

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

STB EX PARTE NO. 659

PUBLIC PARTICIPATION IN CLASS EXEMPTION PROCEEDINGS

**COMMENT OF THE AMERICAN SHORT LINE AND REGIONAL
RAILROAD ASSOCIATION**

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The American Short Line and Regional Railroad Association (“ASLRRA”) respectfully submits its comments concerning the Board’s proposed changes to the current class exemption procedures to lengthen the period before which affected exempt transactions become effective. These comments are submitted in response to the March 10, 2006 Decision by the Board soliciting public comment on the proposed rule changes.¹

Statement of Interest

ASLRRA represents approximately 425 class II and class III railroads in the United States, Canada and Mexico as well as numerous suppliers and contractors to the short line and regional railroad industry. ASLRRA thanks the Surface Transportation Board for inviting the comments of interested parties.

Comments

ASLRRA and its member railroads respect the mandate of the Surface Transportation Board to serve the transportation interests of the public as reflected in its proposal to extend the notice period for identified exemption transactions. Nevertheless,

¹ 71 Fed. Reg. 13563-02 (Mar. 16, 2006).

ASLRRA opposes this proffered change because (a) it will harm the resurgent class II and III railroad industry through increased costs and delays, (b) it will add no meaningful additional public benefit while putting at some risk the gains to the public that have been achieved by a short exemption notice period, (c) it is needless broad and (d) no compelling justification has been identified to justify the additional burden to the industry. ASLRRA will comment on each of these issues in more detail, but first it is important to note that the current seven-day notice period reflects the principle that in the globally competitive logistics marketplace of the twenty-first century, the ability to act with speed and agility is synonymous with deregulation.

America tried sluggish regulation for most of the twentieth century under the heavy hand of the Interstate Commerce Commission. The decline of the railroad industry was steady and virtually unabated during that period, bottoming in widespread bankruptcy, near collapse of the entire industry and massive reorganization. Not surprisingly its ascent from that purgatory began only after the Staggers Act and later the Interstate Commerce Commission Termination Act finally allowed the industry the freedom to compete nimbly in a fiercely competitive world marketplace where the rules of survival are dictated by global market forces. Regulation is still a part of the rail industry in America, but the seven-day notice period reflects an understanding by the Surface Transportation Board that rules which handicap railroads –especially small ones - even slightly in their competitive battle to meet the needs of today’s worldwide shippers will eventually result in their extinction just as surely as natural evolution dooms impaired species in the natural world. Indeed, in its decision adopting class exemption procedures for Class III acquisitions, this Board noted Congressional sensitivity to the

particular vulnerability of Class III railroads to regulatory costs and delays in passing the Interstate Commerce Commission Termination Act, which contains the current section 10902 authorizing class exemptions for Class III acquisitions:

Our decision to go forward here also is in accord with the legislative history.... [T]he Conference Report on the ICCTA states: ... '[T]his new provision ...establishes a clear statutory division between transactions involving large Class I railroads on one hand and smaller railroads on the other. This should promote clearer and more expeditious handling of the affected transactions and avoid imposing additional and sometimes potentially fatal costs on start-up operations of smaller railroads who often can keep rail lines in service, even if not viable as part of a larger carrier's system.'²

From the perspective of the last century of economic regulation of railroads, the proposal to extend the notice period for the ten transactions identified by the Board may seem a modest –even insignificant – move. It is not. A thirty day notice period – or any notice period for that matter – can begin only after an agreement is struck and the notice is filed with the Board. Commercial transactions, be they line acquisitions or operating agreements between carriers, must be conceived and negotiated before parties can even contemplate when they will submit their deal for regulatory review or exemption. Only after that planning and negotiating phase is completed can the clock beginning ticking toward an operating date sometime *after* the notice period has expired. Thus a thirty day notice period for practical purposes easily turns into a *de facto* 45 or even 60 day exercise. If the transaction happens to involve a competitive bid for new shipper business, that kind of delay is a regulatory invitation for competitive modes of transportation not so regulated to fill the transportation void and grab the business.

² Class Exemption For Acquisition. Or Operation of Rail Lines by Class III Rail Carriers Under 49 U.S.C. 10902, 1 S.T.B. 95 (1996) (quoting H.R. Conference. Rep. No. 422, 104th Cong., 1st Sess. 179-80 (1995))

In some circumstances delay may also result in the complete loss of rail service. If a weak operator decides to cease operations, as often as not shippers have little notice before the event occurs. A new operator must be found, organized and approved quickly to assure a continuity of service. A thirty day absence of service while waiting for the regulatory clock to tick away is intolerable to many shippers and those who can do so will find alternative transportation arrangements long before then.

