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

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

REPLY COMMENTS

GORDON P. MacDOUGALL
1025 Connecticut Ave. N.W.
Washington DC 20036

Attorney for Samuel J. Nasca

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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 reply comments in response to initial comments submitted July 9, 2021, by National Transportation Safety Board (NTSB); and on July 12, 2021, by Association of American Railroads (AAR), and by American Short Line and Regional Railroad Association (ASLRRA).

SMART/TD-NY's initial comments, filed July 12, 2021, opposed STB's Notice of Proposed Rulemaking (NPRM), issued May 28, 2021, which NPRM had adopted the thrust of AAR's position that STB should create an additional and entirely new "Emergency Temporary Trackage Rights Class Exemption," to be designated 49 C.F.R. 1180.2(d)(9).

To the contrary, SMART/TD-NY, in opposition to the AAR/STB proposed additional temporary trackage rights class exemption, stands in support of the current temporary trackage rights class exemption, which embraces emergencies, along with other situations, and which

allows modification of its 30-day advance notice period, if appropriate, through concurrent petition for waiver. Thus, any “emergency” can continue to be addressed, through the existing “Temporary Trackage Rights Class Exemption,” 49 C.F.R. 1180.2(d)(8), .4(g)1, with simultaneous waiver petition.

ARGUMENT

The traditional rail industry method for handling emergency track outages in situations where a line segment becomes inoperable like flooding, bridge outages, accidents, derailments, or other disasters, and where temporary train operation over connecting railroad(s) becomes necessary, is for the track-outage carrier to itself operate over the foreign line with its own train and its own employees, but only when guided and directed by a pilot crew of the foreign carrier employee(s) while operating on foreign carrier(s) territory. This is termed “detour” service.

Detour service differs from “trackage rights,” in that “trackage rights” involve train operation by the employees unable to operate their own line, may be accorded authority to operate, with their own crews and equipment, over foreign lines, without necessarily being accompanied and directed by foreign pilot crew member(s).

Emergency operations under the current temporary trackage rights, are authorized by the filing of a 30-days notice with the STB under 49 C.F.R. 1180.2(d)(8); 4(g)1, along with a petition for waiver of the 30-days notice period under 49 U.S.C. § 10502. The waiver notice petition can be denied or modified, but is routinely granted, as NPRM acknowledges. (NPRM 4). Interim operation, either before or between the exemption notice and the resultant operation date may be, and is usually, performed under railroad industry detour agreement without STB notice or approval, subject to the foreign detouring carrier’s employees being currently qualified and

experienced to operate over the pertinent trackage.

In contrast with industry utilization of the current 30-day temporary class exemption, with waiver notice, and any needed interim detour operation, the NPRM would permit the carrier's new emergency temporary trackage rights notice to become effective almost immediately, without prior notice, waiver, or detour arrangement. The carrier would file its notice for the proposed trackage rights under the new class exemption with the STB, the latter then serving the parties with notice of the transaction. Such Board "service" of the notice triggers the trackage rights transaction to become effective immediately. The only time limit is that the STB is to effect "service" within 5 days from filing of the carrier's notice of exemption with the Board. Thereafter, STB is to publish its notice in the Federal Register. (NPRM 4, 12-13).

Members of SMART/TD-NY stand to be adversely affected if the STB's new emergency temporary trackage rights class exemption becomes effective. First, is the loss of work opportunities in not performing train service detour operations. Second, are the safety threats in performing train service with personnel insufficiently experienced in foreign territory operations.

1. Response to National Transportation Safety Board. SMART/TD-NY is in strong support of the NTSB's challenge to the STB Notice of Proposed Rulemaking. (NTSB,1-3):

“...NTSB is concerned that the reduced time to grant waivers could reduce the level of safety, especially for railroad crews and others affected by trains operating in detour territories that may be unfamiliar. The NPRM does not address such safety considerations.”

.....

“The NTSB has investigated several railroad accidents involving operating crews with limited familiarity of track territories.”

.....

“...clear safety requirements are necessary to mitigate the risks associated with crewmembers that are potentially unfamiliar

with the detour territory...”

