

Before the
SURFACE TRANSPORTATION BOARD

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DOCKET No. EP 282 (Sub-No. 21)

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

COMMENTS

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Preliminary Statement

Samuel J. Nasca, for and on behalf of SMART-Transportation Division-New York State Legislative Board (SMART/TD-NY), submits these comments in response to the Surface Transportation Board (STB or Board)'s Decision, entered and served May 28, 2021, 86 Fed. Reg. 30243-49 (June 7, 2021), issuing a Notice of Proposed Rulemaking (NPRM), to establish a new "emergency" temporary trackage rights class exemption for a rail carrier, to immediately operate by trackage rights over the line of another rail carrier, without the prior 30-day notice or waiver under the STB's standard temporary trackage rights class exemption procedures currently in effect. 49 C.F.R. 1180.2(d)(8); 1180.4(g)(1).Railroad Consolidation Procedures-Exemption For Temporary Trackage Rights, 6 S.T.B. 910 (2003), mod. 7 S.T.B. 587 (2004). See also: United Transp. Union v. Surface Transp. Bd., 363 F.3d 465 (D.C. Cir. 2004).

The NPRM should not be adopted as a final rule. For a number of reasons, the proposal would be unnecessary, interfere with traditional detour operations in emergency temporary situations, and adversely affect safety considerations.

Background

The effort to create a new “emergency” temporary railroad trackage rights class exemption - in - addition to and not a substitute for - the existing temporary trackage rights class exemption, comes by petition from the Association of American Railroads (AAR), unaccompanied by any specific rail carrier or other industry participant. The AAR petition to the STB, filed October 9, 2020, with SMART/TD-NY in reply on November 4, 2020, was followed by the STB’s February 1, 2021 decision (served February 5), 86 Fed.Reg. 8336 (Feb. 5, 2021), which granted the AAR’s petition to institute a rulemaking for an emergency temporary trackage rights class exemption.

1. February 5 Decision. The STB’s single-page February 5 decision, instituting an investigation to consider AAR’s petition, recited AAR’s contention that the present two-step process, in obtaining temporary trackage rights, on short notice, despite waiver of advance notice, is inefficient. The STB noted SMART/TD-NY replied in opposition to AAR’s petition.

The Board concluded it appropriate to institute a rulemaking proceeding, stating it would provide an opportunity for additional public participation in a subsequent decision. STB directed advice of its instant February 5 decision be published in the Federal Register. 86 Fed. Reg. 8336.

2. May 28 Decision. The Board on May 28, 2021, issued and served a 17-page Decision, granting AAR’s petition, and initiated a proceeding to establish a new class exemption for emergency temporary trackage rights, Notice of Proposed Rulemaking (NPRM), requesting public comments and reply comments, due July 12 and August 11, 2021, respectively. The Board’s NPRM designated the proposed new emergency temporary trackage rights would appear as 49 C.F.R. 1180.2(d)(9), 4(g)(1); and also proposed certain other related changes to its class

exemptions for trackage rights, 49 C.F.R. 1180.2(d)(7), and for temporary trackage rights. 49 C.F.R. 1180.2(d)(8). NPRM, 11-12; 86 Fed. Reg. 30243, 30247-48.

Although consisting of 17 pages, only apx. 8-1/2 are devoted to discussion of emergency temporary or other trackage rights provisions, plus a further Appendix A dealing with C.F.R. textual revisions. Appendix B to the NPRM, estimating paperwork, will not be included in the C.F.R. See: 86 Fed. Reg. 30243 at 30248.

The NPRM made a number of changes from the AAR's proposed new emergency temporary trackage rights. A carrier would not be required to observe the 30-day advance notice for the proposed transaction prior to consummation, or to secure waiver from any advance notice. Under the NPRM, the rail carrier's notice of exemption after filing with the STB, would become effective upon service of notice of the proposed transaction by the Board. The Board shall serve a notice of exemption on the parties within five days after the notice of exemption is filed, and thereafter, the Board shall publish that notice in the Federal Register. NPRM at 6. 86 Fed. Reg. 30243 at 30245.

ARGUMENT

The NPRM's proposal for a new emergency temporary trackage rights class exemption, 49 C.F.R. §1180.2(d)(9); C.F.R. §1180.4(g)(1), should not be adopted.