In addition to the revenues lost to increasing regulatory delays, increasing the seven day exemption notice period to thirty days will also raise actual costs. Funds are inevitably escrowed or otherwise unavailable while waiting for transactions to close. Those funds have time value. Waiting thirty days to close quadruples the cost of holding funds awaiting operating authorization. In addition, freezing a transaction for thirty days after it is completed before operating authority is granted makes it more likely that documents will have to be redrafted. Estimates contained in documents drafted thirty days before operating authority begins have a greater likelihood of being incorrect than those made a mere seven days before.

In the aggregate, costs and delays imposed on transactions over time will have a debilitating effect on smaller railroads. Weakening – *even at the margins* - the one competitive advantage class II and III carriers do have – speed of responsiveness to both crisis and opportunity – will slowly but surely starve the industry of its legislatively created *raison d’etre*. Put another way, class I carriers are just as good as class II and III carriers at responding *slowly* to opportunities, but Congress has in effect created an environment where smaller carriers can thrive in the commercial nooks and crannies where quick response and agility give them their one competitive edge. In a world of

30 day notice periods, at least some opportunities dependent upon quick execution will be lost, as eventually will the some of the short lines that survive on them. Ultimately it is the shipping public that will pay the price for slower transactions and the marginalization of small and nimble carriers. Some of the transactions that must be completed in a matter of days will simply go to less encumbered but more expensive transportation modes.

Increasing the regulatory delay from seven to thirty days will also discourage new carriers from entering the market because the greater likelihood of stays and other delays, all of which create more direct and indirect costs. It is illogical to think that anything short of increased regulatory activity and expense will result. The short line business thrives on opportunities where class I railroads have little interest in participating because its participants can and do accept lower operating margins than the publicly traded class I railroad corporations. Increasing costs will cut those margins even further. The very prospect of new and additional cost will discourage some new entrants who will not or cannot tolerate the increased risk of additional costs for the level of returns they currently accept. Once again, the absence of these market participants when their presence would otherwise make good commercial sense will deprive shippers of the lower costs the competition provided by the presence of class II and III carriers typically creates. A trend toward lengthier regulatory delay and higher associated costs would represent an ominous setback to the goals of efficiency and lower cost envisioned by Congress in deregulating the rail industry.

In light of the undeniable delay and increased costs associated with extending the notice period from seven to thirty days, what is the offsetting public gain? Virtually none. According to the Notice of Proposed Rulemaking published by the Board, the increased

notice period is intended to “ensure that the public is given notice of proposed transactions presented under one or more of the class exemptions before the exemptions become effective”³ presumably to facilitate motions to stay. However, by the Board’s own assessment, the transactions under consideration here involve “routine and uncontroversial cases” in which “Board authorization is granted so routinely that the Board has put in place a ‘class exemption’ allowing parties to use abbreviated, summary procedures for obtaining that authority, subject to after-the-fact Board review if objections are received”.⁴ Thus, it appears that the Board’s own expectation is that it is only the rare and exceptional case in which the public will object to one of the applications which qualify for class exemption procedures. Weighed against the proven commercial necessity for speedy and routine approval which drives the hundreds of class exemption transactions that are filed before the Board annually, the overall public interest in subjecting applicants to the additional cost and disruption of a thirty day notice period must be miniscule at best. This is especially true since the public is not precluded from objecting to a transaction after Board authority to proceed has been granted as noted in the reference to its “after-the fact Board review if objections are received”.⁵

In fact, it is not the public whose interest is at risk if it must object to a transaction *after* authority has been granted. It is the railroad applicants who assume the risk because at the time they close a transaction after the seven day notice period ends they have no guarantee that they will be insulated from “after-the-fact review” by the Board which could require them to undo the transaction completely. ASLRRRA asserts that Class II and III railroads gladly bear that risk in exchange for the ability to close their exemption

³ Public Participation in Class Exemption Proceedings, 71 Fed. Reg. 13563-02 (proposed March 16, 2006)

⁴ *Id.*

⁵ *see* 49 U.S.C. 10502 (d)

notice transactions in a commercially expedient time frame. Thus, the effect of the proposal to extend the exemption notice period from seven to thirty days imposes significant commercial harm on Class II and III railroads without achieving a corresponding benefit to the public or the railroads themselves since it neither enhances the public's right to object nor the Board's existing authority to revoke an exemption.

