



ASSOCIATION OF
AMERICAN RAILROADS

Law Department
Louis P. Warchot
Senior Vice President-Law
and General Counsel

June 9, 2008

Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: STB Ex Parte No. 673: Information Required in Certain Notices of Exemption

Dear Secretary Quinlan:

Pursuant to the decision served by the Board on October 4, 2007, the American Short Line and Regional Railroad Association and the Association of American Railroads hereby submit the attached Consensus Position in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 673

**INFORMATION REQUIRED IN
CERTAIN NOTICES OF EXEMPTION**

**CONSENSUS POSITION OF AMERICAN SHORT LINE AND
REGIONAL RAILROAD ASSOCIATION AND ASSOCIATION OF AMERICAN
RAILROADS**

Keith Borman
American Short Line and
Regional Railroad Association
Suite 7020
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 585-3448

*Counsel for the American Short Line
and Regional Railroad Association*

Louis P. Warchot
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2502

Kenneth P. Kolson
10209 Summit Avenue
Kensington, M.D. 20895

*Counsel for the Association of American
Railroads*

Dated: June 9, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 673

**INFORMATION REQUIRED IN
CERTAIN NOTICES OF EXEMPTION**

**CONSENSUS POSITION OF AMERICAN SHORT LINE AND
REGIONAL RAILROAD ASSOCIATION AND ASSOCIATION OF AMERICAN
RAILROADS**

On October 4, 2007, the Surface Transportation Board (the “Board”) initiated a rulemaking proceeding to amend certain of the Board’s regulations to increase the information required in a Notice of Exemption and to examine whether the Board should reexamine certain precedent related to proposals to initiate new rail service. The Board noted that it would “prepare a Notice of Proposed Rulemaking, as the circumstances warrant, and ... seek public comments on any such Board proposal.” In furtherance of long-standing Board admonition for parties to seek common ground and to broaden consensus within the industry, the American Short Line and Regional Railroad Association and the Association of American Railroads, on behalf of itself and its members, (collectively “Petitioners”) have developed a consensus position on the issues raised by this Rulemaking, and propose that consensus position to the Board for its consideration.

Underlying the consensus position are several premises. First, this Rulemaking proceeding should not result in a reregulation of the short line industry. The

several important policy reasons for making the effort to create short lines, and the significant contribution of the short lines to the nation's transportation system generally and the nation's railroad transportation system in particular remain as vibrant today as they were when the notice of exemption process was created.

Second, the additional information sought to be included in a notice of exemption should be placed there not to examine, and potentially second-guess, the business and operating plans of new short line efforts. Instead, this information should provide the Board and interested other parties one or more "red flags" to attempts to misuse the Board's streamlined notice of exemption proceedings. If there are no "red flags", the notice of exemption process should be permitted to proceed without interruption.

Third, if one or more "red flags" appears in a notice of exemption, the Board or other interested parties should be able to take a harder look at the proposal. If the Board, after an initial inquiry, is satisfied with the proposal put forth, Petitioners intend for the notice of exemption process to proceed. But if the Board, after an initial inquiry, is not satisfied with the proposal put forth, Petitioners want to ensure that the decisional structure is in place that would allow the Board to take that harder look, which in all likelihood would be outside the notice of exemption process.

The Petitioners are aware of efforts to progress Federal legislation in order to address issues related to the creation of several purported railroads more interested in developing municipal solid waste and construction and demolition transload facilities than performing railroad transportation. The Petitioners believe that the effort to separate and examine proposals that involve the creation of such facilities from bona fide rail

common carrier transportation services would be better performed at the Board. The Petitioners have developed the proposal submitted today in an effort to provide the Board and interested parties both the information and the tools they need to cull out sham proposals.

In light of the foregoing, the Petitioners submit to the Board a proposal, set forth in Appendix A, for its consideration in developing the Notice of Proposed Rulemaking. Specifically, with regard to proposals under 49 U.S.C. Section 10901, the proposal is as follows:

(1) Amend 49 C.F.R. Section 1150.31, Scope of Exemption, to specifically exclude transactions for the acquisition or operation of trackage that is currently a “plant railroad” as described in FRA regulations, 49 C.F.R. Part 209, Appendix A. These are private railroads whose operations are entirely confined to an industrial installation, such as in a steel mill, and leased trackage immediately adjacent to the industry. These railroads are excluded from the reach of Federal Railroad Administration (“FRA”) regulations, are not part of the general railroad system. The Petitioners do not mean to include railroads serving several customers in industrial parks as a “plant railroads,” as many of these railroads are bona fide railroads subject to STB and FRA regulations.

