

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 282 (Sub-No. 21)

PETITION FOR RULEMAKING – RAILROAD CONSOLIDATION PROCEDURES –
EXEMPTION FOR EMERGENCY TEMPORARY TRACKAGE RIGHTS

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

On October 9, 2020, the Association of American Railroads (“AAR”), on behalf of its freight railroad members, petitioned the Surface Transportation Board (“STB” or “Board”) to initiate a rulemaking proceeding to establish a new emergency temporary trackage rights class exemption.¹ Per the petition, the exemption could be invoked in specific situations and would allow emergency temporary trackage rights to take effect immediately, without need for the 30-day notice requirement under 49 C.F.R. § 1180.4(g)(1). On November 4, 2020, Samuel J. Nasca, for and on behalf of SMART-Transportation Division-New York State Legislative Board (“SMART-TDNY”), filed a reply in opposition to AAR’s petition.² On February 5, 2021, the Board instituted a proceeding on the petition, and on May 28, 2021, the Board issued its notice of proposed rulemaking (“NPRM”) which set forth a proposed new emergency temporary trackage

¹ See Petition for Rulemaking of AAR, *Petition for Rulemaking—Railroad Consolidation Procedures—Exemption for Emergency Temporary Trackage Rights*, EP 282 (Sub-No. 21) (Oct. 9, 2020) (“Petition”).

² SMART-TDNY, *Petition for Rulemaking—Railroad Consolidation Procedures—Exemption for Emergency Temporary Trackage Rights*, EP 282 (Sub-No. 21) (Nov. 4, 2020).

rights exemption that largely follows AAR's petition, with some differences.³ The NPRM also proposed other related changes to the class exemptions for trackage rights and temporary trackage rights not contained in AAR's petition. On July 9, 2021, the National Transportation Safety Board ("NTSB") also filed comments citing concern about safety.⁴ As explained below, AAR supports the proposed rule with clarifications.

BACKGROUND

Currently, the Board's rules at 49 C.F.R. § 1180.2 set forth two classes of trackage rights exemptions: (1) an exemption for acquisition of trackage rights found at § 1180.2(d)(7); and (2) an exemption for acquisition of temporary trackage rights found at § 1180.2(d)(8). Both of these exemptions carry out the Board's statutory duty to exempt classes of transactions "to the maximum extent" pursuant to 49 U.S.C. § 10502. However, AAR identified an additional exemption that would further the Board's statutory mandate.

Natural disasters and unforeseen events are by their very nature unpredictable, for which the success of one's response is measured by their pre-disaster mitigation and preparedness. The National Oceanic and Atmospheric Administration (NOAA) recently found that the year 2020 set the new annual record for billion-dollar weather and climate events with 22 events, which shattered the previous annual record of 16 events that occurred in 2011 and 2017.⁵ NOAA further found that the year 2020 was the sixth consecutive year (2015-2020) in

³ *Petition for Rulemaking—Railroad Consolidation Procedures—Exemption for Emergency Temporary Trackage Rights*, EP 282 (Sub-No. 21) (STB served May 28, 2021) ("NPRM").

⁴ NTSB Comments, *Petition for Rulemaking—Railroad Consolidation Procedures—Exemption for Emergency Temporary Trackage Rights*, EP 282 (Sub-No. 21) (July 9, 2021) ("NTSB Comments").

⁵ NOAA National Centers for Environmental Information ("NCEI"), U.S. Billion-Dollar Weather and Climate Disasters (2021) (found here: <https://www.ncdc.noaa.gov/billions/>).

which 10 or more billion-dollar weather and climate disaster events impacted the United States.⁶ While these historic numbers do not necessarily mean railroads will suffer unexpected outages per se, it does evidence a growing trend toward more severe natural disasters. As such, it is appropriate that railroads and the Board be prepared to mitigate the impacts of unforeseen events on the national rail network. The Board's proposal of a new emergency temporary trackage rights exemption provides that regulatory mitigation, which will assist railroads in responding promptly to such unexpected events.

