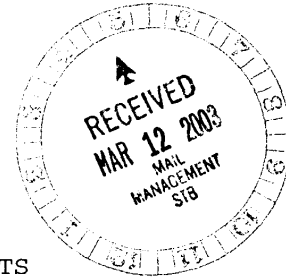


ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD
Ex Parte No. 282 (Sub-No. 20)
RAILROAD CONSOLIDATION PROCEDURES
EXEMPTION FOR TEMPORARY TRACKAGE RIGHTS



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COMMENTS

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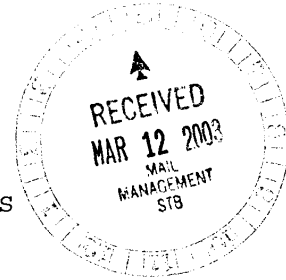
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Due Date: March 12, 2003

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COMMENTS

Preliminary Statement

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits these comments in response to Notice of Proposed Exemption and Rulemaking (NPE&R), dated January 31, 2003 (served February 10, 2003), 68 Fed. Reg. 6695-97 (Feb. 10, 2003).^{2/}

The NPE&R would establish a class exemption for so-called "temporary trackage rights," asserted to be patterned upon the existing trackage rights class exemption from the provisions of 49 U.S.C. 11323(a)(6). 49 CFR 1180.2(d)(7), .4(g), .6(a)(7)(ii). Railroad Consolidation Procedures, 1 I.C.C.2d 270 (1985), rev. den. Illinois Commerce Com'n v. ICC, 819 F.2d 311 (D.C. Cir.

^{1/} General Chairman for United Transportation Union on lines of The Burlington Northern and Santa Fe Railway Company, with offices at 400 E. Evergreen Boulevard, Vancouver, WA 98660.

^{2/} The Board's Director, Office of Proceedings, on January 31, 2003 (served February 10) 68 Fed. Reg. 6795 (Feb. 10, 2003) certified that the proposed rule would not have a significant economic impact on a substantial number of small entities, pursuant to the Regulatory Flexibility Act. This Commentor takes no position as to the impact upon small entities.

1987).^{3/} However, the proposed exemption for temporary trackage rights would go beyond an exemption for the acquisition of trackage rights, 49 U.S.C. 11323(a)(6), so as also to embrace an exemption from the abandonment and discontinuance provisions of 49 U.S.C. 10903, and would have other undesirable consequences.

Background

The proposal to establish a temporary trackage rights exemption was first announced January 23, 2003, but the details were not given until the January 31, 2003 public Board conference, where a 1-1/2-page memorandum was orally presented by a Board employee, with the text of the NPE&R apparently approved for issuance. The text was issued February 10, 2003.

Neither the Staff memorandum, nor the NPE&R, sets forth a single ICC or STB citation of prior instances where temporary trackage rights were either exempted or approved. Examination of prior class exemption proposals makes the lack of case citations unique for the establishment of a class exemption. We know of no request from the railroad industry for a class exemption. Individual exercise of the general trackage rights class exemption, petition for an exemption, and/or petitions to revoke or to discontinue trackage rights, have occurred intermittently, and have been handled without complaint. The proposed temporary trackage rights class exemption appears Board Staff-generated, rather than sought by the rail industry.

^{3/} The class exemption as originally published has been amended in only minor aspects.

The Board should not adopt the NPE&R. There is no need for a class exemption to cover "temporary" trackage rights, and the failure to provide mandatory employee protection for the discontinuance of trackage rights is fatal to the proposal.

ARGUMENT

I. THERE IS NO NEED FOR A CLASS EXEMPTION FOR TEMPORARY TRACKAGE RIGHTS.

A. History of Temporary Rights. The NPE&R purports to present the background for temporary trackage rights as the exercise of the trackage rights class exemption for an indefinite period coupled with a request that the exemption expire on a certain date. (NPE&R 3).^{4/}

It is well established that trackage rights remain in effect until the Board either authorizes discontinuance or approves a new agreement. Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 146-48 (1946). Accordingly, revocation of a trackage rights exemption does not terminate trackage rights. This is settled law. See: Finance Docket No. 32103, Milford-Bennington Railroad Company, Inc.--Trackage Rights Exemption--Boston and Maine Corporation and Springfield Terminal Railway Company(not printed) (served Sept. 3, 1993), and cases cited therein.

