

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

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Pursuant to the decision served in this proceeding on May 28, 2021, the Association of American Railroads respectfully submits these reply comments.

In its petition filed 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 establish a new emergency temporary trackage rights class exemption.¹ While the Board instituted a proceeding on February 5, 2021, the Board issued its notice of proposed rulemaking (“NPRM”) on May 28, 2021.² The NPRM followed closely AAR’s petition, with some differences, and set forth a proposed new emergency temporary trackage rights class exemption. In AAR’s opening comments filed on July 12, 2021, the AAR expressed its support for the proposed rule with clarifications.³ Several other stakeholders also filed comments,

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

³ See AAR Opening Comments, *Petition for Rulemaking—Railroad Consolidation Procedures—Exemption for Emergency Temporary Trackage Rights*, EP 282 (Sub-No. 21) at 4-6 (July 12, 2021)

including SMART-Transportation Division-New York State Legislative Board (“SMART/TD-NY”) and the National Transportation Safety Board (“NTSB”), both expressing safety-related concerns.⁴ In addition, the American Short Line and Regional Railroad Association (“ASLRRA”) filed comments in support of the proposed rule.⁵ As explained below, AAR reiterates its support for the proposed rule with the clarifications enumerated in its opening comments, and addresses several issues raised by the commenters.

I. The Adoption of the Proposed Rules is an Important Use of the Board’s Exemption Authority.

The Board’s new class exemption is essentially a formalization of a process several railroads have utilized to ensure the free flow of commerce in emergency situations.⁶ One commenter claims the current temporary trackage rights exemption is sufficient when coupled with a waiver of the 30-day notice. In the NPRM, however, the Board, agreeing with AAR’s

(“AAR Comments”) (expressing support for the rulemaking, but requesting that examples of an unforeseen outage be added to the rule, and requesting clarification that seeking 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)).

⁴ See SMART/TD-NY Comments, *Petition for Rulemaking—Railroad Consolidation Procedures—Exemption for Emergency Temporary Trackage Rights*, EP 282 (Sub-No. 21) (July 12, 2021) (“SMART/TD-NY Comments”); 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 See ASLRRA Comments, *Petition for Rulemaking—Railroad Consolidation Procedures—Exemption for Emergency Temporary Trackage Rights*, EP 282 (Sub-No. 21) (July 12, 2021) (“ASLRRA Comments”).

⁶ See Pet. at 4-5; AAR Comments at 3-4; see also *Terminal Railway Alabama State Docks—Temporary Trackage Rights Exemption—Norfolk Southern Railway Company*, FD 36190 (STB served May 11, 2018); *Kansas City Southern Railway Company—Temporary Trackage Rights Exemption—Norfolk Southern Railway Company*, FD 36314, et al. (STB served June 13, 2019); *Norfolk Southern Railway Company—Temporary Trackage Rights Exemption—Kansas City Southern Railway Company*, FD 36359 (STB served Oct. 11, 2019); *Alabama & Gulf Coast Railway LLC—Temporary Trackage Rights Exemption—The Kansas City Southern Railway Company*, FD 36418 (STB served July 2, 2020); *Union Pacific Railroad Co.—Temporary Trackage Rights Exemption—BNSF Railway Company*, FD 36424, et al. (STB served Aug. 10, 2020).

petition, explained that “the current process for obtaining temporary trackage rights in emergency situations can be inefficient.”⁷ The Board went on to propose the new exemption, in part, to make “the process of obtaining temporary trackage rights in emergencies more efficient.”⁸ AAR agrees, and its members’ experience with the current process of filing an exemption and a waiver is what led to the petition in the first instance.

The same commenter argues the proposed exemption should not be adopted because it is an “extension of STB regulation, over and above, what has been traditional railroad self-regulation for emergency temporary trackage operations.”⁹ The exact opposite is true. The proposal furthers the Board’s statutory directive in 49 U.S.C. § 10502, which provides that the Board “shall exempt a person, class of persons, or a transaction or service” from regulation “to the maximum extent” consistent with the statute.¹⁰ In adding this language to the statute, Congress expressed its desire to make it “an explicit part of the agency’s statutory duty to utilize exemptions to the maximum extent permissible under the law.”¹¹ This specific statutory provision emphasizes Congress’s policy judgment in favor of *deregulation* of the railroad industry. And that is exactly what this exemption does—removes regulatory requirements in limited circumstances to enhance “the ability of carriers to maintain service in emergency situations.”¹²

⁷ *NPRM* at 4.

⁸ *Id.*

⁹ SMART/TD-NY Comments at 5.

¹⁰ 49 U.S.C. § 10502(a).

¹¹ H.R. Rep. No. 104-311, at 96 (1995), 1995 U.S.C.C.A.N. 793, 808.