Recognizing that rail carriers were facing an inefficient process to obtain temporary trackage rights in emergency situations, AAR filed a petition for rulemaking to establish a new class exemption for obtaining emergency temporary trackage rights when there are emergencies, like flooding, bridge outages, or other natural disasters. AAR's petition proposed a new class exemption that would streamline a process used by rail carriers to obtain temporary trackage rights.⁷ Instead of requiring rail carriers to file a notice of exemption under 49 C.F.R. § 1180.2(d)(8) to obtain temporary overhead trackage rights, and simultaneously file a petition to waive the 30-day notice requirement under 49 C.F.R. § 1180.4(g) to allow the exemption to take effect immediately, AAR's petition combined those efforts into a single

⁶ *Id.*

⁷ See Pet. at 4-5. AAR's petition proposed to incorporate into the regulations a process rail carriers utilized and the Board approved. See *Terminal Railway Alabama State Docks—Temporary Trackage Rights Exemption—Norfolk Southern Railway Company*, FD 36190 (STB served May 11, 2018) ("TASD"); *Kansas City Southern Railway Company—Temporary Trackage Rights Exemption—Norfolk Southern Railway Company*, FD 36314 et al. (STB served June 13, 2019) ("KCS"); *Norfolk Southern Railway Company—Temporary Trackage Rights Exemption—Kansas City Southern Railway Company*, FD 36359 (STB served Oct. 11, 2019) ("NS"); *Alabama & Gulf Coast Railway LLC—Temporary Trackage Rights Exemption—The Kansas City Southern Railway Company*, FD 36418 (STB served July 2, 2020) ("AGR"); *Union Pacific Railroad Co.—Temporary Trackage Rights Exemption—BNSF Railway Company*, FD 36424, et al. (STB served Aug. 10, 2020) ("UP").

filing.⁸ The uncontroversial theme of the petition was to streamline an inefficient process and eliminate unnecessary regulatory requirements.

The Board “agree[d] that the current process for obtaining temporary trackage rights in emergency situations can be inefficient” and proposes to largely adopt AAR’s petition.⁹ The NPRM makes some adjustments to the petition and amends other aspects of the trackage rights exemptions that further AAR’s overall goal of the petition of enhancing efficiencies. Overall, the Board’s proposal builds on the petition and further streamlines the existing trackage rights exemption regulations. Importantly, it ensures that rail carriers will be able to respond expeditiously in exigent circumstances to maintain rail service.

ARGUMENT

I. AAR Supports the Board’s Proposed Rule.

A. The Circumstances for which the Proposed Rule Applies Aligns with AAR’s Intent.

AAR’s petition set forth a new class exemption that would apply “only in the most exigent circumstances” where there is a track outage expected to last more than seven days and there is no reasonable alternative to maintain pre-outage levels of service.¹⁰ While the petition described the new exemption as being used “when an unexpected event occurs...includ[ing] damaged bridges, washouts, significant flooding, and severe weather events” the NPRM further clarifies this intent by restricting the use of the emergency temporary trackage rights exemption to “emergency situations and not to situations where

⁸ See Pet. at App.

⁹ NPRM at 4.

¹⁰ Pet. at 9.

routine temporary trackage rights authority was not sought in a timely manner.”¹¹ Consistent with AAR’s intent, the Board proposes to require that the “new exemption be available only for ‘unforeseen’ track outages expected to last more than seven days and there is no reasonable alternative to maintain pre-outage levels of service.”¹² The addition of “unforeseen” to the proposed rule conforms with the petition’s intent, however, clarification regarding what constitutes an “unforeseen outage” would be appropriate. AAR proposes that the Board include parenthetical examples in its rule, which would not limit the types of situations in which the new class exemption would apply, but instead provide rail carriers and the public context for the types of events contemplated by the new class exemption. Specifically, AAR proposes the following additional language be included in proposed 1180.2(d)(9)(v) (added language in italics):

(v) sought in response to an unforeseen track outage (*e.g., natural disasters, severe weather events, flooding, incidents, accidents, washouts, bridge or tunnel damage*) and expected to last more than seven days where there is no reasonable alternative to maintain pre-outage levels of service.