NTSB is dedicated to railroad safety. Railroad management and railroad employees must give very careful attention and consideration to NTSB conclusions and recommendations. The current involvement of NTSB in STB safety rulemaking appears without precedent. The former Interstate Commerce Commission (ICC), predecessor in 1996 to the current STB, had primary federal regulation of railroad safety provisions, most of which were transferred to Federal Railroad Administration (FRA), beginning with 1966 legislation. However, the current STB still is to consider safety matters, expressed in the rail transportation policy, 49 U.S.C. 10101(11), and throughout other provisions of Interstate Commerce Commission Termination Act (ICCTA). Moreover, many present practitioners at the STB’s Bar commenced their ICC experience prior to 1966, thus with a continuing background interest and ability to evaluate railroad safety matters.

NTSB’s warnings actually understate the danger, for although NTSB states the carrier’s notice of exemption under the proposed rule would become effective 5 days after filing with the STB (NTSB 1, para.2), the text of the NPRM provides notice is to become effective immediately upon service of the STB’s notice of the transaction. The STB is to effect this service within 5 days after the carrier’s notice is filed with the STB. In actual agency practice, the Board’s notice likely would be served the very same day the carrier’s notice is received by the Board. It is inconceivable the Board would wait even one day, much less than five days. The offices of the STB and the AAR are located on the same block in Washington,DC, separated only by an estimated 200 feet of sidewalk. Communication is intense. See: Savitz, G.M., Prepublication Regulatory Discussions (PreReg), 73 Admin. L. Rev. 255 (2021).

It is SMART/TD-NY's strong suggestion that AAR, in the best interest of the entire railroad industry, might withdraw its emergency temporary trackage rights class exemption proposal.

2. Response to Association of American Railroads. AAR would allow emergency temporary trackage rights to take effect immediately without need for the 30-day notice requirement of 49 C.F.R. §1180.4(g)(1); and without waiver or interim detour operation prior to full exercise of the trackage rights transaction. (AAR 1). SMART/TD-NY replies to various AAR comments and arguments.

A. Inefficient Process. The primary justification advanced for the new and additional class exemption is asserted by AAR to be an inefficient two-step process under the current class exemption, wherein carriers file a notice of exemption under 49 C.F.R. §1180.2(d)(8), and simultaneously file a petition to waive its 30-day notice requirement under 49 C.F.R. §1180.4(g), so as to allow the trackage rights to take effect immediately. AAR's asserts its petition for an additional class exemption is to combine the two efforts into a single filing. (AAR 3-4).

The two-stage filings are not difficult, inefficient, or extensive documents. The carrier notice of exemption filed with STB is not "approved" by the agency. It is a pro forma self-executing document under the current temporary class exemption. The carrier's petition for waiver of the 30-day advance notice is a simple 2 or 3-page document filed simultaneously along with the carrier's notice of exemption, and is routinely granted. (NPRM 4). The claimed serious inefficiency with the current process is a hoax, and should be so recognized by STB carrier practitioners.

STB did not affirmatively adopt AAR's inefficiency view, but merely acknowledged, in a qualified response, that the two-stage situation "can" be inefficient; but that the proposed emergency temporary class exemption would be "more efficient." (AAR 4; NPRM 4, para. 2,5). Of course, the present and proposed trackage rights differ in terms of their effective notice period, absence of detour operations, and differing safety concerns. The current temporary trackage rights class exemption has been in effect since 2003, as modified in 2004, hereto without serious claims of inefficiency.

B. Elimination of Detour Operations. The essence of AAR's quest for immediate acquisition and operation of full trackage rights for an emergency track outage, would be to eliminate detour service by foreign carrier employees, with resulting impact upon railroad employment and upon railroad safety. The initial AAR October 9, 2020 filing, as well as the latest AAR July 12, 2021 filing, both fail even to mention detour operations. Likewise, NPRM makes only passing reference to detour service (NPRM 3), with some confusing reference to detour service. (NPRM 4). Cf. SMART/TD-NY Nov. 4 2020 filing, at 3, and July 12, 2021 filing at 5-6; NTSB July 9, 2021 filing at 1-2-3. The silence of AAR with respect to detour practice is contrasted with five recent STB decisions involving detour service and its member carriers, as cited by AAR in its July 12, 2021 filing. (AAR, 7/12/21, 3n.7):

