

STB EX PARTE NO. 282 (SUB-NO. 20)

RAILROAD CONSOLIDATION PROCEDURES—EXEMPTION FOR
TEMPORARY TRACKAGE RIGHTS

Decided May 9, 2003

The Board adopts a class exemption for trackage rights that, by their terms, are for overhead operations only and expire on a date certain, not to exceed 1 year from the effective date of the exemption.

BY THE BOARD:

By decision served February 10, 2003, and published in the *Federal Register* at 68 Fed. Reg. 6695 (2003) (*February Decision*), we proposed to amend our rules at 49 CFR part 1180 to adopt a new class exemption to allow rail carriers to obtain temporary authorization of trackage rights that, by their terms, expire on a date certain. This class exemption would permit the authorization of trackage rights for a limited period of time. Such authorization would terminate automatically on the date specified without the need to separately obtain discontinuance authority.

In our *February Decision*, we requested comments on our proposed exemption. Having considered the comments submitted, we will adopt the class exemption with two modifications, as explained below.

BACKGROUND

As discussed in our *February Decision*, the acquisition by a rail carrier of trackage rights over a railroad line owned or operated by another rail carrier may be carried out only with the approval and authorization of the Board. See 49 U.S.C. 11323(a)(6). However, under 49 U.S.C. 10502, we must exempt a person, class of persons, or a transaction or service from our regulation when we find that: (1) regulation is not necessary to carry out the Rail Transportation Policy of 49 U.S.C. 10101 (RTP), and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from an abuse

of market power. We also explained that we may exempt not only a single transaction, but an entire class of transactions in appropriate situations where the statutory findings of 49 U.S.C. 10502 can be made.¹

In our *February Decision*, we explained that, in *Railroad Consolidation Procedures*, 1 I.C.C.2d 270 (1985), our predecessor, the Interstate Commerce Commission (ICC),² adopted a class exemption for trackage rights that are based on written agreements and not sought in responsive applications in rail consolidation proceedings. See 49 CFR 1180.2(d)(7).³ We also explained that the authorization obtained under this class exemption remains in effect indefinitely, regardless of any provision in the trackage rights agreement relating to duration. We also noted, however, that, in recent years, parties have sought authorization for trackage rights that were temporary in nature and intended to expire on a certain date. Those requests often involved carriers that were about to perform extensive maintenance over portions of their heavily used track.⁴ Carriers have usually sought authorization for trackage rights of finite duration in a two-step process – first filing a notice of exemption under section 1180.2(d)(7) for authorization of the trackage rights and subsequently filing a request that we allow that authorization to expire on a specific date.⁵ We pointed out that, in the past, we have handled these requests on a case-by-case basis under 49 U.S.C. 10502.

We solicited comments from interested persons on our proposal. Comments were filed by SEDA-COG Joint Rail Authority (JRA), the Association of American Railroads (AAR), and United Transportation Union–General Committee of Adjustment (UTU–GCA).

¹ A class exemption does not mean that a particular transaction is beyond our reach. Rather, it is a streamlined means by which a carrier may obtain an authorization without going through a full regulatory process in the types of cases to which the class exemption applies.

² Under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), the ICC was abolished and its remaining rail regulatory functions were transferred to the Board, effective January 1, 1996.

³ Published in the *Federal Register* at 50 Fed. Reg. 15,751. These rules were subsequently amended in 1986, 1993, and 1997.

⁴ Other requests for temporary trackage rights have involved the need to accommodate the short-term storage of rail cars or to make provision for line relocation and rehabilitation projects, as well as a variety of freight, intercity passenger and commuter operations.

⁵ This second filing has been either a petition seeking a partial revocation of the class exemption, or a petition seeking an exemption to permit the trackage rights operations to remain in effect only on a temporary basis. Regardless of the form, we have dealt with each such filing as a request to permit the authorization to expire on a specific date.

JRA, a municipal authority that owns five rail lines in central Pennsylvania, states that it supports the proposal to the extent that it would permit authorization of temporary trackage rights agreements that are entered into specifically for maintenance and repair purposes and that involve only overhead traffic. JRA opposes allowing use of the proposed class exemption for any agreements involving local service or connections with other carriers on which shippers may rely. JRA urges the Board to continue requiring that such agreements remain effective until the Board specifically acts to authorize their termination.