AAR supports the clarification regarding unforeseen outage proposed by the Board with the slight modification above. This change would conform with AAR’s original intent.

Additionally, because the Board proposes to remove the caption summary requirement for all trackage rights exemptions (*see infra*), the Board includes a requirement that, when railroads certify that “the verified notice should provide a description of the situation that includes, to the extent possible, the following information:

“1. The nature of the event that caused the unforeseen outage;

¹¹ *Id.*; *NPRM* at 5.

¹² *NPRM* at 5, App. at proposed § 1180.2(d)(9).

- “2. The location of the outage;
- “3. The date that the emergency situation occurred;
- “4. The date the track outage was discovered; and
- “5. The expected duration of the outage.”¹³

This proposal is a logical requirement that will provide the Board and the public the pertinent information to understand the specific circumstances surrounding the need for the emergency trackage rights exemption. As the Board is not requiring a specified caption summary that would otherwise contain this information, AAR supports this proposal as an improvement to the Board’s current regulations.

B. The Duration of the Proposed Exemption is Reasonable.

The NPRM limits the proposed exemption to a total duration of 6 months. Specifically, the Board proposes to “limit the emergency temporary trackage rights to an initial period not to exceed three months, with the option to request a renewal for an additional three months.”¹⁴ The Board reviewed the cases in which the 30-day notice was waived under the current process and found the trackage rights requested in those circumstances would suggest the emergency temporary trackage rights in the proposal would not be needed for more than that time frame. AAR supports this reasonable adjustment to the petition, *so long as* the Board makes clear that obtaining an exemption under the new emergency temporary trackage rights in proposed 49 C.F.R. § 1180.2(d)(9) does not preclude a rail carrier from pursuing temporary trackage rights under 49 C.F.R. § 1180.2(d)(8) if there are unique circumstances that require a longer time frame beyond proposed section 1180.2(d)(9)’s six months. While such a situation

¹³ NPRM at 5; *see id.* at App. at proposed § 1180.4(g)(1)(ii).

¹⁴ NPRM at 6.

has not yet presented itself in any of the prior cases, it is simply not known whether future circumstances would require more time. AAR requests, therefore, the Board clarify that pursuing an exemption under proposed section 1180.2(d)(9) would not preclude a subsequent exemption under section 1180.2(d)(8) if the circumstances of the unforeseen event required more time to restore the outage than the maximum six-month time frame under section 1180.2(d)(9).

C. Not Requiring Certification Every 30 Days is Appropriate Given the Shorter Duration.

Instead of requiring the rail carrier to certify every 30 days that the track outage continues to exist and that the temporary trackage rights continue to be necessary to maintain service, as AAR petitioned, the Board proposes to simplify the process. It only requires the rail carrier to file a notice stating that the outage has been resolved, the trackage rights are no longer needed, and the date on which use of the trackage rights ceased.¹⁵ This requirement would be triggered only if the trackage rights become unnecessary prior to the expiration of the exemption period. The Board proposes that the notice be filed within five business days of the date on which use of the trackage rights ceased.

By only requiring a filing of a notice, and not a certification every 30 days, the Board's proposal reduces the burden on the rail carrier, especially when coupled with the shorter three-month timeframe for the emergency temporary trackage rights. The timing of the filing of the notice, within five business days of when the trackage rights ceased, is appropriate to ensure

¹⁵ See *NPRM* at 6, App. at proposed § 1180.2(d)(9).

proper notice to the Board and public of the changed circumstances. AAR supports these improvements to the proposed exemption.

D. The Effective Date Modification Will Provide Greater Certainty to Rail Carriers and the Public.

To provide certainty to the rail carrier and public, the Board modified the petition to make the effective date of the emergency temporary trackage rights be upon the “service of the Board’s notice, which would occur within five days of filing of the railroad’s verified notice of exemption.”¹⁶ While the petition requested that the effective date be upon publication in the Federal Register, the Board makes an important point based on its own experience that publication in the Federal Register cannot be guaranteed within five days of the filing of the exemption. The Board correctly states there are factors outside its control that determine when the Federal Register publishes agency materials. AAR appreciates the Board’s recognition of this limitation and its corresponding modification of the effective date to ensure greater certainty for rail carriers and the public.