- (i) Kansas City Southern Railway Company-Temporary Trackage Rights Exemption-Norfolk Southern Railway Company, FD36314 et al.(June 13,219): "Under 49 C.F.R. § 1180.4(g), a verified notice of exemption must be filed at least 30 days before the covered transaction can be consummated. As such, the earliest date Applicants may consummate the transaction is July 7, 2019. However, as noted above, Applicants have filed a petition to waive the 30-day requirement and allow the exemption to take effect immediately. They note that, although they currently are conducting emergency detour operations over portions of each other's lines, those operations require each carrier to supply an

experienced train crew member as a pilot to supplement the normal crew of the detouring train, while their crew bases are already taxed by the absence of crew members who must lay off work to protect their own homes from flooding. (Pet.3).....”

(ii) Terminal Railway Alabama State Docks-Temporary Trackage Rights Exemption-Norfolk Southern Railway Company, FD36190 (May 11, 2018).

“However, simultaneously with is notice, TASD filed a petition to waive the 30-day requirement and allow the exemption to take effect immediately. TASD explains that it recently experienced a structural failure on the Viaduct Bridge that carries TASD’s rail line over Bay Bridge Road in Mobile, isolating TASD’s Chickasaw Line from the remainder of TASD’s system. TASD arranged to begin emergency detour operations over 2.9 miles of parallel NSR rail line in order to reach the Chickasaw Line, on the understanding that TASD would seek immediate authority from the Board to continue those detour operations over NSR as temporary trackage rights. (Pet. 1-2.) TASD states that the waiver is needed to accommodate TASD’s emergency detour operations while repairs are made to its out-of-service bridge, and to effectuate the cooperative arrangements with NSR and rail labor that allowed those emergency operations to commence immediately.”

(iii) Union Pacific Railroad Company-Temporary Trackage Rights Exemption-BNSF Railway Company, FD36424, et al. (Aug. 10, 2020).

“UP explains that on July 9, 2020, a train derailed on a bridge over the Tempe Town Lake in Tempe, Ariz., and the bridge was subsequently taken out of service for repairs.(Pet. 2.) The bridge is located on UP’s Phoenix Subdivision, which provides a route between Tempe and Arlington, Ariz. (*id.*) UP states that, due to the bridge outage, it is currently rerouting trains over BNSF’s rail lines using BNSF crews pursuant to detour agreements between UP and BNSF.(*Id.*) Because UP is uncertain how long the bridge will be out of service, it has entered into the Agreements with BNSF for the sole purpose of allowing UP’s crews to handle its own trains in overhead service over BNSF’s rail lines described above while the repairs are being made. (*Id.*) UP states that the temporary trackage rights will expire on September 18, 2020. (Notice of Exemption 1, FD36424; Notice of Exemption 1, FD36425.)

.....

“Under 49 C.F.R. § 1180.4(g), a verified notice of exemption must be filed at least 30 days before the covered transaction can be consummated. Thus, under the regulations, the earliest date UP may consummate the transactions would be September 5, 2020. However, as noted above, UP has filed a petition to waive the 30-day requirement and allow the exemptions to take effect immediately. UP states that this waiver would allow UP crews to operate as soon as possible, thereby relieving the strain on BNSF of having to provide BNSF crews for both UP and BNSF trains. (Pet.2) UP further states that the temporary trackage rights are needed to

facilitate a return to normal service for its customers and to prevent disruptions in service. (Id.)”

(iv) Alabama & Gulf Coast Railway LLC-Temporary Trackage Rights Exemption-The Kansas City Southern Railway Company, FD36418(July 2, 2020).

“AGR explains that on June 24, 2020, an AGR train derailed and damaged a bridge two miles north of Aliceville, Ala., rendering the bridge inoperable. (Verified Notice 2.) As a result, AGR has been forced to suspend service between Pickensville, Ala., and Boligee, Ala. (Id.) Because AGR anticipates that the bridge will remain inoperable for several weeks, it has entered into the Agreement (fn. AGR states that it will cease use of KCSs line upon completion of the repairs and the temporary trackage rights will expire no later than August 31, 2020. (Verified Notice 1-2.)) with KCS, allowing AGR’s crews to handle its own trains over the Line while the repairs are being made. (Pet.2.)

