

Before the
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 659

**PUBLIC PARTICIPATION IN CLASS
EXEMPTION PROCEEDINGS**

COMMENTS OF GENESEE & WYOMING INC.

Genesee & Wyoming Inc. (“GWI”) is filing these comments on behalf of itself and the 38 operating carriers in its corporate family, in response to the notice of proposed rulemaking (“NPRM”) served by the Board on March 10, 2006. The NPRM requests comments on the Board’s proposal to increase the timeframes for certain classes of exempt transactions. The purported goal of the changes is to provide the public greater notice, and to allow the Board to process notices of exemption and related petitions for stay in an orderly and timely fashion. GWI believes that the result of the proposed changes will increase regulatory burdens and costs for carriers in all covered exempt transactions while providing limited, if any, countervailing public benefits. Accordingly, GWI believes that the Board should *not* modify its exemption regulations as proposed.

Interest of GWI

GWI is a publicly-traded, non-carrier holding company that directly and indirectly controls one Class II railroad, and 37 operating Class III railroads. *See Genesee & Wyoming Inc., RP Acquisition Company One and RP Acquisition Company Two—Control Exemption—Rail Partners, L.P., AN Railway, et al., Atlantic & Western Railway, et al.,*

and *KWT Railway, Inc.*, STB Finance Docket No. 34708 (served June 24, 2005). GWI and its subsidiaries have benefited over the years from the use of a number of the Board's stream-lined class exemptions, and they believe that the existence of those class exemptions have played a significant role in their ability to consummate transactions in a cost-effective, timely manner.

Comments of GWI

A. The Board's Proposed Changes

The Board is proposing to amend its regulations relating to ten types of exempt transactions to extend the periods between when notice is filed with the Board and when the transaction becomes effective. For the most part, the change will increase the notice period from 7 days to 30 days.

B. Lack of Justification for Proposed Changes

Although the NPRM sets forth the substance of the proposed new regulations, it does not explain the purposes of the changes, the issues involved or how the goals of the national transportation policy will be benefited. Thus, interested parties like GWI are left to speculate, and have not been given a fully adequate opportunity to comment.

The Board notes that the exemptions are meant to cover "routine" transactions, subject to after-the fact Board review if necessary. NPRM at 2. The Board in the NPRM does not suggest that any of the exempt transactions are too broad and should be changed, suggesting that all of the transactions generally are in fact routine. If this is the case, why is additional notice required in *all* instances?

While the Board observes that at times exemptions may become effective before notice is published in the Federal Register, the NPRM does not specifically discuss what problems this has caused, or how the proposed changes will solve the problems. Who is not receiving adequate notice of proceedings? What actions would they take if they received additional notice?

If the issue is the handling of stay requests on an expedited basis, the Board has not indicated how often that has been an issue, who the parties are that have been seeking stays, what types of transactions have been challenged, and why after the fact remedies would not have been sufficient. Nor does the NPRM discuss how many transactions have been stayed (or revoked) over the years.

Since the NPRM does not set forth an adequate justification for the proposed changes, the changes should not be adopted. If there are particular problems with specific types of exemptions or situations that the Board believes need to be addressed, then the Board and the public would be better served if the Board were to address those concerns in a more targeted fashion without making changes to *all* of the most used and useful class exemptions. There is no justification for making wholesale changes to the proven system of class exemptions to address a small number of problem cases that could better be handled through the current case-by-case approach, or through more focused changes if truly determined to be necessary.

C. Lack of Need for Proposed Changes

The current set of class exemption regulations are designed to balance between the desire to provide potentially affected parties with notice of a transaction to analyze its potential effects and to respond, and the need not burden the exemptions so as to threaten

their usefulness. By imposing the burden of the additional notice period, the Board threatens to disrupt the delicate balance that has been created by the current regulations.

GWV believes that most of the transactions that take advantage of the class exemptions continue to be routine matters that are not the subject of any particular controversy, and that are rarely if ever opposed.

In particular, the exemptions set forth in 49 CFR 1180 involve internal corporate matters (control of non-connecting carriers, reincorporation in another state, transactions within a corporate family), and contractual matters between two willing carriers (joint line relocation projects, renewals of leases or operating agreements, trackage rights and temporary trackage rights). Specifically with respect to trackage rights exemptions, in adopting the exemption regulations, the ICC acknowledged that Federal Register publication would not take place until after consummation, that current procedures were working well, and that stay petitions would not be permitted. *Railroad Consolidation Procedures – Trackage Rights Exemption*, ICC Ex Parte No. 282 (Sub-No. 9), 1 ICC 2d 270, 281 (1985) (“*Trackage Rights Exemption*”), *aff’d*, *Illinois Commerce Commission v. ICC*, 819 F.2d 311 (DC Cir. 1987). The NPRM does not explain in what way this is no longer the case. Overall, the section 1180 exemption transactions generate little controversy, and there is no need for enhanced public notice of these types of proceedings.

