II. Summary of the AAR Position

The AAR continues to strongly support use of the exemption process under 49 U.S.C. § 10502 as a way to streamline the regulatory process and remove unnecessary regulatory burdens. While the AAR certainly understands the agency's continued vigilance to ensure that its processes are in the public interest, and has issued this notice of proposed rulemaking with that objective in mind, the industry is concerned that the agency proposal unnecessarily lengthens certain time frames. Most of the Ten Exempt Transaction Types are completely routine and non-controversial and should go into effect with as little notice as possible.

The AAR thus urges that the time frames remain as they are today with three exceptions— those relating to sections 10901 and 10902, and those relating to temporary trackage rights. The AAR supports the time frame changes proposed by the STB with respect to 49 U.S.C. §§ 10901 and 10902 transactions -- those that involve Class III carriers as well as those that involve Class Is and IIs. As we will discuss later in this filing, we are aware that there has been a growing trend toward abuse of the class exemption process pursuant to those sections, and these time frame changes could help address this problem. In this regard, the AAR also would ask the agency to add to its final rule some additional changes in the class exemption process under sections 10901 and 10902, as discussed herein, that would make refinements to applicant eligibility and modest additions to the information that would be required in the notice.

In addition, the AAR strongly urges the STB to adopt as part of its final rule a provision that would allow the class exemption for temporary trackage rights to become effective immediately. These arrangements are entered into as a temporary measure typically to prevent service disruptions, and their implementation should not be delayed.

III. Discussion of Class Exemptions Under Sections 10901 and 10902

A. Background.

As the agency well knows, in 1986, the STB's predecessor adopted rules that exempt from regulation certain acquisitions by non-carriers, operations by new carriers of rail property acquired by a third party, and changes in operators. 49 C.F.R. § 1150.31, Class Exemption for the Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C. 2d 810 (1985). Subsequently, in 1996, after the ICC Termination Act added a new statutory provision for transactions involving Class III carriers (49 U.S.C. § 10902),

transactions involving Class III carriers were also exempted from regulation 49 C F R. § 1150 41.

All that is required under these class exemption rules is the filing of a notice with the STB by a qualifying party, which must include basic information. The acquisition, operation, or other change then becomes effective 7 days after the notice is filed with the STB, while the public is informed within 30 days after the notice is filed with the STB. 49 C F R § 1150 32(b). Through this process, which does not include any regulatory review or prior approval, the STB and the public generally are informed after-the-fact of changes in responsibilities for operating portions of the rail network.

In response to concerns raised regarding Class I and Class II railroad use of the class exemptions, the agency adopted some additional rules that apply to those railroads. In particular, these larger railroads must file a notice of intent to file a notice of exemption with certain parties. 49 C F R § 1150.35(a). That notice of intent includes more information than is required in the notice. 49 C.F.R § 1150 35(b). A notice of exemption filed by these larger railroads is effective 21 days after it is filed, and public notice is provided within 30 days after it is filed in the Federal Register. 49 C F R § 1150 35(e).

When one of the class exemptions is inapplicable, the STB's rules further provide a process for filing a petition for exemption from regulation pursuant to 49 U.S.C. § 10502. 49 C F.R. Part 1121. The STB's rules require that the applicant include a basic amount of information in such a petition – more information than is required for a notice of exemption pursuant to one of the class exemptions. However, the petition process

requires less extensive information and is more expeditious than the full application process that would otherwise apply

B. The Class Exemption Procedure Has Served Its Original Purpose Well.

When the STB's predecessor first adopted exemptions in 1986, they were a much needed tool. By then, the Staggers Rail Act of 1980 was implemented, including its less restrictive provisions governing rail line abandonments. As a result, railroads were beginning to evaluate their networks and shedding less profitable lines. The agency began to see railroads sell more and more lines to new carriers and to enter into other arrangements. The premise of the Interstate Commerce Commission ("ICC") in adopting these class exemptions was simple

"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."

Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901,

11 C.C. 2d at 813

In adopting the 1986 exemptions, the ICC noted that they were intended to encompass standard line "spinoff" transactions designed to preserve rail service and avoid the abandonment alternative. The ICC recognized that extended regulatory reviews of transactions which were uniformly desirable not only was unnecessary but also could prevent positive arrangements because of regulatory delay. Specifically, the ICC said that the class exemptions were "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.” Id at 811 (emphasis added)

Consistent with the new statutory objectives to reduce regulation and grant exemptions from regulation, the agency creatively achieved these objectives by adopting the class exemptions Id The class exemptions eliminated regulatory hurdles to short line spin offs and helped preserve rail service on marginal lines “This exemption is designed to reduce regulatory delay and costs ” Id Hundreds of new, bona fide, short line railroads were created that preserved individualized customer service, employment opportunities, and competitive rates to local shippers Id at 813; Class Exemption for the Acquisition and Control of Rail Lines Under 49 U S C § 10901, 4 I C.C 2d 822, 822 (1998). (“[O]ur class exemption procedures have been very successful overall New carriers created under the exemption have preserved service, jobs, and rail investment ”) Indeed, the railroads’ experience is that, in the overwhelming number of cases, transfer of lines to short line operators has led to increased customer service and traffic growth

C. The Class Exemptions Under Section 10901 and 10902 Are Being Abused By Parties Whose Primary Objective Is Something Other Than Providing Rail Service.

Unfortunately – and regrettably – over the past several years, a growing number of parties have viewed the class exemptions under sections 10901 and 10902 as regulatory loopholes to obtain an advantageous legal status for purposes other than rail service – a use never intended by the STB or its predecessor. This abuse of process should not be allowed to continue.

Today, more and more entities that have no intent of operating a true common carrier railroad are invoking the class exemption for entirely different purposes. These controversial proposals have quite rightly attracted much public and congressional

criticism Criticisms include allegations that new operations are designed for purposes other than rail operations, including to.

- Avoid local permit requirements for Municipal Solid Waste and Construction and Demolition debris;
- Demand privileges from regulated rail carriers, such as a share of revenue or interchange rights;
- Frustrate the terms of a private contract,
- Avoid condemnation of property by local government; and
- Gain status for security guard operations as "Railroad Police."

Using the class exemption process, these entities can lay claim to the same legal status as a "railroad" -- as a bona fide short line railroad, a regional railroad, or a Class I -- without any meaningful opportunity for review by the public or the STB

Consider the following recent examples in this regard In 2005, the STB rejected a notice of exemption filed by Northeast Interchange Railway, LLC, where NIR sought rail carrier status by acquiring a private sidetrack, a track that had previously been used -- like most private sidetracks -- to switch cars to and from a CSXT track. This new "railroad" was said to be all of 1,600 feet long, and it was clearly anticipated that CSXT would continue to operate exactly as it had in the past. NIR also was acquiring a facility that loaded construction and demolition debris and that had been declined a new zoning permit by the Village of Croton-on-Hudson In the STB's words:

"The Village raises concerns about the nature of the handling that the waste material would receive at the site (which, it believes, will constitute processing, rather than transloading), whether NIR would be operating as a common carrier by railroad (rather than as a private shipper of waste), and whether the transaction is private track or excepted from our licensing authority under 49 U.S.C. 10906 on the ground that the track is switching or spur track. Under these circumstances, we conclude that our class exemption procedure is not appropriate for considering NIR's proposed transaction, and we will reject its notice "

Northcast Interchange Railway, LLC – Lease & Operation Exemption – Line in Croton-on-Hudson, NY, STB Finance Docket No. 34734 (STB served Nov 18, 2005) at 4-5

Federal preemption of local efforts to regulate interstate rail transportation is an important, even essential, element of our national transportation policy. But invoking carrier status where no carrier truly exists is not

In 2004 and 2005, the STB dealt with two class exemptions filed by the Northern Central Railroad that caused the State of Maryland concern. Apparently, the State had an ongoing dispute with the Northern Central Railroad's owner, Mr. Riffin, about an office building. In its petition to revoke the first exemption filed by Northern Central Railroad, the State, based on information that the State already had but which was not included in the original notice, claimed that NCR was using the STB's preemptive jurisdiction to circumvent state law. In particular, the State claimed that NCR was obstructing the efforts of the Maryland Department of the Environment to conduct indoor air quality sampling in an office building operated by Mr. Riffin. Riffin d/b/a Northern Central Railroad – Acquisition & Operation Exemption – in York County, PA, & Baltimore, MD, STB Finance Docket No. 34484 (STB served Apr 20, 2004) at 2. The STB revoked the notice.

In its decision revoking the second notice, the STB was blunt

“Here, it appears that NCR is attempting to use the cover of Board authority allowing rail operations in Pennsylvania to shield seemingly independent operations and construction in Maryland from legitimate processes of state law. the Board is concerned that Riffin may be using the licensing process in improper ways ”

Riffin d/b/a Northern Central Railroad – Acquisition & Operation Exemption – in York County, PA, STB Finance Docket 34552 (STB served Feb 23, 2005) at 6 This was the right decision, but it took a proceeding, and considerable expenditure of effort by the State of Maryland to get that result. If the State had not been aware of Mr. Riffin's

activities prior to the filing at the STB, the exemption likely would have become effective and resulted in more legal battles to revoke it

In 2003, the STB's Office of Compliance and Enforcement initiated an investigation of the bona fides of the railroad status of Comrail International Railroad ("Comrail") Contacts over a period of years by various agencies, including the Illinois State Police and the Federal Railroad Administration, raised questions about whether Comrail was genuinely interested in serving as a common carrier railroad or was using its railroad status to establish a police force for other purposes Comrail had used the class exemptions to become a railroad Recently, the Atlantic and Pacific Railroad was also investigated for abusing the process to become a railroad in order to establish a police force, which it apparently intended to operate as a commercial security firm ~ just another example of misuse of the class exemption process

D. Two Additional Proposals Should Be Included in the Final Rule to Address Such Abuses.

As the class exemption process is currently structured, and as the previous examples illustrate, the STB has few procedural avenues for addressing possible abuse in the first instance The agency can take last minute action (e.g , by responding to a request for a stay or issuing a housekeeping stay) before a notice of exemption takes effect or to allow time to consider petitions to revoke Also, the STB can revoke the class exemption and require an applicant to pursue a petition for exemption See Riverview Trenton Railroad – Acquisition & Operation Exemption – Crown Enterprises, Inc., STB Finance Docket No. 33980 (STB served Feb 15, 2002).

To address these abuses, the STB should have more at its disposal than after-the-fact responses. The AAR proposal would address this need by providing that more

information be provided in the first instance and by making refinements as to who can pursue the process.

In this way, the public would have enough information to participate meaningfully. And the proposal would ensure that a notice process remains available for legitimate transactions that serve legitimate rail transportation purposes. At the same time, the proposal preserves much as possible the class exemptions for the situations they were intended to address.

i. The STB Should Adopt a Procedural Requirement To Provide More Information In a Notice of Exemption Under Sections 10901 and 10902

To make the public's participation meaningful, the STB should require users of the class exemption process under sections 10901 and 10902 to provide modestly more information than it does now. This information would provide a more complete picture of the proposed acquisition and operation. It would eliminate confusion and prevent the filing of stay requests and petitions to revoke based on inaccurate information or an incomplete understanding of the proposed acquisition or operation.

Specifically, in 49 C.F.R. §§ 1150.33 and 1150.43, the STB should require that the notice include a statement as to whether the subject property (1) has been and is currently being operated as a line of railroad subject to the STB's abandonment authority¹, (2) is currently owned or leased by a rail carrier subject to the STB's jurisdiction; and (3) has not been abandoned pursuant to 49 U.S.C. §§ 10502 and 10903. It also should require the notice to state (1) what customers will be served, (2) how those customers will be served, (3) with what locomotives and crews they will be served,

¹ The term "line of railroad subject to the STB's abandonment authority" is meant to distinguish bona fide railroad lines from auxiliary trackage covered by 49 U.S.C. § 10906 or private trackage.

(4) whether a police force will be established; and (5) whether the entity seeking the authority at issue intends to serve or provide facilities for the transportation or transloading of municipal solid waste, construction and demolition debris, or other waste. An example of how the STB might implement this suggestion is provided in Appendix A.

The additional information that the AAR suggests should be included in a notice of exemption, are minor and not overly burdensome. An operator that cannot provide this kind of information is ill-prepared to participate in the national rail network. Accordingly, the notice of exemption would remain a meaningful and expedient regulatory process that will continue to facilitate the preservation of rail service

While not the subject of the present Notice of Proposed Rulemaking, the STB could require in 49 C F R § 1121.3 that petitions for exemption to acquire and operate rail line also include additional information. This additional information could help the STB and the public assess whether a petition is being sought for legitimate rail purposes. The information required might be similar to the information the Director of the Office of Compliance and Enforcement required from Comrail, and similar to the information suggested above in connection with notices of exemption, and could include some or all of the following:

- Whether the rail property has been operated as a line of railroad subject to the STB's abandonment authority and whether it is currently being operated as such;**
- Whether the rail property is owned or leased by a rail carrier subject to the STB's jurisdiction;**
- Whether the rail property has been abandoned pursuant to 49 U.S.C §§ 10502 and 10903,**
- Whether and how the railroad facilities will be operated,**
- Whether the entity seeking the authority at issue intends to serve or provide facilities for the transportation or transloading of municipal waste, construction and debris, or other waste;**

- The nature or type of existing and prospective industries (e.g , agriculture, manufacturing, mining, warehousing, forestry, construction and debris transloading, or solid municipal waste transloading) in the area, with general information about the age, size, growth potential and projected rail use of these industries;
 - What equipment will be used to conduct rail operations, including locomotives and car supply arrangements and the party anticipated to conduct such rail operations;
 - The number and types of petitioner's personnel and employees, including engineers, conductors, and non-operations personnel;
 - Whether car hire, interchange, and commercial contracts have been executed with all connecting carriers;
 - Whether the petitioner is or will be a bona fide carrier and has sufficient financial assurance;
 - Whether petitioner intends to employ railroad police; and
 - Whether petitioner has the clear right to occupy and operate on all property necessary to the proposed railroad operation
- ii. **The Board Should Adopt a Procedural Requirement Refining Who Can Use The Class Exemption Process Under Sections 10901 and 10902.**

Also to address the problems created in recent years by an overly aggressive use of the class exemptions under sections 10901 and 10902 for reasons other than to provide rail service, the availability of these class exemptions should be refined. The class exemptions for transactions under sections 10901 and 10902 at 49 C F R. §§ 1150.31(a)(1 & 2) and 1150.41(a & b) should be limited to transactions involving lines of railroad that (1) have been operated as a line of railroad subject to the STB's abandonment authority, (2) are currently owned or leased by a rail carrier providing common carrier service, and (3) have not been abandoned. The class exemption at 49 C F.R. §§ 1150.31(a)(3) and 1150.41(c) should be limited to transactions that change the operator on the line from one carrier subject to the STB's jurisdiction to another carrier subject to the agency's jurisdiction. An example of how the STB might implement this suggestion is provided in Appendix B

Limiting these class exemptions to situations involving rail lines that have been operated as a line of railroad subject to the STB's abandonment authority ensures that the line has been part of the national rail system. This limitation is consistent with the ICC's goal when it first adopted these class exemptions. The ICC was responding to the growing number of lines of railroad subject to the agency's abandonment authority that Class I railroads were spinning off to short lines. The agency sought to create an efficient way to preserve rail service rather than enabling someone simply to purchase some property just to declare itself a railroad for other purposes.

The proposed requirement that the line not be abandoned is self-explanatory. Lines are abandoned for a reason – in such a situation there is generally not enough business on the line to sustain rail operations and no short line or other rail operator has shown much interest in the line. Accordingly, a proposal to acquire and operate an abandoned line should receive a higher level of scrutiny given the proliferation of abuses. For the bona fide new operator, a petition for exemption provides an expedient regulatory process, while simultaneously enabling the STB to determine whether the proposed operation is for legitimate rail reasons or is being pursued for some other purpose.

iii. Summary of the AAR Proposal

The adoption of these proposals would return the class exemptions under sections 10901 and 10902 to their original purpose of preserving rail service on marginal rail lines. At the same time, these changes would prevent the abuses of the class exemption process under these sections that have become far too commonplace.

It is important to note that the AAR proposal would not increase unnecessary regulatory burdens. If a transaction were one of the very few legitimate transactions that

would fall outside the class exemption, it could still be approved quickly, after public participation and review, through the petition for exemption process. For truly non-controversial and deserving projects, the petition for exemption can take as little as 90 days. If a petition for exemption raises issues that require the STB to initiate a proceeding, it almost certainly would not have been a good candidate for the class exemption process in any event.

IV. Temporary Trackage Rights

With respect to the STB's proposal as it relates to the class exemption for temporary trackage rights, the AAR is concerned that it would unnecessarily impede the ability of railroads to quickly make arrangements in emergency situations. Indeed, for temporary trackage rights the notices should be effective immediately.

The STB has noted in a number of situations the importance of its class exemption for temporary trackage rights to permit railroads quickly to respond to events that disrupt rail operations. Most frequently this exemption has been used to permit one railroad to operate over another railroad for a finite period of time to allow the first carrier to complete maintenance projects. These maintenance projects sometimes arise suddenly because of unforeseen events. Railroads must have the ability to implement these temporary trackage rights quickly so that rail traffic can flow with as little disruption as possible. Even the 7-day waiting period for these exemptions under the current rules is too long. Accordingly, the STB should reconsider application of its proposed rulemaking to the temporary trackage rights class exemption at 49 C.F.R. § 1180.2(d)(8). In fact, the public interest would benefit from a notice of exemption filed pursuant to this class exemption becoming effective immediately.

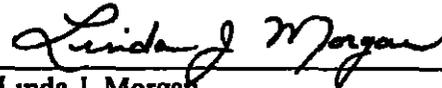
V. Conclusion

The AAR continues to support the exemption process as a way of streamlining regulatory procedures and eliminating unnecessary regulation. We understand the agency's continued commitment to ensuring that its procedures are in the public interest and view this notice of proposed rulemaking in that light. However, the AAR is concerned that the STB's proposal unnecessarily lengthens certain time frames before certain exemptions can become effective and would urge reconsideration of its proposal with this concern in mind.

The AAR, however, would support lengthening of time frames in connection with sections 10901 and 10902 transactions and urge the STB to consider adding to its final rule the AAR's modest proposals concerning eligibility and information to ensure that the process is not abused and continues to fulfill the purpose for which it was originally intended. The AAR also urges the STB to reconsider lengthening the timeframe associated with the temporary trackage rights exemption and in fact to consider making those exemptions effective immediately.

The AAR remains committed to a class exemption process that is not unnecessarily burdensome, yet still fulfills its original mission. We look forward to continuing to work with the STB to that end.

Respectfully submitted,



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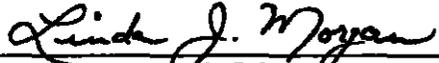
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Attorney for the Association of American Railroads

May 15, 2006

CERTIFICATE OF SERVICE

I, Linda J Morgan, certify that, on this 15th day of May, 2006, I caused a copy of the foregoing document to be served by first-class mail, post prepaid on all parties of record in Ex Parte No 659



Linda J Morgan

APPENDIX A

§ 1150.33 Information to be contained in notice—transactions that involve creation of Class III carriers.

