

**DEPARTMENT OF TRANSPORTATION****Surface Transportation Board****49 CFR Part 1180****[STB Ex Parte No. 282 (Sub-No. 20)]****Railroad Consolidation Procedures—  
Exemption for Temporary Trackage  
Rights****AGENCY:** Surface Transportation Board, DOT.**ACTION:** Notice of proposed exemption and rulemaking.

**SUMMARY:** The Surface Transportation Board (Board) is proposing to adopt a new class exemption and related regulations that would be available for trackage rights agreements that by their terms expire on a date certain and would permit their authorization for a limited period of time. Carriers utilizing this new class exemption would not be required to file for discontinuance authority at the end of the authorized period. The temporary trackage rights would automatically terminate on the date specified.

**DATES:** Comments must be submitted by March 12, 2003.

**ADDRESSES:** Send an original and 10 copies of any comments referring to STB Ex Parte No. 282 (Sub-No. 20) to: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar, (202) 565–1600. [Federal Information Relay Service (FIRS) for the hearing impaired: 1–800–877–8339.]

**SUPPLEMENTARY INFORMATION:****Trackage Rights**

Acquisition by a rail carrier of trackage rights over a railroad line owned or operated by another rail carrier may be carried out only with the approval and authorization of the Board. See 49 U.S.C. 11323(a)(6). Under 49 U.S.C. 11324(d), the Board is required to approve trackage rights applications unless we find that (1) as a result of a transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States, and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

**Use of Exemption Authority**

The Staggers Rail Act of 1980 substantially broadened the authority of

our predecessor, the Interstate Commerce Commission (ICC), and hence our authority, to exempt transactions from regulation. Under 49 U.S.C. 10502, we are directed to exempt a person, class of persons, or a transaction or service from our regulation whenever we find that (1) regulation is not necessary to carry out the RTP, and (2) either the transaction or service is of limited scope or regulation is not needed to protect shippers from an abuse of market power. We may exempt not only a single transaction, but an entire class of transactions, as the ICC did when adopting the existing class exemption at 49 CFR 1180.2(d)(7). A class exemption does not mean that a particular transaction is beyond our reach. Rather, it is a means by which a carrier may obtain an authorization without going through a full regulatory process, in the types of cases to which the class exemption applies.

**Existing Class Exemption for Trackage Rights**

In *Railroad Consolidation Procedures*, 1 I.C.C.2d 270 (1985), the ICC adopted a class exemption for trackage rights based on written agreements and not sought in responsive applications in rail consolidation proceedings. See 49 CFR 1180.2(d)(7).<sup>1</sup> In adopting those procedures, the ICC found that exempting trackage rights proposals as a class would promote the RTP and competition generally because trackage rights facilitate operating efficiencies. The ICC also found that the exemption was limited in scope because the class of exempted transactions was limited and, typically, trackage rights transactions either involved modifications in operations that promoted efficiency for the operator and maintained the status quo, or involved the addition of a competing carrier to a line through trackage rights that increased the number of carriers on the line and increased competition for traffic. For these reasons, the ICC also found that regulation of this class of trackage rights is not necessary to protect shippers from an abuse of market power.

**Proposed Class Exemption**

Our reason for instituting this proceeding is that authorization of trackage rights approved under the current class exemption remains in effect indefinitely, regardless of any durational contract provision. However,

in recent years parties have sought authorization for temporary trackage rights that were to expire on a certain date. On a number of occasions, those requests have involved carriers that were about to perform extensive maintenance over portions of their heavily used track. Other requests for temporary trackage rights have involved the need to accommodate the short-term storage of rail cars or the need to make provision for local service, line relocation and rehabilitation projects, as well as a variety of freight, intercity passenger and commuter operations.

Generally, a carrier seeking such a time-limited authorization has first filed a notice of exemption under 1180.2(d)(7), thereby acquiring authority to exercise trackage rights indefinitely over a particular line. Subsequently, it has filed a request that we allow the authorization to expire on a certain date. In the past, we have analyzed these subsequent filings on a case-by-case basis under 49 U.S.C. 10502, and have routinely granted the requested petition to allow the authorization to expire on a specific date.<sup>2</sup> In those individual cases, having found the time-limited authorization to be consistent with the statutory limited scope criterion, we have not found it necessary to examine whether full regulation of a temporary trackage rights arrangement is necessary to protect shippers from an abuse of market power.

Given our experience in those cases, we believe that both rail carriers and the public would benefit from a rule that expressly provides a class exemption from 49 U.S.C. 11323 to permit authorization, for a limited period of time, of trackage rights that by their terms expire on a date certain. We further believe that this proposal is consistent with the exemption criteria at 49 U.S.C. 10502, as next discussed.

Individual approval of trackage rights transactions for which the carriers seek authorization for a limited period of time does not appear to be necessary to carry out the goals of the RTP. Rather, exempting such proposals as a class would promote the RTP by eliminating the need to file a second pleading seeking discontinuance when the agreement expires, thereby minimizing regulation of the rail system (49 U.S.C. 10101(2)), promoting the continuation of a sound rail system by facilitating the

<sup>1</sup>Published in the *Federal Register* at 50 FR 15751. These rules were subsequently amended in 1986, 1993, and 1997.

<sup>2</sup>This second filing has often taken the form of a petition seeking a partial revocation of the class exemption, or a petition seeking an exemption to permit the trackage rights operations to remain in effect only on a temporary basis. Regardless of the form, we have generally dealt with each request as a request that the Board permit the authorization to expire on a particular date.