¹² *NPRM* at 4.

Indeed, when addressing the exemption standard under 49 U.S.C. § 10502, the Board found the new proposed class exemption would advance the rail transportation policy (“RTP”) in several ways, as:

[i]t would provide for the *expeditious handling and resolution of proceedings*, 49 U.S.C. § 10101(15), and encourage the efficient management of railroads, 49 U.S.C. § 10101(9), by *making the process* of obtaining temporary trackage rights in emergencies *more efficient by eliminating the need for a waiver of the 30-day notice period* under 49 C.F.R. § 1180.4(g)(1) and *more predictable by requiring the Board to act within a set number of days*.¹³

The Board also found *continued regulation was not needed* to protect shippers from an abuse of market power.¹⁴ By its very nature, creation of a new class exemption is deregulatory, not an “extension of STB regulation”, and is consistent with the Board’s statutory directive. In this instance, it also alleviates burdens on Board resources and rail carriers facing exigent circumstances.¹⁵ In that respect, it is a good-government proposal that should be adopted.

II. The Proposed Rule Ensures Safety in Emergency Situations.

As AAR explained in its opening comments, and the Board noted in the NPRM, nothing about the proposed class exemption would undermine safety.¹⁶ When unforeseen circumstances arise on the railroad—be it due to a natural disaster, severe weather event, flooding, incident, accident, washout, bridge or tunnel damage—railroads cannot operate over impacted track due to unsafe conditions. The proposed class exemption would ensure railroads could continue to operate to serve their customers in a safe manner.

¹³ *Id.* (emphasis added); *see also* ASLRRRA Comments at 2.

¹⁴ *NPRM* at 4.

¹⁵ *See* Pet. at 9.

¹⁶ *See* AAR Comments, at 10-12; *NPRM* at 4.

To be clear, the proposal makes no change to safety regulation. There is no waiver of any safety-related regulation contained in the proposal; it merely creates a means of granting the railroad a type of operating authority—a class exemption—over another railroad’s tracks. As noted previously, the railroad safety regulations administered by the Federal Railroad Administration (“FRA”) continue to apply to railroads, in all operating circumstances, as long as those laws and regulations do not interfere with interstate commerce.¹⁷ AAR is not requesting FRA waive any applicable safety regulations, and the Board already rejected arguments that the proposal would somehow waive safety requirements. The Board explained it gave no merit to the argument the “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.”¹⁸ AAR urges the Board to reaffirm that position, as nothing presented in either commenter’s filings demonstrate otherwise.

The proposal would not otherwise affect rail safety. While SMART/TD-NY implies that “detour operations” and “detour arrangements” would be undermined and thereby cause safety concerns, such operations or arrangements are not mentioned in FRA’s train crew certification safety regulations.¹⁹ FRA regulations require that railroads not allow “any person to operate a locomotive in any class of train or engine service unless that person has been

¹⁷ See AAR Comments at 10-12, fn. 21; *NPRM* at 4.

¹⁸ *NPRM* at 4; see NTSB Comments at 2; SMART/TD-NY Comments at 6-7.

¹⁹ SMART/TD-NY Comments at 5-7. Detour operations are arrangements that allow a host railroad’s crew to operate a tenant’s train over the host railroad’s track, usually for limited periods of time. Though these detours can be helpful for a short duration, temporary trackage rights provide greater efficiency and require the tenant crew be properly qualified.

certified as a qualified locomotive engineer for the purposes of joint operations and issued a certificate that complies with § 240.223” and that train crews be familiar with the territory over which they are operating, per the requirements of 49 C.F.R. Pts. 240 and 242.²⁰ These requirements apply regardless of whether the railroad’s operations are authorized under the new class exemption or the current class exemptions. Railroad employees must be qualified on a particular territory under the safety regulations, regardless of the operational authority provided by the Board. Were the proposal adopted, the Board’s granting of an emergency temporary trackage rights exemption under proposed section 1180.2(d)(9) would not carry with it automatic safety qualification or territorial familiarity for the railroad’s employees.

In sum, neither NTSB nor SMART/TD-NY provide evidence that the proposal would undermine rail safety, nor demonstrate any safety implications of the Board’s proposal.²¹ As such, the Board should continue to reject claims that the proposal would in any way undermine safety.

²⁰ 49 C.F.R. § 240.229(a); *see generally* 49 C.F.R. Pts. 240, 242.

²¹ *See* AAR Comments at 10-12.

CONCLUSION

For the foregoing reasons, the Board should adopt the proposed emergency temporary trackage rights class exemption in the NPRM, with the clarifications set forth by AAR in its opening comments.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'JK' or similar, with a stylized, cursive style.

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