.....
“Under 49 C.F.R. §§ 1180.4(g), a verified notice of exemption must be filed at least 30 days before the covered transaction can be consummated. Thus, under the regulations, the earliest date AGR may consummate the transaction would be July 31, 2020. However, as noted above, AGR has filed a petition to waive the 30-day requirement and allow the exemption to take effect immediately. AGR notes that, while it has arranged detours for its traffic through a series of haulage agreements with cooperating carriers, the arrangements are inefficient, tax the crews of the cooperating carriers, and are causing significant impacts on AGR’s service to its customers. (Pet, 1-2.) AGR states that the temporary trackage rights are needed to minimize as much as possible the impacts of the situation on AGR’s customers. (Id. at 2.)”

(v) Norfolk Southern Railway Company-Temporary Trackage Rights Exemption-The Kansas City Southern Railway Company, FD36359 (Oct. 11, 2019).

“NSR explains that it has been forced to suspend train service over the Grand River Bridge in Brunswick, MO., following a debris strike and washout of NSR’s railroad bridge on October 1, 2019, due to heavy rains and rising river waters. (Pet.2.) NSR states that the purpose of the temporary trackage rights(fn. NSR states that the temporary trackage rights will expire no later than September 30, 2020. (Verified Notice 2.)) is to accommodate its emergency need to operate over a portion of KCS’s line in order to create an accessible route between Moberly, MO., and Kansas City, and minimize, as much as possible, the impacts to customers while working through these weather-created disruptions. (Pet. 3; Verified Notice 2,4.)

.....
“Under 49 C.F.R. § 1180.4(g), a verified notice of exemption must be filed at least 30 days before the covered transaction can be consummated. Thus,

under the regulations, the earliest date NSR may consummate the transaction would be November 9, 2019. However, as noted above, NSR has filed a petition to waive the 30-day requirement to allow the exemption to take effect immediately. NSR notes that, although it is currently seeking emergency detour operations over portions of the lines of its interline partners, detours are less efficient than trackage rights due to the potential need to require KCS to supply an experienced train crew member as a pilot to supplement the normal crew of the detouring train. (Pet. 3) NSR asserts that permitting the temporary trackage rights exemption to become effective immediately would help improve service during the restoration period and reduce the impacts to NSR's customers. (Id.)”

AAR's claim that the proposed emergency temporary trackage rights class exemption is, at its core, a modified version of the existing process, is completely in error. The silence and misleading nature of the effect of the detour function is cause for our concern, above, for precise language in the agency decisions. AAR cited the same five recent STB decisions in support of its initial October 9, 2020 petition. (AAR Pet. 10/9/20, at 3, n. 1), and again in its July 12, 2021 filing (AAR Comments 7/12/21 at 3 n.7). SMART/TD-NY pointed to the identical five STB decisions, in its July 12, 2021 filing. (SMART/TD-NY, Comments 7/12/21 at 5-6). The STB's NPRM made reference to its same five recent citations. (NPRM 2, 5-6).

Elimination of the important present detour practices—even without mention or analysis—in itself, requires denial of the proposed emergency temporary trackage class exemption. The risks for railroad employment, and for appropriate railroad operation, are too great for an industry vital to the nation's commerce and welfare.

C. Option to Use Temporary Class Exemption. AAR asks that carriers invoking the new “emergency” temporary trackage exemption, can opt also to seek exemption for the same transaction under the current temporary trackage class exemption, 49 C.F.R. §

1180.2(d)(8). (AAR Comments 7/12/21, at 6-7). The suggested occurrence for such option is anticipated to be expiration of the six months limit for relief under the proposed “emergency” temporary trackage class exemption, so as to thereafter permit notice under the existing temporary trackage class exemption, allowing completion of outage repairs.

The AAR’s option request supports denial of the NPRM, pointing to the sufficiency of current regulatory availability and opportunity therefor.