E. The Elimination of the Caption Summary is a Needed Update to the Regulations.

The Board proposes to remove the caption summary requirement for the proposed new emergency temporary trackage rights exemption and the two other trackage rights exemptions found at §§ 1180.2(d)(7) and 1180.2(d)(8). The Board explains that the original “purpose of this requirement was to facilitate Federal Register publication by providing the Board with a document that could be published as the Board’s notice.”¹⁷ The Board explains that in practice

¹⁶ *Id.*

¹⁷ *NPRM* at 7.

the caption summaries have not been used for that purpose and, therefore, it does not require a caption summary for the new emergency temporary trackage rights. In addition, the Board takes the opportunity to propose to eliminate the existing caption summary requirements for exemptions under §§ 1180.2(d)(7) and 1180.2(d)(8). Instead, for all three trackage rights exemptions, the Board proposes to replace the caption summaries with a requirement that the parties provide in their notices the same information currently required in caption summaries.¹⁸ This is a sensible solution that updates the Board's regulations and would ensure outdated requirements are not perpetuated, but instead reformed.

F. The Board's Clarification Regarding Interchange Commitments Resolves Uncertainty for Stakeholders.

In the NPRM, the Board takes the opportunity to clarify that § 1180.4(g)(4)'s requirement to certify "whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means" is not intended to apply to trackage rights transactions under §§ 1180.2(d)(7) or 1180.2(d)(8), nor the proposed

¹⁸ See *NPRM* App. at proposed § 1180.4(g)(1)(ii) (setting forth the following information be included: "A) The name of the tenant railroad; (B) The name of the landlord railroad; (C) A description of the trackage rights, including a description of the track. For notices under §§ 1180.2(d)(8) and 1180.2(d)(9), the notice must state that the trackage rights are overhead rights. For notices under § 1180.2(d)(7), the notice must state whether the trackage rights are local or overhead; (D) The date the trackage rights transaction is proposed to be consummated; (E) The date temporary trackage rights will expire, if applicable; and (F) For notices under § 1180.2(d)(9), a description of the situation resulting in the outage in sufficient detail to allow the Board to determine an emergency exists, including, to the extent possible, the nature of the event that caused the unforeseen outage, the location of the outage, the date that the emergency situation occurred, the date the outage was discovered, and the expected duration of the outage.).

emergency temporary trackage rights transaction under § 1180.2(d)(9).¹⁹ The Board explains this change is consistent with its prior precedent. Therefore, to remove uncertainty, clarifying that the interchange commitments provision does not apply to the proposed emergency temporary trackage rights also makes good sense.

II. The Board Properly Found the Proposal Would Not Impact Safety.

Nothing in AAR's petition nor the Board's proposal would undermine safety. Indeed, the intent is to ensure the free flow of commerce when unexpected, unsafe conditions arise by allowing for expedited trackage rights exemptions in emergency situations. NTSB and SMART-TDNY seem to be under the impression that the new exemption would waive safety requirements.²⁰ This is not the case, nor the intent behind the petition. Indeed, the Board takes the position that the railway safety regulations administered by the Federal Railroad Administration ("FRA") continue to apply to railroads, so long as those laws and regulations do not interfere with interstate commerce.²¹ The NPRM does not preempt FRA regulations or

¹⁹ NPRM at 7.

²⁰ NTSB notes that "the NPRM lacks discussion about existing regulations... particularly ... 49 CFR Part 214 that require a train engineer to be familiar with the territory." NTSB Comments at 2. AAR is unclear as to NTSB's reference to Part 214's bridge and roadway worker protections and their relevance to the requirements governing the territorial qualifications of train crew members. Rather, Parts 240 and 242 address train crew territorial qualifications. Regardless, no federal railroad safety regulations are impacted by the proposal.