Trackage rights have been revoked, not to permit discontinuance, but to provide a more individualized review of a proposed

^{4/} The NPE&R throughout says the Board gives its "authorization" to the individual trackage rights by the use of the class exemption, and the proposed exemption also employs the "authorization" term. (NPE&R 8). But the Board under the exercise of the class exemption provisions does not "authorize" any transaction. Rather, the Board exempts the transaction from any need for authorization. Railroad Consolidation Procedures, 1 I.C.C.2d 270, 279 (1985).

transaction. Leading examples are Union Pacific RR Et Al.-Trackage Rights over CNW, 7 I.C.C.2d 177, 180-81 (1990); Finance Docket No. 31088, Southern Railway Company and Norfolk Southern Corporation-Purchase-Illinois Central Gulf Railroad Company Line-Between Fulton, KY and Haleyville, AL, 4 (not printed) (served Oct. 2, 1987).^{5/}

1. Apart from an isolated and uncontested governmental commuter situation,^{6/} a drift toward a "temporary" trackage rights might be said to have begun with Finance Docket No. 32446, Soo Line Railroad Company--Trackage Rights--Over a Line of Chicago, Central and Pacific Railroad Company in Rockford, IL (not printed) (served January 6, 1994), 59 Fed. Reg. 1407-8 (Jan. 10, 1994) (Rockford Bridge). When the Soo Line's bridge at Rockford, IL was damaged and rendered inoperative, SOO Line filed a petition for an overhead trackage rights exemption over Chicago, Central & Pacific Railroad Company (CCP). Although only a 60-day period was accorded by CCP, the ICC granted SOO Line an unlimited trackage rights exemption, citing the emergency situation, subject to standard trackage rights employee conditions. Soo Line did not ask for discontinuance authority as part of its exemption petition.

2. The key proceeding resulting in the current temporary trackage rights procedure involved a 56.4-mile Union Pacific Railroad Company (UP) overhead trackage rights for two months over

5/ Petitions to review denied on other grounds. United Transp. Union v. ICC, 871 F.2d 1114 (D.C. Cir. 1989); United Transp. Union v. U.S., 905 F.2d 463 (D.C. Cir. 1990).

6/ See: Finance Docket No. 32300, Southern Pacific Transportation Company--Trackage Rights Exemption--Peninsula Corridor Joint Powers Board (served June 8, 1993); Finance Docket No. 32303 (Ibid.) (served June 8, 1993).

CCP in Iowa due to UP track maintenance and line congestion. Finance Docket No. 32959, Union Pacific Railroad Company--Trackage Rights Exemption--Chicago, Central and Pacific Railroad Company(served May 31, 1996), 61 Fed. Reg. 27383-84 (May 31, 1996); Finance Docket No. 32959 (Sub-No. 1), Ibid.(not printed)(served July 25, 1996), 61 Fed. Reg. 38799 (July 25, 1996)(UP/CCP). UP on May 21, 1996 filed a notice under the trackage rights class exemption for overhead rights without time limitation, accompanied by a petition for partial revocation and for temporary exemption. UP in its petition stated an alternative procedure acceptable to UP would be for the Board to grant discontinuance authority for UP under 49 U.S.C. 10903, a procedure the Board had followed in several analogous circumstances, Finance Docket No. 30721, Dakota Rail, Inc--Petition for Exemption From 49 U.S.C. 10901, 10903, and 11301 (served Nov. 14, 1985);^{7/} Docket No. AB-252 (Sub-No.2X), Northern Missouri Railroad Company--Exemption--To Discontinue Operation in Daviess, Gentry, and Nodaway Counties, MO (served Sept. 26, 1986). (UP/CCP UP Pet., 6/4/96, 3).

