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Before the
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 282 (Sub-No. 21)

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

REPLY

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November 2, 2020

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REPLY

Preliminary Statement

Samuel J. Nasca,¹/for and on behalf of SMART-Transportation Division-New York State Legislative Board (SMART/TD-NY), submits this reply to the petition by Association of American Railroads (AAR), filed October 9, 2020, that the Surface Transportation Board (STB) institute a new proceeding to establish a class exemption for rail carriers to permit so-called “emergency temporary trackage rights” to take effect immediately, merely after carrier’s notice publication by the STB (within 5 days, absent waiver), but without prior notice to the public.

The AAR asserts its request for immediate Government pre-authorization of emergency trackage rights operation by one rail carrier, over the tracks of another carrier, is claimed advisable, despite the existence and availability for temporary operation under the current and long-standing class exemption for “temporary trackage rights” class rights exemption. 49 CFR

¹/ New York State Legislative Director for SMART-Transportation Division, with offices at 35 Fuller Road, Albany NY 12205.

1180. 2(d)(8).

SMART/TD-NY opposes the initiation of a new class exemption. The present “temporary” class trackage exemption, §1180.2(d)(8), is sufficient without establishing an additional “emergency temporary” class trackage exemption, to be labeled §1180.2(d)(9). AAR does not suggest that the present temporary trackage class exemption, §1180.2(d)(8), should be amended or replaced; or that the basic trackage rights class exemption, §1180.2(d)(7), should in anyway be revised. The proposed third trackage rights class exemption would be wholly unwarranted. Moreover, the AAR’s proposal invites serious safety considerations. The STB is urged not to initiate a proceeding to establish an “emergency temporary” trackage class exemption, but to maintain the current “temporary” trackage class exemption, without adding a new “emergency temporary” along with the existing satisfactory “temporary” trackage rights class exemption.

I. AAR’s Petition Does Not Correctly Explain Temporary Exemption. AAR’s petition states it is based upon the year 2003 temporary trackage rights exemption proceeding, citing Railroad Consolidation Procedures, 6 S.T.B. 910 (2003). (Pet. 2, 4). However, the STB’s decision was later amended, Railroad Consolidation Procedures, 7 S.T.B. 587 (2004). The 2003 decision had been reviewed and remanded in United Transp. Union v. Surface Transp. Bd., 363 F.3d 465 (D.C. Cir. 2004).

The AAR’s 11-page petition, in its text, does not discuss the detour provisions of the railroad industry. Nevertheless, the AAR’s footnotes do mention the temporary non-regulated detour operations, along with five temporary citations, but without analysis. (Pet. 3,n.1-2).

The treatment of detour operations is a critical absent topic to the AAR’s petition, for emergency temporary trackage rights are conducted under detour arrangements between carriers.

The present detour operations occur to prevent disruptions to commerce and to public transportation (passenger and freight). If an emergency is anticipated to continue, the STB's temporary trackage rights may be invoked and, if appropriate, combined with waiver of the otherwise required 30 days notice (absent waiver) thereunder.

II. The AAR's Proposed Rule Would Impact Rail Safety. The AAR's proposal for an "emergency temporary" class exemption, in addition to the existing "temporary" class exemption, would provide opportunity for an automatic cut-off of detour operations. The detour arrangements in the railroad industry provide for a pilot employee(s) from the landlord carrier line to provide guidance for the detour carrier's operation in the emergency situation. This is critical assistance for safe operation by the disabled carrier over substitute trackage. To permit detour operations over foreign trackage without the usual detour arrangements would threaten safety. The AAR proposal would give authority for the immediate cessation of detour operation, with displacement by emergency temporary class exemption, giving rise to the possibility of operation solely by unfamiliar operating tenant carrier personnel. Moreover, there would be also the possibility of initial detour avoidance altogether.

CONCLUSION

The STB should decline to institute a rulemaking to consider a class exemption for emergency temporary trackage rights.

Respectfully submitted,

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November 2, 2020

Attorney for Samuel J. Nasca

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing upon counsel for petitioner AAR
by first class mail postage-prepaid.

Dated at
Washington DC
November 2, 2020

/s/Gordon P. MacDougall
Gordon P. MacDougall