²¹ See *Tyrrell v. Norfolk S. Ry.*, 248 F.3d 517, 523 (6th Cir. 2001) (explaining that "the ICCTA and its legislative history contain no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety. 49 U.S.C. § 10101(11). Rather, the agencies' complementary exercise of their statutory authority accurately reflects Congress's intent for the ICCTA and [Federal Railroad Safety Act ("FRSA")] to be construed *in pari materia*. For example, while recognizing their joint responsibility for promoting rail safety in their 1998 Safety Integration Plan rulemaking, the FRA exercised primary authority over rail safety matters under 49 U.S.C. § 20101 et seq., while the STB handled economic regulation and environmental impact assessment."); see also *Island Park, LLC v. CSX Transp.*, 559 F.3d 96 (2d Cir. 2009).

otherwise dilute safety regulations. Indeed, the NPRM states quite the opposite and the proposal, if adopted, would be in harmony with FRSA.

Contrary to NTSB's claim that the NPRM "does not address safety considerations" and "lacks discussion about existing regulations", the Board, in rejecting the safety concerns of SMART-TDNY, states it "does not see merit in [SMART-TDNY's] claim that the proposed class exemption would threaten rail safety. This proposal would not alter or impact the existing rail safety operating regulations administered by the [FRA], which is the Federal agency with primary responsibility over rail safety matters."²² In short, the FRA's safety regulations apply to freight rail carriers regardless of whether operations are authorized by application or exemption, including the emergency exemption proposed in the NPRM. Specifically, 49 C.F.R. § 240.229's requirement that "no railroad that is responsible for controlling the conduct of joint operations with another railroad shall permit or require any person to operate a locomotive in any class of train or engine service unless that person has been certified as a qualified locomotive engineer for the purposes of joint operations and issued a certificate that complies with § 240.223..." and the requirements of 49 C.F.R. Parts 240 and 242, that require a train crew to be familiar with the territory, would still apply.

The Board's proposal does nothing to change those requirements, nor does it claim those requirements are preempted. Further, there is no evidence provided by either NTSB or SMART-TDNY that demonstrate that the proposal threatens rail safety.²³ In sum, while AAR

²² NTSB Comments at 1-2; *NPRM* at 4.

²³ While NTSB cites accidents that involved Amtrak engineers' lack of familiarity with the territory over which they were operating, it does not cite any such freight rail accidents, and specifically none involving occasions when the freight railroads have availed themselves of the current temporary trackage rights

disagrees with NTSB's concern the proposal could reduce safety, AAR agrees with NTSB's recognition of "the need for expedited procedures that allow railroads to quickly respond to unforeseen track outages," and its belief that "improved procedures addressing the operational disruptions of railroads caused by unforeseen track outages is an important step in maintaining transportation resiliency."²⁴ The Board should reiterate its rejection of claims that the proposal would in any way undermine safety.

exemption and the 30-day notice requirement has been waived. *See, supra*, fn. 7. It is also important to note that in both Amtrak accidents, the NTSB accident reports explained that positive train control was not yet implemented and would have prevented the accidents. *See* National Transportation Safety Board, *Amtrak Passenger Train 501 Derailment, DuPont, Washington, December 18, 2017*, RAR-19/01, at 79 (Washington, DC: National Transportation Safety Board, 2019) (explaining "the NTSB concludes that had the PTC system been fully installed and operational at the time of the accident, it would have intervened to stop train prior to the curve, thus preventing the accident."); National Transportation Safety Board, *Collision of Amtrak Passenger Train 371 and Norfolk Southern Railway Company Freight Train 23M, Chicago, Illinois, November 30, 2007*, RAR-09/01, at 32 (Washington, DC: National Transportation Safety Board, 2009) (concluding that "[h]ad a positive train control system been in place at the time of this accident, the collision would not have occurred.").

²⁴ NTSB Comments at 1,2.

CONCLUSION

For the foregoing reasons, the Board should adopt the proposed emergency temporary trackage rights class exemption in the NPRM, with the clarifications discussed above.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'JK' or similar initials, with a stylized flourish.

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