The Board's staff advised UP the Board instead would treat UP's petition as one seeking an exemption, and assigned it Sub-No. 1 with an additional filing fee. The Board then exempted the transaction so as to extend only for a two-month period.^{8/} However, the decision gratuitously announced that UP could discontin-

^{7/} See: Winter v. ICC, 828 F.3d 1320 (8th Cir. 1987); Wisconsin Cent. Ltd. v. Surface Transp. Bd., 112 F.3d 881 (7th Cir. 1997).

^{8/} The change in Board handling of temporary trackage exemptions, overruling UP's position, is also apparent from the May 31 and July 25, 1996 issuances, particularly the May 31 Board notice, at fn. 2.

ue the exempted trackage rights without securing discontinuance authority. UP/CCP, 7/25/96, 2:

"Therefore, we will grant the petition and permit the trackage rights exempted in STB Finance Docket No. 32959 to expire on August 1, 1996, without UP being required to obtain discontinuance authority."

3. Subsequent to UP/CCP, the vast preponderance of the use for the class exemption-plus-exemption petition procedure, in dealing with temporary trackage rights, has been in connection with an apparent agreement between BNSF and UP to employ this method, between themselves, in lieu of detour practices, for overhead movements involving maintenance of way projects. This appears to have commenced with Finance Docket No. 35574 and 33574 Sub-No. 1), The Burlington Northern and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company(served April 6, and April 24, 1998), 63 Fed. Reg. 16859 (Apr. 6, 1998), and 63 Fed. Reg. 20441-42 (Apr. 24, 1998). (BNSF/UP).9/

The stated basis for UP's need to have BNSF use trackage rights, rather than standard detour, is due to "operating crew restraints," suspected to be another term for "labor relations." BNSF/UP, 4/24/98, 2:

"According to petitioners, operating crew constraints on UP dictate that BNSF's operations over UP's trackage be handled as trackage rights rather than as detour or other similar arrangement."

9/ In the past two years prior to filing these comments, the individual temporary trackage rights (class exemption+petition for exemption) have been invoked 13 times, of which 11 have involved BNSF/UP or UP/BNSF. Finance Docket Nos. 34036, 34053, 34055, 34058, 34082, 34047, 34069, 34160, 34194, 34128, 34242, 34249, 34316, and related Sub-No. 1.

BNSF/UP is noteworthy for not carrying forward the Board's statement in UP/CCP that the carrier being accorded temporary trackage rights would not need to obtain discontinuance authority.

B. Use of Temporary Trackage Rights. There has been a very limited use of the Board's two-step procedure in dealing with temporary trackage rights. In virtually every instance, it has involved overhead movements, and has been limited to emergency or repair situations. Such use should not be cause for a class exemption.

Individual situations can be handled separately, as at present. As already indicated, the temporary trackage rights is utilized chiefly by the BNSF/UP swap arrangement.

Unlike other class exemptions, neither the rail industry or other members of the public have sought a class exemption. Cf. Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985).^{10/}

II. THE PROPOSED CLASS EXEMPTION FOR
TEMPORARY TRackage RIGHTS IS AN
INVALID ATTEMPT TO AVOID MANDATORY
EMPLOYEE PROTECTION REQUIRED BY LAW.

The Staff memorandum presented at the January 31, 2003 Board conference purports to provide standard employee conditions, "...standard labor conditions would be imposed on any carrier using this class exemption, and carriers using the exemption could discontinue service at the end of the authorization period without the need to obtain a certificate or an exemption from the Board."

^{10/} The trackage rights class exemption drew 23 comments in a proceeding extending over three years. Railroad Consolidation Procedures, 1 I.C.C.2d 270, 271 (1985).