The few controversies that have more recently arisen before the Board seem to be in connection with acquisitions. (Acquisitions by existing Class III carriers under 49 USC 10902 seem to involve fewer controversies – perhaps because the existing carrier acquiring the additional line or lines to operate is already known to the public and to the

Board.) In adopting regulations to implement the exemption for acquisitions under 49 USC 10902, the Board specifically rejected a request to lengthen the time between when a notice is filed and the date when it becomes effective - finding that the current exemption under 49 USC 10901 was working well and that there was no reason to increase the notice period. *Class Exemption for Acquisition or Operation under 49 USC 10902*, STB Ex Parte No. 529, 1 STB 95, 101 (1996).

The Board has already enhanced notice to the public over the past several years with respect to the exemption of acquisition transactions. With its new website, filings are posted promptly after their filing, giving interested parties more immediate notice of filings than the proposed publication in the Federal Register. (GWI believes that few, if any, interested parties will actually receive additional notice merely from the publication of a notice in the Federal Register.)

Further, the ICC and Board have already addressed the potential need for additional notice in what they have found to be the most controversial types of transactions, those being “larger” acquisitions. In acquisitions that result in the creation of a Class I or Class II carrier, a total of 35 days’ notice is provided to the public - a notice of intent must be filed 14 days before the exemption is filed, and the exemption is not effective until 21 days thereafter. 49 CFR 1150.35, 1150.45. Additionally, in acquisitions involving carriers that will have in excess of \$5,000,000 in revenue after the transaction, the Board adopted enhanced notice provisions that provide labor, and their local communities, with at least 60 days prior notice of the transaction. *Acquisition of Rail Lines under 49 USC 10901 and 10902 – Advanced Notice of Proposed Transactions*, STB Ex Parte No. 562 (served May 1, 1997) (adopting 49 CFR 1150.32(e) and

1150.42(e)). These provisions for enhanced notice give the public sufficient advanced notice to learn more about the transactions and to seek any necessary regulatory relief.¹

In the relatively few controversial instances in which the class exemptions are invoked, the public retains the right to petition the board to revoke the exemption. In such instances there is no time constraint, and this right has always been considered as an adequate remedy. *Class Exemption for the Acquisition and Operation of Rail Lines under 49 USC 10901*, ICC Ex Parte No. 392 (Sub-No. 1), 1 ICC 2d 810, 811 (1985) (“10901 Exemption (1985)”); *Trackage Rights Exemption*, 1 ICC 2d at 281 (citing *American Trucking Assn. v. ICC*, 565 F.2d 1115, 1120 and 1127 (5th Cir. 1981)). The NPRM gives no hint as to why this might no longer be the case.

As part of its regulatory flexibility analysis, the Board is required to consider the impact on small entities. Since the Board’s regulations already provide for added notice in “larger” transactions, any changes to the acquisition exemption regulations will have a disproportionate effect on small carriers and small transactions that represent the vast majority of the exemptions sought under these regulations.

D. Harmful Effects of the Proposed Changes

The current exemptions provide expedited procedures for the handling of the most routine transactions. In adopting the exemptions, the Board (and its predecessor the Interstate Commerce Commission (“ICC”)) has already determined that the transactions are not likely to have a significant impact on the public (they are of “limited scope”) or on shippers (they will not result in “an abuse of market power”). These exemptions were adopted in order to reduce the regulatory burdens on carriers, and with respect to

¹ Indeed, with respect to transactions involving the creation of a Class I or Class II carrier, the regulations already provide specific time periods provided for the handling of stay petitions within the 21 days after filing of the exemption notice. 49 CFR 1150.35(f) and 1150.45(f).

acquisitions under 49 USC 10901 (and later 49 USC 10902), on short line carriers in particular. The success of GWI and the short line industry has largely been built on the ability of short lines, and their parent companies, to act swiftly to address transportation needs without the costly and time-consuming burdens that would apply in the absence of the class exemptions that have been adopted over the years.

The purpose of the exemption powers granted under the statutes is allow the Board “to review its regulations and withdraw any such regulations found to be unnecessary to effect the goals of national transportation policy or regulations that served little or no public purpose.” *Simmons v. ICC*, 697 F.2d 326, 333 (D.C. Cir. 1982). On the other hand, the Board’s proposal here will *undermine* the following goals of the rail transportation policy set forth in 49 USC 10101 that are the basis of the current exemption procedures:

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required; ...

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes; ...

