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

STB EX PARTE NO. 659

PUBLIC PARTICIPATION IN CLASS EXEMPTION PROCEEDINGS

**REPLY COMMENTS 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 Reply 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

In response to a question posed to him at the May 23, 2006 Hearing on Impacts of Railroad-Owned Waste Facilities, Chairman Buttrey confirmed that in part at least concern about the activities of those who would use the Exemption Transaction

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

procedures established by the Surface Transportation Board and its predecessor to escape local and state regulation motivated the Board to propose lengthening the seven-day notice period to thirty days. While widely assumed by those who submitted Comments in this proceeding, the Board did not reference the issue in its Notice of Proposed Rulemaking. Nevertheless, the Comments submitted in Ex Parte 659 ranged far beyond the current proposal in their attempts to provide solutions to the heretofore unstated issue. ASLRRRA believes that the very breadth of these solutions underscores the fact that the proposed thirty day notice period does not suitably address the real issue underlying this rulemaking, but it does needlessly increase the costs and regulatory burden of the vast majority of railroads who currently comply with the seven-day notice requirement without controversy or inconvenience to the interested public. The merits and demerits of the Board's 30 day notice proposal have been explored fully in the Comments already filed by interested parties, including ASLRRRA, and no Comments filed by interested parties identify any need or justification for lengthening the notice period or requiring additional information for the eight transactions listed in 49 C.F.R. 1180.2(d). Accordingly, this Reply will address the suggestions contained in Comments which go beyond the rule change proposed by the Board.

The State of New Jersey ("New Jersey") asks the Board to move away from the time honored Federal Register notice system, which it calls "constructive notice" to what it calls "actual" notice to its own list of special government interests. (New Jersey at 5) It complains that state and local governments do not have the resources to monitor the Federal Register to find the Notices. (Id. at 5) Given the electronic ease with which the Federal Register is delivered today, if New Jersey's lament is to be taken seriously either

its fiscal woes must be dire or its employees electronically challenged. The Federal Register is sent free almost daily by the Government Printing Office to email addressees who have requested it at the GPO website more or less daily. The email presents the Table of Contents organized alphabetically by agency. One click takes the reader to the agency's list of entries, and a second click takes the user to the substance of the notice or decision. The entire process may take thirty seconds. Thousands of subscribers easily scan the Federal Register for relevant notices this way every day. Even the most impoverished local jurisdiction can determine without cost whether an Exemption Transaction notice involves its authority or community in less time than it takes to scan headlines in the morning newspaper. In addition, the Board's own website provides a free, searchable list of Notices and other filings as well as Board Decisions which is updated daily. Still, New Jersey suggests that the "constructive" notice in the Federal Register, which has served for decades as the official means to inform the public of federal government actions, is insufficient and should be replaced with 'actual' notice for the so-called Ten Transaction types identified in the Notice of Proposed Rulemaking. (Id. at 6-7) This proposal would transform a simple and effective notice system virtually without cost to government into a tedious and expensive process for the many small railroads that use the Exemption Transaction procedures to obtain the regulatory approvals they need to conduct their businesses. There is no practical or equitable justification for creating this additional new burden for businesses, particularly for small railroads, so that state and local jurisdictions will not have to take a few seconds a day to check an email from the U.S. Government Printing Office.

Both New Jersey and the Association of American Railroads ("AAR") suggest a host of additional information they believe should be collected as part of the Exemption Notice process. New Jersey would exclude new service from the exemption process altogether and for exemptions for the preservation or restoration of previously existing service would have the Board require data on shippers served, financial affiliations, lines of business to be handled, an operating plan including types and volumes of traffic, descriptions of the equipment and crews to be used, an operating plan, construction plans, negotiations with connecting carriers, financial projections, environmental mitigation plans and even justification for the privilege of receiving either a certificate of public convenience and necessity or an exemption to operate as a rail common carrier. (New Jersey at 12-13). AAR suggests similar requirements plus information on whether or not a police force will be established. (AAR at 10-11). The AAR does differ from New Jersey by conveniently excluding its own Class I members from its proposal for this plethora of new data. It would limit the requirement for all the additional information to transactions under 49 U.S.C. §§ 10901 and 10902, which apply to non-carriers and class III railroads, respectively.

The effect of these calls for more and more information is to eviscerate the "exemption" from the exemption notice procedures. What remains is plainly the kind of detailed information that would be expected in an application process, not an 'exempt' transaction. Further, none of this additional information would address the statutory exemption criteria set forth at 49 U.S.C. 10501. ASLRRRA asserts that the many legitimate and non-controversial applicants who currently employ the seven-day notice have done nothing to deserve de facto having the efficiency and cost-effectiveness of the

current Exemption Notice procedures taken from them. To impose a data-intensive prerequisite to obtaining operating authority would be a major and unfortunate first step in re-regulating the class II and class III participants in the railroad industry. Clearly this goes far beyond the Board's own view of its proposed additional 23 days' notice period as a mere 'procedural' adjustment² to far more substantive and policy-changing rulemaking. In the view of the ASLRRRA if such sweeping reforms are needed to police a few non-industry abusers, then it seems more appropriate to drop the current rulemaking, which will only punish the innocent without achieving its real objective, and in its place institute a new proceeding to deal with the real problem in a more focused manner.

