

SERVICE DATE – OCTOBER 5, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35656

PROGRESSIVE RAIL INCORPORATED—
ACQUISITION AND OPERATION EXEMPTION—
RAIL LINES OF CRAB ORCHARD & EGYPTIAN RAILROAD COMPANY

Digest:¹ The Board is denying a railroad's appeal of an earlier decision by the Director of the Office of Proceedings making the railroad's exemption effective 60 days after the railroad certified that it complied with an employee notification requirement.

Decided: October 3, 2012

BACKGROUND

On September 7, 2012, Progressive Rail Incorporated (PGR), a Class III rail carrier, filed a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire from Crab Orchard & Egyptian Railroad Company (COER) and operate 12.23 miles of COER's rail lines in Williamson County, Ill.² The Director of the Office of Proceedings (Director), in a decision served and published in the Federal Register on September 21, 2012, made the exemption effective 60 days after PGR submitted its certification to the Board under 49 C.F.R. § 1150.42(e) regarding notice to employees. On September 21, 2012, PGR submitted an appeal of the Director's decision pursuant to 49 C.F.R. § 1011.2(a)(7).

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1011.7(a)(2)(x)(A), the Board has delegated to the Director the authority to determine initially whether to issue notices of exemption under 49 U.S.C. § 10502 for acquisition transactions under 49 U.S.C. § 10902. The Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director. See

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² PGR originally filed its notice of exemption on September 5, 2012. On September 6 and September 7, 2012, it amended its notice of exemption. Accordingly, the Board considers September 7, 2012, to be the filing date of the verified notice.

49 C.F.R. § 1011.2(a)(7). Here, PGR argues that the Director erred in stating that the exemption cannot become effective until November 4, 2012, 60 days after PGR submitted its certification under 49 C.F.R. § 1150.42(e).³ Thus, on appeal, the Board considers whether the Director properly established the effective date of the exemption.

PGR contends that the 60-day period runs from posting of the notice in the workplace, not from the date of certification of such posting. According to PGR, certification to the Board of the required posting can occur long after the employment notice is posted.

Contrary to PGR's assertions, the Director's application of 49 C.F.R. § 1150.42(e) is consistent with the plain language of the regulation and with well-established Board precedent. Section 1150.42(e) provides (emphasis added):

If the projected annual revenue of the rail lines to be acquired or operated, together with the acquiring carrier's projected annual revenue, exceeds \$5 million, the applicant must, *at least 60 days before the exemption becomes effective*, post a notice of applicant's intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) *and* serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, *and* certify to the Board that it has done so.

Thus, to comply with this regulation, an applicant must do three things at least 60 days before the exemption becomes effective: post a notice in the workplace, serve a copy of the notice on the national offices of the employees' unions,⁴ and certify to the Board that it has done so. The Board's decisions have consistently interpreted 49 C.F.R. § 1150.42(e) to require certification to the Board at least 60 days before the exemption becomes effective. See, e.g., Progressive Rail, Inc.—Acquis. Exemption—Rail Lines of Wis. Cent., Ltd., FD 35257, slip op. at 2 (STB served Aug. 28, 2009) ("PGR also has certified to the Board that it has complied with the employee notice requirements of 49 CFR 1150.42(e). Pursuant to that provision, the exemption may not become effective until 60 days from the August 12, 2009 date of the revised certification to the Board"); Utah Ry.—Acquis. & Operation Exemption—Lines of Utah Transit Auth. in Salt Lake City, Utah, FD 33785, slip op. at 1-2 (STB served Aug. 30, 1999)

³ In its certification, filed on September 5, 2012, PGR stated that it posted the required notice at COER headquarters at Marion, Ill., at least 60 days before the date on which PGR proposed the exemption would become effective. Thus, based on PGR's proposal that the exemption become effective on October 5, 2012, its certification indicates that it posted the notice on or before August 6, 2012.

⁴ PGR explained that, because COER employees are not members of a labor union, the notice was not sent to the national office of any labor union.

(disagreeing with applicant's statement that the transaction could be consummated 60 days after notice was posted in the workplace, and instead making exemption effective 60 days after later-filed certification).

In this case, PGR did not submit the certification required under 49 C.F.R. § 1150.42(e) until September 5, 2012. Therefore, the Director correctly determined that the exemption cannot become effective until November 4, 2012, 60 days after PGR submitted its certification to the Board.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. PGR's appeal is denied.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.