(7) to reduce regulatory barriers to entry into and exit from the industry;...

(9) to encourage honest and efficient management of railroads; ...[and]

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

The delays proposed by the Board may be merely “procedural” in style, but the delay will adversely affect the involved parties and necessarily increase costs, particularly

if the result is more stay petitions. The current system recognizes that the limited ability to obtain a stay, together with the right to seek revocation is an adequate counterweight to the need for an expeditious way of proceeding with generally uncontroversial transactions. *See 10901 Exemption (1985)*, 1 ICC 2d at 816 (“there has been no showing of a benefit from a notice and comment period that outweighs the benefit of expeditious handling”).

When the acquisition exemptions were originally adopted, the ICC, relying on Congressional intent in granting exemption authority under what is now 49 USC 10502 and the goal of removing as many regulatory impediments as possible, contemplated that revocation after the fact would be a sufficient remedy, and did not contemplate that stays would be widely used or granted. *See 10901 Exemption (1985)*, 1 ICC 2d at 811; *Trackage Rights Exemption*, 1 ICC 2d at 281. The NPRM does not explain how the Board’s experience has been different. The additional time periods proposed in the NPRM will upset that balance, and will make it easier, and more likely, that stay petitions will be filed, or threatened, by opponents as a way of imposing additional costs on a transaction to thwart transactions or to extract concessions that are not in the public interest and that otherwise would not be imposed by the Board.

With respect to acquisition exemptions, the ICC found that new carriers preserved rail service, rail employment and rail investment, and that the key to the exemption’s success was the ability of short lines to begin operations promptly. *Class Exemption for the Acquisition and Operation of Rail Lines under 49 USC 10901*, ICC Ex Parte 392 (Sub-No. 1), 4 ICC 2d 309, 311 (1988). The additional notice periods proposed by the

NPRM will necessarily result in additional costs to the applicants in terms of lost time and lost opportunities, and revenues.

In transactions between carriers, the details of the transaction - mileposts, financing for the transaction, timing for the transition – often are not finalized until just before the transaction is ready to be closed. Under the current procedures, the parties know that once matters have been finalized, they will be able to proceed seven days later. The additional notice requirement will mean that carriers may be filing their notices of exemption before all of the details of the transaction have been finalized. This in turn may necessitate additional filings and corrections as the transaction date approaches.² These changes may also raise controversy about whether the original notice period continues to run or whether it needs to start again. On the other hand, if carriers wait until all of the details are finalized, and then must comply an increased notice period, the transition and start up of new operations will be delayed costing shippers a month of improved service, and the new carrier operations a month of revenues.

In other instances, the increased notice could directly cause the loss of business. Short lines (indeed all carriers) are presented with opportunities to bid for new, sometimes short-term, traffic that might otherwise move by truck. The ability to put trackage rights (or temporary trackage rights) in place in seven days may make it possible for a railroad to bid on such traffic, while a delay of 30 days makes it almost certain that it will not.

² GWI has seen this with the advanced notice to labor requirement. In a number of instances, the description of the line has changed between when the original labor notice was given and when the transaction has been finalized. Such changes have necessitated seeking additional acknowledgement from the Board that the original notice to labor was still valid.

In adopting the seven day notice period for trackage rights, the ICC also noted their importance in addressing service emergencies. *Trackage Rights Exemption*, 1 ICC 2d 270, 281 (1985). This ability too would be lost with the proposed longer notice periods.

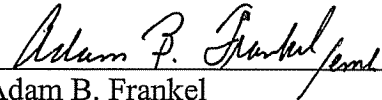
Thus, the Board should not assume that the increased notice requirement is *only* a delay in timing and not a change in the exemption. Such delays are likely to have real consequences in terms of increased costs and lost opportunities that will clearly undermine the usefulness of the class exemptions.

Conclusion

For all of the foregoing reasons, Genesee & Wyoming, Inc. and the carriers in its corporate family believe that the proposed modifications to the Board's exemption regulations will increase the regulatory burdens on carriers (and small carriers in particular), and believes that the Board should *not* to modify its exemption regulations in the overly broad manner proposed. If there are particular problems that the Board

perceives then it should propose rules that narrowly address those concerns while minimizing the effects on the broad range of class exemptions.

Respectfully submitted,



Adam B. Frankel
Senior Vice President and General
Counsel

Genesee & Wyoming, Inc.
66 Field Point Road, 2nd Floor
Greenwich, CT 06830
(203) 629-3722



Eric M. Hocky, Esquire
Gollatz, Griffin & Ewing, P.C.
Four Penn Center, Suite 200
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 563-9400

Attorneys for
Genesee & Wyoming Inc.

Dated: May 15, 2006