

DEPARTMENT OF TRANSPORTATION

49 CFR Part 1121

[STB Ex Parte No. 527 (Sub-No. 2)]

Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (Board) is proposing to modify the regulations concerning exemption and revocation proceedings. The proposal would clarify when additional information or public comment will be sought in response to a petition for a class exemption or a petition for an individual exemption.

DATES: Comments are due July 26, 1999.

ADDRESSES: Send comments referring to STB Ex Parte No. 527 (Sub-No. 2) to: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Thomas J. Stilling, (202) 565-1567. (TDD for the hearing impaired: (202) 565-1695.)

SUPPLEMENTARY INFORMATION: The Board's predecessor, the Interstate Commerce Commission (ICC), issued rules concerning exemption and revocation proceedings in *Rail Exemption Procedures*, 8 I.C.C.2d 114 (1991). These rules generally codified the procedures for handling rail exemption petitions issued in *Modification of Procedure for Handling Exemptions Filed under 49 U.S.C. 10505*, Ex Parte No. 400 (ICC served Dec. 29, 1980, and Jan. 21, 1981).

In response to changes resulting from the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (1995) (ICCTA), the Board modified its rail exemption procedures in *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, Ex Parte No. 527 (STB served Oct. 1, 1996) (*Expedited Procedures*), modified by decision served Nov. 15, 1996, *aff'd sub nom. United Transp. Union-III. Legis. Bd. v. Surface Transp. Bd.*, 132 F.3d 71 (D.C. Cir. 1998). As relevant here, the current regulations (49 CFR 1121.4(c)) state:

If the impact of the proposed exemption cannot be ascertained from the information contained in the petition or accompanying submissions, or significant adverse impacts might occur if the proposed exemption were granted, or a class exemption is sought, the Board will:

- (1) Direct that additional information be filed; or
- (2) Publish a notice in the **Federal Register** requesting public comments.

Other than updating the language to refer to the Board rather than the ICC, this rule is identical to the former rule at 49 CFR 1121.4(d) except that it specifically states that the Board will seek additional information or public comments when a class exemption is sought, and it does not contain the phrase "in its discretion" but rather states that the agency "will," rather than "may," seek additional information or public comment.¹

In our decision in *San Joaquin Valley Railroad Company—Abandonment Exemption—In Kings and Fresno Counties, CA*, STB Docket No. AB-398 (Sub-No. 4X) (STB served Mar. 5, 1999) (*San Joaquin*), slip op. at 7 (emphasis supplied), we noted that "(s)ection 1121.4(c)(1) * * * can be interpreted as mandating that the Board seek comments in situations where a class exemption is sought, and whenever the impact of a proposed individual exemption cannot be determined or if there would be significant adverse impacts if an exemption were granted." But we stated that, while the filing of additional comments would be sought for class exemption requests, we have the discretion to determine whether additional evidence would be necessary in individual exemption proceedings:

Our discussion of this matter in *Expedited Procedures* at 14 and n.23 does not state that we wished to cede our discretion to seek comments in individual exemption requests, and we could not have intended such a result in modifying § 1121.4(c)(1). While the rule and the language might be literally read to require solicitation of comments, it cannot be logically interpreted to do so. To follow such an interpretation, the Board could never deny a petition if it believed that significant adverse impacts would result from the grant of an individual exemption. Instead, we would be required to continually seek additional information where a petitioner had failed to show that the applicable statutory requirements had been met, unless, at some point, the petitioner were to actually make the necessary showing. *Id.*

We indicated in *San Joaquin* that we would clarify the § 1121.4(c)(1) issue in a separate proceeding. *Id.*

¹ Former 49 CFR 1121.4(d) read:

If the impact of the proposed exemption cannot be ascertained from the information contained in the petition or accompanying submissions, or significant adverse impacts might occur if the proposed exemption were granted, the Commission, in its discretion, may:

- (1) Direct that additional information be filed; or
- (2) Publish a notice in the **Federal Register** requesting public comments.

Accordingly, we propose to modify § 1121.4(c) to make clear the treatment that will be accorded petitions for class exemptions and individual exemptions. Class exemptions are codified in the Code of Federal Regulations and are rules of general applicability and, accordingly, public comment is necessary before such an exemption is granted. Thus, when a class exemption is sought, we will require that additional information or public comments be filed before granting the new class exemption. This is consistent with our statement in *Expedited Procedures* at 14 (footnote omitted) that we would "provide for public comment in all class exemption requests." We also propose to modify the rule to state that seeking public comment is not required to deny the petition. Petitioners have an initial burden of showing that a class exemption proceeding is warranted, and if they fail to meet this burden, it serves no purpose to require us to seek additional evidence (although we retain the discretion to do so.)

We are also proposing to modify the rule to make clear that where the impact of an individual exemption cannot be ascertained from the petition or if significant adverse impacts might occur if the individual exemption were granted, we have the discretion to seek additional information or comment. In light of our discussion in *San Joaquin* (indicating the possibility of our repeatedly seeking additional evidence), this revision would rationalize the rule.

In most situations involving individual exemptions, the record will be sufficient to enable us to determine whether to grant or deny the petition. In cases where the determination to grant or deny a petition is not clear-cut, the modification we are proposing would allow us, in our discretion, to seek further information. The proposed rule comports with traditional ICC and Board practice.

Because these proposed modifications are simply clarifications of the rule and do not entail any substantive changes to Board procedures, we believe that we could adopt the modifications without notice and comment.² Nevertheless, we will allow interested persons to comment on our proposal.

The Regulatory Flexibility Act does not apply to this action, because, as noted above, the Board is not required to publish a notice of proposed rulemaking. See 5 U.S.C. 603.

² Under the Administrative Procedure Act, "interpretative rules, general statements of policy and rules of agency organization, procedure, or practice" are exempted from requirement of notice and comment. 5 U.S.C. 553(b)(A).

Nevertheless, we certify that the proposed rule will not have a significant economic impact on a substantial number of small entities, because it constitutes no substantive change to Board procedures.

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

List of Subjects in 49 CFR Part 1121

Administrative practice and procedure, Rail exemption procedures, Railroads.

Decided: June 15, 1999

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams,
Secretary.

For the reasons set forth in the preamble, title 49, chapter X, part 1121 of the Code of Federal Regulations is amended to read as follows:

PART 1121—RAIL EXEMPTION PROCEDURES

1. The authority citation for part 1121 is revised to read as follows:

Authority: 49 U.S.C. 10502 and 10704.

2. In § 1121.4, paragraph (c) is proposed to be revised to read as follows:

§ 1121.4 Procedures.

* * * * *

(c)(1) If the impact of the proposed individual exemption cannot be ascertained from the information contained in the petition or accompanying submissions, or significant adverse impacts might occur if the proposed exemption were granted, the Board may, in its discretion:

(i) Direct that additional information be filed; or

(ii) Publish a notice in the Federal Register requesting public comments.

(2) If a class exemption is sought, the Board will publish a notice in the Federal Register requesting public comments before granting the class exemption. The Board may deny a request for a class exemption without seeking public comments.

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