(2) Amend 49 C.F.R. Section 1150.33(c), with reference to certain Information to be contained in a notice – transactions that involve creation of Class III carriers, in two ways. First, if an agreement on the underlying transaction creating the short line railroad is not yet complete, the proposed amendment would require the applicant to request the effectiveness of the exemption to be withheld until an agreement

has been reached. Second, when that agreement has been reached, the applicant would be required to notify the Board. This amendment would leave undisturbed the current practice of, at times, submitting a notice of exemption to the Board prior to reaching a final agreement in order to allow a new short line enterprise to begin operations at the soonest possible time, but withholding the imprimatur of an effective notice of exemption from sham railroads that are intent on misusing the Board's regulatory procedures.

(3) Add a new 49 C.F.R. Section 1150.33(g), which would require the applicant in a transaction involving the creation of a Class III carrier to state whether any of the property that will form the Class III railroad operating property: (a) is a "Line of Railroad" subject to the Board's abandonment authority; (b) is currently owned or leased by a rail carrier providing transportation subject to the jurisdiction of the Board; or (c) has recently been used to originate or terminate traffic to multiple customers. The Petitioners believe that a short line created from trackage that would fit into one of these categories is substantially less likely to be a sham railroad.

(4) For short lines created only from private trackage or ancillary trackage (yard, industrial, spur or other trackage described in 49 U.S.C. 10906) not meeting the criteria set forth in new 49 C.F.R. Section 1150.33(g), the Petitioners would require certain additional information to be submitted. Petitioners would add a new 49 C.F.R. Section 1150.33(h), which would require the applicants in a transaction involving the creation of a Class III carrier to: (a) identify customers capable of being served by rail from the subject trackage, regardless of whether those customers have agreements or have expressed an interest in receiving such service; (b) whether the new short line

intends to operate any locomotives;¹ (c) whether the new short line will have full time employees subject to Railroad Retirement and Railroad Unemployment Insurance Acts (“Railroad Retirement”) and the Federal Employers Liability Act (“FELA”); (d) a description of the rail transportation services (other than pickup, delivery, or movement of freight cars) that the applicant intends to perform; and (e) whether the applicant or an affiliate intends to provide solid waste transloading services.

The Petitioners recognize that many legitimate short line railroads are created, for example, entirely from an industrial park or rail yard, and that these new short line railroads will serve multiple customers. The Petitioners desire the additional information to be submitted to raise “red flags” with regard to applicants that will have only ancillary tracks, that will not be capable of directly and physically serving more than one customer, and that might not be even operating a locomotive or having full time employees subject to traditional railroad retirement and employment acts. Not all of these non-traditional railroads will be sham railroads, but the sham railroads are likely to be found primarily among the small group of applicants that are unable to provide clear responses to these additional information requests.

Further, the regulations are designed to elicit information on what services the applicant itself intends to perform. Often submissions to the Board are drafted in such a manner as to preclude the Board and third parties from discerning whether or not the applicant will conduct the rail transportation services typically associated with

¹ The commonly accepted regulatory definition of a “locomotive” can be interpreted as including trackmobiles and other large vehicles designed to move rail cars on industrial tracks which are not standard locomotives. The suggested regulation is intended to have the applicant describe the anticipated equipment with sufficient specificity that one could discern whether or not the applicant anticipates operating as a general system railroad rather than an industrial switching operation.

railroad operations – the pickup, delivery and movement of freight cars. Current regulations, moreover, do not require the applicant to inform the Board if other operations –not normally considered as related to rail service – are anticipated.²

(5) The Petitioners would modify 49 C.F.R. Section 1150.34 to include the additional information submitted as described above.

The Petitioners propose to make corresponding changes in the regulations for transactions governed by 49 U.S.C. Section 10902 (specifically, 49 C.F.R. Sections 1150.41 and 1150.43).

Simply raising a “red flag” is not enough, however. The Petitioners are concerned that the so-called bright line test in Effingham can provide a safe harbor for applicants that acquire ancillary trackage or private trackage and express an intention to perform common carrier service over that trackage, regardless of its physical ability to do so. While the Board may not need to overrule Effingham, the Board should make clear that Effingham only applies if the applicant will actually be performing common carrier service. In the past, the Board has often accepted without question highly speculative, unsupported claims from applicants about the common carrier services they “could” perform and the shippers who “might” use those services. Given the potential for abuse in

² See, Williams Rail Services LLC v. Stewart, 2007 WL 2471198, August 27, 2007 (involving an unsuccessful attempt by a new railroad to claim ICCTA preemption for operating gambling machines in parked passenger rail cars contrary to South Carolina state gambling laws). This railroad had been created earlier that year from a former rail spur track under a notice of exemption in STB F.D. 34988, Williams Rail Service, LLC – Acquisition and Operation Exemption – Lines Owned by Duchess Investments, served February 27, 2007. Not surprisingly, Williams’ notice of exemption (filed January 30, 2007) failed to mention that one of its intended “transportation” activities would be the operation of a gambling casino. Under the proposed regulation, if an applicant like Williams intended, at the time it filed its notice of exemption, to operate a gambling casino as rail “transportation” entitled to ICCTA preemption, that activity would have to be disclosed in the notice.

sham railroad transactions, the Board should not be accepting such claims at face value. That more searching review is particularly important in the transactions not covered by paragraph 'g' of the proposed rule, since these are the transactions in which "sham railroad" abuses are most likely to arise.