AAR supports the proposal, arguing that requests for authorization of short-term, temporary trackage rights have been limited in scope, have been unopposed, will not result in market power abuse, will promote the RTP, and will benefit carriers, shippers, the general public, and the Board. AAR, however, suggests a revision to our proposed class exemption. AAR asserts that some “temporary agreements,” even those with definite termination dates, could involve lengthy time periods and carry significant ramifications beyond mere operational or maintenance convenience. AAR is concerned that the termination of such agreements may not necessarily be limited in scope and may have market implications. In light of its concern that STB review of such agreements on a case-by-case basis may be necessary, AAR suggests that a 1-year term limit be placed on any temporary trackage rights authorized under the new class exemption. AAR says that this would draw an appropriate line between short-term trackage rights, the focus of this new class exemption, and trackage rights involving a broader range of purposes, which would remain eligible for processing under the current class exemption at 49 CFR 1180.2(d)(7).⁶

UTU-GCA opposes adoption of our proposal and raises various concerns. First, it argues that no need exists for the proposed class exemption because the current two-step process under the existing class exemption is adequate. UTU-GCA also argues that, because the proposed class exemption would not require a railroad to file a separate request for discontinuance authority to terminate trackage rights operations, the proposal would deprive employees of the mandatory labor protection that we normally impose on discontinuance transactions. *See Oregon Short Line R.R.—Abandonment—Goshen*, 354 I.C.C. 76

⁶ According to AAR, at the end of the 1 year, parties could either file for a new authorization to extend the trackage rights for a period up to 1 year under the new class exemption or pursue an individual exemption.

(1977), modified, 360 I.C.C. 91 (1979).⁷ Finally, if we adopt our proposal, UTU-GCA asks that any authority granted under the new class exemption be limited to 30 days' duration and to overhead operations.

DISCUSSION AND CONCLUSIONS

We conclude that our proposed rule should be adopted, with two limitations based on the comments we received. The overall record before us supports our conclusions in the *February Decision* that there is a need for a class exemption for authorization of temporary trackage rights, and that carriers, shippers, and the general public will benefit from a class exemption from 49 U.S.C. 11323(a)(6) to permit authorization, for a limited period of time, of trackage rights that by their terms expire on a date certain. We further conclude that this proposal is consistent with the exemption criteria at 49 U.S.C. 10502.⁸

Accordingly, we are adding an eighth category of exempt transactions to our rail consolidation regulations by amending 49 CFR part 1180 to add new sections 1180.2(d)(8) and 1180.4(g)(2)(iii) and (iv). Consistent with the regulations in part 1180, we will require carriers invoking this new exemption to submit the information specified at 49 CFR 1180.4(g)(1)(i).⁹ In addition, the caption summary required in connection with this proposed class exemption must

⁷ Under 49 U.S.C. 10502(g), in granting exemptions, we may not relieve a carrier of its obligation to protect employees.

⁸ As explained in our *February Decision*, at 3, individual approval of such transactions does not appear necessary to carry out the goals of the RTP. Rather, exempting such proposals as a class would promote the RTP by eliminating the need to file a second pleading seeking discontinuance when the agreement expires, thereby minimizing regulation of the rail system (49 U.S.C. 10101(2)), promoting the continuation of a sound rail system by facilitating the process of line repair and maintenance (49 U.S.C. 10101(4)), and promoting coordination between rail carriers (49 U.S.C. 10101(5)). Moreover, the proposed class exemption would also reduce the regulatory uncertainty of the parties, facilitate the parties' ability to reach agreement on temporary trackage rights, reduce the filing fees required of carriers seeking such rights, and encourage more use of trackage rights in general and temporary trackage rights in particular. 49 U.S.C. 10101(7), (15). In addition, the proposed class exemption is limited in scope because we are limiting the class of exempted transactions as well as the duration of our authorization. Moreover, regulation of this class of temporary trackage rights is not necessary to protect shippers from an abuse of market power, primarily because the class exemption would not reduce competition among carriers on the line.

⁹ This information includes the names of the applicants, a summary of the nature of the proposed transaction, a contact person, the proposed time schedule for consummation, the purpose to be accomplished, any other supporting statements deemed material by applicants, the level of labor protection to be imposed, a list of the states in which any part of the property of each applicant carrier is located, and a map showing the involved lines.

specify the date the authorization will expire. 49 CFR 1180.4(g)(2)(iii). The carrier must submit an executed copy of the written trackage rights agreement. 49 CFR 1180.6(a)(7)(ii).

We will impose standard employee protective conditions on all temporary trackage rights exemptions. As with other grants of trackage rights, approval of temporary trackage rights agreements under 49 U.S.C. 11323 must include the employee protective conditions set forth in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

Although separate discontinuance authority is required to terminate operations under the current class exemption, 49 CFR 1180.2(d)(7), discontinuance authority will not need to be separately obtained to terminate operations under the proposed class exemption. We conclude that this requirement of a separate filing is unnecessary under the new class exemption, 49 CFR 1180.2(d)(8). In these cases, the authority to exercise trackage rights temporarily, only until a particular date, implicitly includes the authority to discontinue service on that date.