D. Elimination of Caption Summary. The NPRM proposes to omit the caption summary from the notices of exemption filed under the proposed emergency temporary trackage rights, and published in the Federal Register. 49 C.F.R. § 1180.2(d)(9).(NPRM 6-7). In this same proceeding, the NPRM would also mandate the same omission of caption summaries for trackage rights exemptions under two other trackage rights class exemptions, 49 C.F.R.

§ 1180.2(d)(7) & (d)(8). (NPRM 6-7):

“This requirement mirrors the requirement of a caption summary for exemptions sought under § 1180.2(d)(7) and (d)(8). Originally, the 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. (fn. The caption summary regulations originally indicated that caption summaries themselves would be published in the Federal Register. R.R. Consolidation Procs.-Exemption for Temp. Trackage Rts., EP 282 (Sub-No. 20), slip op. at 9 (STB served May 23, 2003); R.R. Consolidation Procs.-Trackage Rts. Exemption, 1 I.C.C. 270, 283 (1985). See also 49 C.F.R. §§ 1180.4(g)(2)(i) and (ii) (requiring caption summaries to be “suitable for publication in the Federal Register”).) However, in practice, caption summaries have not routinely been used for that purpose. Accordingly, the Board proposes not to require a caption summary for exemptions under § 1180.2(d)(9) and to eliminate the existing caption summary requirements under § 1180.2(d)(7) and § 1180.1(d)(8). Pursuant to the Board’s proposal, the caption summary requirements would be replaced by a requirement that the parties provide in their notices the same information currently required in caption summaries.”

Contrary to NPRM's elimination of the caption summary, AAR would have continued the caption summary requirement. (NPRM 6 & n.5). Cf. AAR Comments, 7/12/21, at 8-9.

The proposed removal of the caption summary is inconsistent with the NPRM's requirement that the Board would continue to publish notice of the proposed emergency temporary trackage rights in the Federal Register, although after, rather than before, the effective date of the transaction. Moreover, continued publication of the caption summary would assist easier access to research information for and about the Board's notices of the instant and various other transactions. The Board's proposed action now to eliminate the caption summary from all trackage rights class exemption notices is irrational under the circumstances.

E. Serious Safety Concerns Associated With Proposed Exemption. The SMART/TD-NY earlier filing addressed the proposal has safety risks for train personnel operating outside their familiar territory. (SMART/TD-NY, 7/12/21, 7) . NTSB shares this concern, supra at 4-5. However, STB mysteriously claims "the proposal would not alter or impact the existing rail safety operating regulations administered by the Federal Railroad Administration, which is the Federal agency with primary responsibility over rail safety matters. See, e.g., 49 C.F.R. § 240.229." (NPRM 4). See also, AAR's reference to § 240. 229 in its earlier filing. (AAR, 7/12/2021, 11). Here, the views of NTSB, also a federal agency, are to be accorded considerable, and perhaps controlling weight on the issue.

SMART/TD-NY understands detour agreements are private arrangements between rail carriers and not, per se, regulated by either STB or FRA. However, the new proposed exemption would become effective immediately, and thereby obviate effective notice to the public and other carriers.

Under the proposed new emergency trackage rights, a carrier would be accorded immediate operating authority to stand in the stead of traditional detour operations, which here-to-fore have by industry practice required foreign carrier personnel, highly experienced with operations on their foreign carrier territory, to accompany other personnel who likely may not be so qualified or actually sufficiently experienced with the foreign carrier operations. Moreover, in the face of emergency conditions, timely caution has proven necessary, despite and in addition to regulation which may be limited, incomplete, or perhaps confusing to some minds.

3. Response to American Short Line & Regional Railroad Association. The short three-page submission by American Short Line and Regional Railroad Association (ASLRRA), is simply a me-too echo of the AAR.

However, ASLRRA errs in finding the exemptions “become effective 5 days after the verified notice in which the railroads certify that the trackage rights are needed is filed with the STB.” (ASLRRA 2).

CONCLUSION

The NPRM should not be adopted as final rule.

Respectfully submitted,

/Gordon P. MacDougall/
Gordon P. MacDougall
1025 Connecticut Ave. NW
Washington DC 20036
Attorney for Samue J. Nasca

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