The Board should make clear in adopting its rules in this proceeding that it: (1) will carefully review the notices of exemption in these transactions to ensure that they are actually proposals for common carrier railroads and (2) reserves the right, on its own motion or in response to questions raised by interested parties, to institute a proceeding to consider this issue in particular cases.

Therefore, the Petitioners urge the Board to determine to adopt the proposed regulations submitted by Petitioners, and to ensure that its decisional structure is sufficient to permit the Board, on its own motion, or pursuant to request by other interested parties, to look behind the information required to be submitted in the notice of exemption to better weed out sham transactions in a more efficient and effective manner.

Respectfully Submitted,



Keith Borman
American Short Line and
Regional Railroad Association
Suite 7020
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 585-3448

*Counsel for the American Short Line
and Regional Railroad Association*

Dated: June 9, 2008



Louis P. Warchot
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2502

Kenneth P. Kolson
10209 Summit Avenue
Kensington, M.D. 20895

*Counsel for the Association of American
Railroads*

APPENDIX A

§ 1150.31 Scope of Exemption

(a) 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:

- (i) 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 49 CFR 1180.3(c); or
- (ii) to acquisition or operation of rail property consisting entirely of property which is currently a "plant railroad" as described in 49 CFR Part 209, Appendix A

(b) 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 Part 1175.

* * * *

§ 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, if an agreement has not yet been reached, whether there are on-going negotiations that the applicant anticipates will result in details about when an agreement and a statement that: (1) the exemption sought should not be effective until such an agreement is reached, and (2) that notice that an agreement has been reached will be submitted to the Board 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 as to whether the subject rail property meets the following criteria:
 - (1) The rail property is currently a line of railroad subject to the Board's abandonment authority under 49 U.S.C. §10903;
 - (2) The rail property is currently owned or leased by a rail carrier providing transportation subject to the jurisdiction of the Board; or
 - (3) The rail property has, within the twelve calendar month period preceding the filing of the notice, originated or terminated local freight traffic from two or more customers having separate facilities on or adjacent to the subject rail property.
- (h) (This requirement is not applicable to rail property meeting one or more of the criteria specified in 49 CFR § 1150.31(g)). A statement containing sufficient information to show that the subject property will be actually be operated as a common carrier railroad, and that the notice is not being

filed for purposes unrelated to rail transportation. The statement should, at a minimum, contain the following information:

- (1) Identifying the customers capable of direct rail service from the subject rail property;
 - (2) Whether the applicant will acquire and operate locomotives, and if so, a description of the locomotives to be acquired and operated, including the general categories of locomotives to be operated (trackmobiles; dual rail-highway use equipment; switch (shunter) engine; capable of line haul movement of freight cars (movement of freight cars other than for the purpose of spotting, loading or assembly of a train));
 - (3) Whether the applicant will have full time employees subject to the Railroad Retirement and Railroad Unemployment Insurance Acts and the Federal Employers Liability Act.
 - (4) A description of the rail transportation services (other than pickup, delivery or movement of freight cars) the applicant intends to perform, and
 - (5) Whether the applicant, or any entity affiliated with the applicant, intends to serve or provide facilities for the transportation or transloading of municipal solid waste, construction and demolition debris, or other waste.
- (g) i) A certificate that applicant's project revenues do not exceed those that would qualify it as a Class III carrier.

CERTIFICATE OF SERVICE

I hereby certify on this 9th day of June, 2008, I served by first class mail, postage prepaid, a copy of the forgoing on the following

John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9241

Jonathan M. Broder
Consolidated Rail Corporation
2001 Market Street
Philadelphia, PA 19103-7044

Gordon P. Macdougall
1025 Connecticut Avenue, NW
Suite 919
Washington, DC 20036

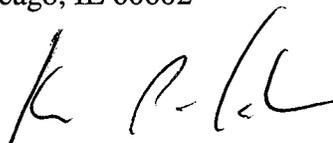
Daniel R Elliott III
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107-4250

Kevin P. Auerbacher
New Jersey Department of
Environmental Protection
25 Market Street, PO 093
Trenton, NJ 08625

Vincent Caruso, Jr.
BP Rail Corporation
22 Somerset Place Clifton, NJ 07012

Thomas F. Mcfarland
Thomas F. Mcfarland, P.C.
208 South Lasalle St
Suite 1890
Chicago, IL 60604

David C. Dillon
Dillon & Nash Ltd.
111 West Washington Street
Suite 719
Chicago, IL 60602



Kenneth P. Kolson