In response to UTU-GCA's concerns, we stress that all transactions authorized under these rules will be subject to labor protective conditions as specified in 49 U.S.C. 11326. Under 49 CFR 1180.4(g)(1)(i) and (ii), which are applicable to the new class exemption, the carrier's notice of exemption must indicate the level of labor protection to be imposed, and the notice that the Board publishes in the *Federal Register* will indicate the labor protection required. The new rules are not intended to, and should not be interpreted to, diminish any rail employee's right to any labor protection available under the law. Of course, the application of labor protection to a particular situation will be determined in the first instance by a claim filed with the carrier by the employee or, if such claim is denied by the carrier, by arbitration.

As indicated, commenters have suggested limiting our original proposal in various ways. UTU-GCA and JRA are concerned about extending the exemption to local trackage rights. Because there is no specific support on the record for inclusion of local trackage rights in the new class exemption, and because the vast majority of past temporary trackage rights situations have involved the use of overhead rights only, we will confine the new class exemption to overhead trackage rights.

AAR and UTU-GCA call for time limits on grants of temporary trackage rights – the AAR for 1 year and the UTU-GCA for 30 days. We believe the

latter period to be too short to enable carriers to make effective use of the class exemption, and we see no basis in any of the comments for limiting such rights to a period shorter than a year. Therefore, we will adopt a 1-year limit in our final rules.

However, in light of the two modifications discussed above, we see no need to further restrict the use of any temporary rights granted under the new class exemption to maintenance and repair only. We believe that a "broad use" policy for such rights would be beneficial by affording carriers the flexibility to make increased use of such rights in the future. Accordingly, the purposes for which these rights may be used will not be restricted.

The class exemption for authorization of temporary trackage rights and related rules, modified as discussed herein, will be adopted.

By a separate decision in these proceedings, served concurrently with our *February Decision*, the Director of the Office of Proceedings has certified that this rule would not have a significant impact on a substantial number of small entities. No comments have been filed in support of a different conclusion. We affirm that finding here.

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

It is ordered:

1. Our regulations at 49 CFR 1180 are amended as set forth in the Appendix to this decision.
2. Notice of this decision will be published in the *Federal Register* on May 23, 2003.
3. This decision will be effective on June 22, 2003.

By the Board, Chairman Nober and Commissioner Morgan.

APPENDIX

For the reasons set forth in the preamble, the Surface Transportation Board amends part 1180 of title 49, chapter X, of the *Code of Federal Regulations* as follows:

PART 1180—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES.

1. The authority citation for Part 1180 continues to read as follows:

AUTHORITY: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, and 11323-11325.

2. Amend § 1180.2 by revising the first sentence of paragraph (d) introductory text and by adding a new paragraph (d)(8) to read as follows:

§ 1180.2 Types of transactions.

* * * * *

(d) A transaction is exempt if it is within one of the eight categories described in paragraphs (d)(1 through 8) of this section. * * *

* * * * *

(8) Acquisition of temporary trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are: (i) based on written agreements, (ii) not filed or sought in responsive applications in rail consolidation proceedings, (iii) for overhead operations only, and (iv) scheduled to expire on a specific date not to exceed 1 year from the effective date of the exemption. If the operations contemplated by the exemption will not be concluded within the 1-year period, the parties may, prior to expiration of the period, file a request for a renewal of the temporary rights for an additional period of up to 1 year, including the reason(s) therefor. Rail carriers acquiring temporary trackage rights need not seek authority from the Board to discontinue the trackage rights as of the expiration date specified under

49 CFR 1180.4(g)(2)(iii). All transactions under these rules will be subject to applicable statutory labor protective conditions.

3. Amend § 1180.4 by adding new paragraphs (g)(2)(iii) and (iv) to read as follows:

§ 1180.4 Procedures.

* * * * *

(g) * * *

(2) * * *

(iii) To qualify for an exemption under §1180.2(d)(8) (acquisition of temporary trackage rights), in addition to the notice, the railroad must file a caption summary suitable for publication in the *FEDERAL REGISTER*. The caption summary must be in the following form:

6 S.T.B.

SURFACE TRANSPORTATION BOARD

Notice of Exemption

STB Finance Docket No.

(1)—Temporary Trackage Rights—(2)

(2) (3) to grant overhead temporary trackage rights to (1) between (4).
The temporary trackage rights will be effective on (5). The authorization
will expire on (6).

This notice is filed under §1180.2(d)(8). Petitions to revoke the
exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing
of a petition to revoke will not stay the transaction.

Dated:

By the Board.

[Insert name]

Secretary.

The following key identifies the information symbolized in the
summary.

- (1) Name of the tenant railroad.
- (2) Name of the landlord railroad.
- (3) If an agreement has been entered use “has agreed,” but if an
agreement has been reached but not entered use “will agree.”
- (4) Describe the temporary trackage rights.
- (5) State the date the temporary trackage rights agreement is proposed
to be consummated.
- (6) State the date the authorization will expire (not to exceed 1 year
from the date the trackage rights will become effective).

(iv) The Board will publish the caption summary in the *FEDERAL REGISTER* within 20 days of the date that it is filed with the Board. The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of an exemption.

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