The above statement is highly misleading. The prime feature of the proposed exemption is anti-employee, and is to remove the standard Oregon Short Line employee conditions which presently govern discontinuance of trackage rights. Railroad Consolidation Procedures, supra, 1 I.C.C.2d at 270-71. Although the NPE&R proposes changes to the trackage rights regulations at 49 CFR 1180, dealing with trackage rights, it does not revise regulations at 49 CFR 1152, dealing with abandonments/discontinuances.

The summary of the NPE&R states the Board is granting an exemption from the requirement for discontinuance authority, and the NPE&R carries a discussion on eliminating the need for 49 U.S.C. § 10903 approval:

"Carriers using this new class exemption would not be required to file for discontinuance authority at the end of the authorized period. (NPE&R, 1).

"As previously discussed, under 49 U.S.C. 10903, after a carrier begins trackage rights operations, even when conducted under an exemption, discontinuance of the service may not occur absent a certificate of discontinuance, or exemption therefrom, issued by the Board. This requirement would continue to apply to carriers utilizing the current trackage rights class exemption, 49 CFR 1180.2(d)(7). Although we normally require that a carrier seeking to terminate trackage rights operations file a separate request for discontinuance authority, this requirement of a separate filing would be unnecessary under the proposed new 49 CFR 1180.3(d)(8) class exemption." (NPE&R, 5).

The NPE&R in the proposed CFR regulation makes it explicit rail carriers discontinuing temporary trackage rights would not need discontinuance authority. §1180.2(d)(8)(iii). (NPE&R, 7):

"....Rail carriers acquiring temporary trackage rights need not seek authority from the Board to discontinue the trackage rights as of the expiration date specified under 49 CFR 1180.4(g)(2)(iii)."

The NPE&R errs as a matter of law in exempting discontinuance of trackage rights, permanent or temporary, without the imposition of employee protective conditions. 49 U.S.C. 10502(g); 10903(b)(2). The courts will step in where the agency issues class exemptions without the required minimum mandatory employee conditions. McGinness v. ICC, 662 F.2d 853, 857-60 (D.C. Cir.1981).

The NPE&R does not give any reasons for exempting rail carrier discontinuance of trackage rights from the provisions of 49 U.S.C. 10903; indeed, UP has expressed a willingness to be subjected to § 10903. (UP/CCP UP Pet., 6/4/96, 3). Apparently, the Board believes it knows better than the carriers how to deal with rail employees.^{11/}

This commentor does not support imposition of discontinuance protective conditions for employees as a substitute for denial of the NPE&R. The approval or exemption of a future discontinuance, in advance, could cause serious problems with changed conditions between exercise of trackage rights and any proposed discontinuance, such that discontinuance properly might be denied at the future point in time.

III. THE NPE&R HAS A NUMBER OF IMPROPER FEATURES.

The NPE&R has a number of features, which render the proposal improper, apart from the grounds already presented.

^{11/} Of course, now that the NPE&R proposes to strip rail employees of their mandatory protection, the carriers may be of a different mind. This commentor does not attempt to divine the carriers' present position.

A. Temporary Period. There is no maximum time limit for the "temporary" trackage rights. Certainly such a period should not extend beyond 30 days. Any greater period suggests an individual petition for exemption.

B. Overhead Operations. This commentor knows of no examples where temporary trackage rights were other than overhead, such that any class exemption should be confined to such operations, and not include local trackage rights.

C. Agreement. The NPE&R does not amend the provisions of 49 CFR 1180.6(a)(7)(ii), so as to require the submission of the written agreement for temporary trackage rights, as in the case of other trackage rights:

"In addition, parties to exempt trackage rights agreements and renewal of agreements described at §1180.2(d)(7) must submit one copy of the executed agreement or renewal agreement with the notice of exemption, or within 10 days of the date that the agreement is executed, whichever is later."

The above are among other objectionable matters.

CONCLUSION

The NPE&R should not be adopted by the Board.

Respectfully submitted,


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March 12, 2003

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