I. Separate "emergency" temporary trackage rights class exemption is unnecessary.

The current temporary trackage rights class exemption, in effect since 2004, is sufficient to embrace emergency situations, especially when joined currently with simultaneous request for waiver of its 30-day advance notice provision. The use of the existing temporary trackage class

exemption, plus advance notice waiver, is the actual practice in the railroad industry, waiver being routinely granted, as the NPRM itself recognized. NPRM, at 4. See: 86 Fed. Reg. 30243 at 30244.

Moreover, extension of STB regulation, over and above, what has been traditional railroad self-regulation for emergency temporary trackage operations, would be unfortunate. The typical pattern of relief for emergency situations has been utilization of rail carrier “detour” agreements. An indication of estimate of current and anticipated use of the proposed STB emergency temporary trackage rights would be for only two instances per year. NPRM, at 15. 86 Fed. Reg. 30243 at 30248. We add concern with insufficient current STB staff expertise in details of railroad operational dislocations, former ICC train operation functions having been subsumed by FRA and NTSB, or within the rail industry itself. Clearly, there is no need for a new and separate emergency temporary trackage rights class exemption.

II. The proposed new emergency temporary class exemption threatens an improper cessation or delay of detour operation. The NPRM, throughout, cites a number of STB decisions involving the current temporary trackage exemption where detour operations are mentioned as an initial substitute for invoking a temporary trackage rights class exemption.

SMART/TD-NY criticized the AAR’s October 9,2020 petition for failure to discuss the detour provisions in its emergency temporary trackage operations. See: SMART/TD Reply(ID 301252, at 3-4)(Nov. 4, 2020). The STB carried forward the AAR’s silence on detour operations in its February 5 and May 28, 2021 issuances. Nevertheless, NPRM although itself silent on detour train operations, lists examples of STB temporary trackage decisions which do, in fact, mention detour operations, such as FD36424, UP/BNSF, 8/10/20, at 2(NPRM, 2,4,5); FD36418,

A&G/NS, 7/2/20, at2 (NPRM, 2,4,8);FD36190, TRAS/NS,5/11/18, at1(NPRM, 6); FD36359, NS/KCS,10/11/19, at2(NPRM, 5);FD 36314, KCS/NS,6/3/19, at2(NPRM, 5-6).

There is an important difference between detour and trackage rights operations. As indicated in the STB decisions, a carrier unable to operate over its own line, may with its own equipment continue its train operations (detour) over the line(s) of another carrier(s), but such train operations must be accompanied by and under the direction of pilot crew member(s) of the foreign carrier(s). On the other hand, a carrier unable to operate its own line may be accorded authority to operate over the foreign line(s) with its own crews and equipment. This would be termed trackage rights, rather than detour.

It is obvious that immediate exercise of the proposed class exemption for emergency temporary trackage rights, could serve to prematurely prevent or terminate detour operations; indeed, the class trackage class exemption might be utilized to prevent or delay the initiation of detour train operation, to the disadvantage of rail service to the public.

Detour operations usually are performed under guidance by qualified personnel of the foreign carrier, whereas trackage rights may be performed by personnel without sufficient experience and qualification outside their own territory.

The major rail carriers recently have been engaged in efforts to reduce their employment levels, as reflected in national crew consist efforts, among other indicia. The recent concern of the STB's chairman has noted disfavor with reduced railroad employment in this regard. The detour operating practice for emergency situations has stood the test of sound experience in the railroad industry. There is no basis for intrusion by the STB at this time to impose a different operating scheme.

III. Serious safety concerns are associated with the proposed exemption. The NPRM poses serious safety risks for operating railroad employees. The detour practice provides that train personnel operating outside their familiar territory, especially on foreign rail carriers, be accompanied by qualified personnel for the different territory or the foreign rail carrier. This is long-maintained railroad industry procedure must not be disturbed by non-qualified trade association personnel or by uninformed regulatory agencies.

History indicates that rail carrier incidents are bound to arise when improper train operations occur by failure to conduct proper detour arrangements, or train operation by trackage rights in unfamiliar territory, upon which the operating employees are not qualified.

CONCLUSION

The NPRM should not be adopted as final rule.

Respectfully submitted,

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July 12, 2021

Certificate of Service

I hereby certify that a copy of the foregoing has been served upon all parties by first-class mail, postage-prepaid.

Washington DC

/Gordon P. MacDougall/