While the AAR Comments appear to identify non-railroads as the source of the mischief, (see AAR at 7-9) it seems intent on gratuitously punishing existing small railroads as part of its proposed solution. Each of the examples cited involved applicants who had used or attempted to use the exemption available under 49 C.F.R. 1150.31 to meet the requirements of 49 U.S.C. 10901, the statutory provision for non-railroads to obtain authority to operate as common carriers. Yet as part of its proposed solution, AAR would have the Board require significant additional data from the applicants for exemptions *both* under §10901 *and* under §10902, the latter of which is the statutory scheme for *existing* class III railroads to obtain authority to acquire and operate other railroad facilities. (AAR at 10) In addition, it would limit the availability of the exemptions to transactions involving non-abandoned lines of railroad under the STB's

² "...the Board does not propose to make any changes to situations in which a class exemption can be used, or the information that entities seeking to use a class exemption must provide." Public Participation in Class Exemption Proceedings, STB Ex Parte 659 (STB served March 10, 2006) at 2.

abandonment authority which are currently owned or leased by rail common carriers.

(AAR at 12)

Why it has expanded its proposed solution to deprive existing authorized class III common carriers of the benefits of the current exemption process under 49 U.S.C. 10902 and 49 C.F.R. 1150.41 the AAR does not explain. The effect, however, would be highly prejudicial to the part of the rail industry that AAR does not represent - the small class II and class III railroads. Ironically, under AAR's proposal the cost of increased information gathering and reduced availability of expedited regulatory procedures would be borne by the small railroads that are least able to afford it. AAR dismisses the additional cost of this burden by alleging "an operator that cannot provide this kind of information is ill-prepared to participate in the national rail network". (AAR at 11). It is myopic and demonstrably wrong to suggest that an existing small class III carrier attempting to grow its business by acquiring other existing lines is "ill-prepared" to be part of the national rail infrastructure simply because its resources for responding to significant and prospective data demands are limited. For example, AAR would require an applicant - even an existing class III common carrier filing for authority under §10902 - to identify future customers to be served and even what locomotives and crews will be used to serve them. (AAR at 10). The former is often competitively sensitive and sometimes contingent, and the latter patently superfluous when the applicant is an existing and operating Class III carrier. Having or lacking answers to these questions is not a litmus test for the legitimacy of a class III carrier or its ability to operate another class III facility successfully. If it were, many of today's class III carriers who were created from

abandoned or nearly abandoned class I lines without answers to these questions would never have passed regulatory review.

To justify leapfrogging over the Board's proposed rulemaking with its more sweeping proposals, the AAR concludes that "the STB should have more at its disposal than after-the-fact-responses". ASLRRRA would simply point out that in the example cited by the AAR as an abuse, without more tools at its disposal the Board dealt quite effectively after the fact with the class notice filed by the Northern Central Railroad by revoking it. Riffin d/b/a Northern Central Railroad – Acquisition & Operation Exemption – in York County, PA, STB Finance Docket No. 34552 (STB served Feb. 23, 2005). In the case of the notice of exemption filed by Northeast Interchange Railway, LLC, also cited as an abuse by AAR for which presumably the Board needs more authority at its disposal, the community objected in a timely fashion (apparently it had the resources to find the notice in the Federal Register) and the Board ably prevented the exemption from taking effect *before* the fact. Northeast Interchange Railway, LLC – Lease & Operation Exemption – Line in Croton-on-Hudson, NY, STB Finance Docket No. 34734 (STB served Nov. 18 2005). If anything, these examples belie AAR's assertion that the Board lacks the needed tools to conduct its regulatory oversight of exemption notice transactions.

Finally, there is an underlying assumption in the Comments both of the State of New Jersey and the AAR that "the problem" - as they define it - is a "growing" menace. The AAR says that "a *growing* number of parties have viewed the class exemptions . . . as regulatory loopholes" (AAR at 6) and "abuses of the class exemption process . . . have become *far too commonplace*" (AAR at 13). [emphasis added] New Jersey says "*More*

and more, the exemption procedures are being invoked by persons that do not appear to intend to operate as legitimate rail carriers". (New Jersey at 9) [emphasis added] These quantitative assertions may or may not be true, but neither commenter provides any data other than anecdotal illustrations to support their frequency claims. ASLRRA notes that New Jersey is the only jurisdiction, state or local, to file comments, which suggests the problems New Jersey addresses are more limited than the state suggests.

In any event, the proposed sweeping remedies both parties identify go far beyond the Board's own rulemaking and at a minimum should be supported with statistical data before undergoing serious consideration. ASLRRA believes that under any statistical analysis the Board will find the vast majority of applications for exemption notice authority by existing class III carriers are routine and lacking a scintilla of controversy. ASLRRA again urges the Board not to punish gratuitously the legitimate class III applicants and to reject the increased regulatory notice period and informational requirements proposed by the State of New Jersey and the AAR.

Respectfully submitted,

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