- (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 mileposts of the subject property, including any branch lines, and
 - (4) The total route miles being acquired,
- (f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and
- (g) A statement that the subject property (1) has been operated as a line of railroad subject to the agency's abandonment authority; (2) is currently owned or leased by a rail carrier subject to the agency's jurisdiction; and (3) has not been abandoned pursuant to 49 U.S.C. §§ 10502 and 10903.***
- (h) The customers to be served;***
- (i) A description of how the customers will be served, including whose locomotives and crews will be used to serve the customer;***
- (j) Whether a police force will be established;***
- (k) Whether the entity seeking the authority at issue intends to serve or provide facilities for the transportation or transloading of municipal solid waste, construction and demolition debris, or other waste; and***
- (l) A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III carrier.***

§ 1150.43 Information to be contained in notice for small line acquisition.

(a) The full name and address of the Class III rail carrier 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 mileposts of the subject property, including any branch lines, and

(4) The total route miles being acquired,

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

(g) A statement that the subject property (1) has been operated as a line of railroad subject to the agency's abandonment authority; (2) is currently owned or leased by a rail carrier subject to the agency's jurisdiction; and (3) has not been abandoned pursuant to 49 U.S.C. §§ 10502 and 10903.

(h) The customers to be served;

(i) A description of how the customers will be served, including whose locomotives and crews will be used to serve the customer;

(j) Whether a police force will be established;

(k) Whether the entity seeking the authority at issue intends to serve or provide facilities for the transportation or transloading of municipal solid waste, construction and demolition debris, or other waste; and

(l) A certificate that applicant's projected revenues as a result of the transaction will not result in the creation of a Class II or Class I rail carrier so as to require processing under § 1150 45.

APPENDIX B

§ 1150.31 Scope of exemption.

(a) Except as indicated below, this exemption applies to 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 *from one carrier subject to the agency's jurisdiction to another carrier subject to the agency's jurisdiction to be the operator* 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 at §1180.3(c).

(b) Excluded from this exemption are the following:

(1) Transactions primarily involving rail property which, prior to the transaction, was not a railroad line subject to the agency's abandonment or discontinuance authority under 49 U.S.C. § 10903;

(2) Transactions primarily involving rail property which, prior to the transaction, was not owned, leased or operated by a rail carrier subject to the agency's jurisdiction;

(3) Transactions primarily involving rail property that was previously abandoned pursuant to 49 U.S.C. §§ 10502 or 10903;

(c) Other exemptions that may be relevant to a proposal under this subpart are the exemption for control at § 1180.2(d)(1) and (2), and the securities regulation at 49 C.F.R. part 1175.

§ 1150.41 Scope of Exemption.

(a) Except as indicated in paragraphs (1) through (4) of this subsection, this exemption applies to acquisitions or operations by Class III rail carriers under section 10902. This exemption also includes:

(1)) Acquisition by a Class III rail carrier of rail property, that would be operated by a third party,

(2) Operation by a Class III carrier of rail property, acquired by a third party,

(3) A change in operators on a line *owned or leased by a rail carrier subject to the agency's jurisdiction*; and

(4) Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the acquisition of trackage rights to operate over the line of a third party, that occurs at the time of the purchase.

(b) Excluded from this exemption are the following:

(1) Transactions primarily involving rail property which, prior to the transaction, was not a railroad line subject to the agency's abandonment or discontinuance authority under 49 U.S.C. § 10903;

(2) Transactions primarily involving rail property which, prior to the transaction, was not owned, leased or operated by a rail carrier subject to the agency's jurisdiction;

(3) Transactions primarily involving rail property that was previously abandoned pursuant to 49 U.S.C. §§ 10502 or 10903.