Since the vast majority of exemption notice transactions are now approved routinely as intended without requests for stay or after the fact requests for revocation, ASLRRA must speculate that there are unaddressed but limited issues of concern to the Board which the current procedures inhibit from coming before it. If so, then ASLRRA respectfully requests the Board identify with more specificity the nature of those issues. Exploring specific solutions for specific problems would at the very least offer an opportunity to preserve the current notice period for the vast majority of transactions which are manifestly routine and uncontroversial.

In that spirit ASLRRA suggests the Board preserve the seven day notice period for intra-industry transactions. They involve railroads already known by and subject to the Board's authority. Most of the transactions railroads file under the exemption transaction procedures are routine operating agreements. ASLRRA believes it is especially important to preserve the seven day notice period for railroad-to-railroad filings in an era when velocity and capacity are vexing problems for rail transportation. The shipping public and rail labor also already know these authorized carriers. They do not require additional time to learn the identity of the applicants. Any putative issues can be addressed directly and immediately.

Specifically, ASLRRRA suggests that the Board modify its rulemaking to continue the seven-day notice period for transactions described in 49 U.S.C. 10902 and in 49 U.S.C. 11323. Section 10902 addresses short line acquisitions involving Class III carriers, and the Board has exempted those transactions from prior review⁶. In these cases, the Board already regulates the activities of the acquiring railroads as well as the lines to be acquired, and both will have at least some record of operating applications and other activity in the Board's archive. In addition, existing carriers already operating under the authority of the Board should be well aware that the Board can revoke authority granted to consummate their transactions after they have been completed. If a member of the public decides to object to the transaction, it makes little substantive difference whether the pleading comes in the form of a motion to stay the transaction or as a motion to revoke a few days after the authority under exemption is granted. In either case the public's voice is heard, but the valuable alacrity of the current seven-day notice period is preserved for the great percentage of transactions where no objection would ever be raised.

49 U.S.C. 11323 addresses mergers and acquisitions of one railroad by another. The Board has carved out exemption status for a portion of these transactions⁷ and requires a one-week notice period before they become effective.⁸ The eight transactions which qualify for this expedited treatment involve primarily acquisitions of lines authorized for abandonment, acquisitions of non- class I non-connecting lines, intra corporate family transactions and lease and trackage rights agreements. In each of these

⁶ 49 CFR 1150.41

⁷ 49 C.F.R. 1180.2(d)

⁸ 49 C.F.R. 1180.4(g)

types of transactions, prompt authority is often needed to maintain operating continuity and uninterrupted service for the benefit of the shipping public. In the case of lines authorized for abandonment, the lengthy procedures required before an abandonment takes place assures that the public is well aware of the status of the line at the point where another carrier proposes to acquire it, so little is to be gained by offering another 23 days to enter an objection before the acquisition may take place. Intra-corporate transactions and operating agreements such as trackage rights arrangements while not typically attracting much public attention are so routine as to form a part of the everyday operating life of most railroads. Delaying their authority to operate for an additional 23 days merely clogs the rail transportation arteries for that period while offering no real corresponding public benefit in exchange. ASLRRA suggests that none of these processes is broken, and therefore they should be exempt from any fix which the Board may deem needed.

Class exemptions for qualified transactions and the implementation of the seven-day notice period were originally created two decades ago at a time when the future of freight rail transportation was hardly assured. Since then this seemingly small procedural step has played an unheralded but nevertheless key part in building a rail transportation infrastructure that shippers can count on to be alive and strong for them for the future. Class II and Class III railroads have particularly thrived because the seven day notice period allowed them to capitalize on their inherent and statutorily granted ability to move quickly to seize opportunities, adjust to fast changing circumstances and efficiently serve their customers constantly evolving requirements. The strong rail transportation system that Congress has bestowed upon the nation through deregulation is today more needed

than at any other time in the past half century. It would be a step in the wrong direction to raise costs and slow transactions when current procedures are perfectly adequate to address the tiny minority of situations where Board review is needed. ASLRRRA urges the Board to maintain the current seven-day notice period for exempt transactions and to avoid the temptation to undermine in the guise of fine tuning the very processes that have helped bring the rail system back to health.

Respectfully submitted,

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