

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte No. 659

PUBLIC PARTICIPATION IN CLASS EXEMPTION PROCEEDINGS

REPLY COMMENTS

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

Attorney for John D. Fitzgerald

Due Date: June 14, 2006

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REPLY COMMENTS

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits these Reply Comments in response to Comments filed by other parties, on or about May 15, 2006, pursuant to the Board's Notice of Proposed Rulemaking (NPRM).^{2/} Apart from UTU/GO-386, some six other parties filed Comments.^{3/} All but two are in general support of the revisions suggested by the NPRM.

Two of the comments flatly oppose any of the changes advanced by the NPRM.^{4/} The three rail employee organization comments are

^{1/} General Chairman for United Transportation Union on lines of BNSF Railway Company, with offices at 400 E. Evergreen Blvd., Vancouver WA 98660.

^{2/} 71 Fed. Reg. 13563-65 (March 16, 2006).

^{3/} Association of American Railroads (AAR); American Short Line and Regional Railroad Association (ASLRRA); Genesee & Wyoming, Inc. (GWI); State of New Jersey (NJ); Rail Conference, International Brotherhood of Teamsters (RC); and Rail Labor Division, Transportation Trades Department, AFL-CIO (RLD).

^{4/} ASLRRA and GWI.

in favor of the NPRM.^{5/} The remaining two comments generally favor the NPRM;^{6/} however, AAR would give the added notice only for §10901 and §10902 class exemptions, retaining the 7-day period for inter-carrier transactions under §11323, and AAR would even go backward and eliminate the existing 7-day notice for temporary trackage rights, so as to provide an "immediate" effectiveness for the temporary trackage rights exemption. Nevertheless, AAR would go further than the NPRM in certain respects, and seeks some restrictions to the list of transactions covered by the §10901 and §10902 class exemptions, and AAR would require that more information be included in these §10901, and §10902 notices. NJ, in addition to supporting expanded notice for all class exemption transactions, desires to have additional information included in the notices, and would have certain additional persons given actual notice of the filings.

1. Reply to ASLRRRA and GWI. ASLRRRA and GWI would maintain the status quo. ASLRRRA asserts the ability to act with speed and agility is synonymous with deregulation; ASLRRRA opposes any time extension, although minor, to any notice period, which extension it associates with "sluggish regulation" by the former ICC for most of the twentieth century that, according to ASLRRRA, resulted in the near collapse of the railroad industry. ASLRRRA claims the industry did not begin its ascent from that "purgatory" until after the Staggers Act and the ICC Termination Act. (ASLRRRA,

^{5/} UTU/GO-386, RC, and RLD.

^{6/} AAR and NJ.

2). GWI takes the position that there is insufficient justification for the proposed changes, and lack of need for the NPRM.

The short answer to ASLRRRA and GWI is the reality of experience, which indicates abuse of the class exemptions has occurred through the insufficient 7-day notice period. The comments of AAR and NJ on the §§ 10901, 10902 process constitute persuasive refutation of the contentions advanced by ASLRRRA and GWI. The misuse of the class exemptions has proven scandalous.

2. Reply to AAR and NJ. UTU/GO-386 is in agreement with State of NJ and AAR concerning the present inadequacy of the content of the notices under the §§ 10901, 10902 class exemptions; that the transactions covered by the class exemptions should be restricted somewhat; and additional persons should be served with the notices.^{7/}

AAR is wrong in opposing comparable time period extensions for notices, publication, and stays to govern procedures under the §11323 class exemptions. The present 7-day notice period is wholly inadequate, for the reasons given by the Board in its NPRM. AAR has not shown any prejudice for comparable notice in inter-carrier transactions under §11323, as AAR itself recognizes for §§ 10901, 10902 class exemption procedures.

3. Temporary Trackage Rights. UTU/GO-386 is amazed that AAR proposes to eliminate any notice for temporary trackage rights. There is no basis for AAR's extreme and unfounded request. The temporary trackage rights class exemption is of very recent

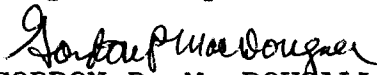
^{7/} At a minimum, the same public members to be served in applications under § 10901 and §10902, should be served with notices under the respective class exemptions. Cf. 49 CFR 10(e).

origin. Railroad Consolidation Procedures, 6 S.T.B. 910 (2003),
rev. United Transp. Union v. Surface Transp. Bd., 363 F.3d 465
(D.C. Cir. 2004), 7 S.T.B. ____ (May 17, 2004).^{8/} AAR claims that
the present exemption^{9/} most frequently has been used in maintenance
projects, but that a need sometimes arises suddenly because
of unforeseen circumstances, such that the railroads should be
able to implement trackage rights immediately, without notice,
even 7 days is too long. (AAR Comments, 5/15/06, 14).

The AAR's contentions lack a factual basis. No recent carrier
claims or STB decisions are cited. The temporary trackage rights
class exemption originated from the Board, not from the railroad
industry, which did not come to the Board's support on judicial
review. For all that appears, AAR's present proposal may be aimed
to assuage agency (or staff) feelings.

Maintenance projects are almost always planned in advance.
Any genuine need for prompt temporary trackage rights can be met
by waiver of Board regulations. Moreover, there is the 20-day
advance notice for employee protection under any trackage rights,
including those of a temporary nature. Traditionally, real emergency
routing is achieved by detour arrangements, a remedy which
remains available, and not carrying mandatory employee protection.

Respectfully submitted,


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

June 14, 2006

Attorney for John D. Fitzgerald

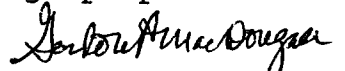
^{8/} See: 69 Fed. Reg. 27970-71. (May 17, 2004).

^{9/} 49 CFR 1180.2(d)(8).

Certificate of Service

I hereby certify I have served a copy of the foregoing upon
all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall