

TABLE 1 TO PARAGRAPH (a)

Commodity	Parts per million
Banana <sup>1</sup> .....	0.9
Rice, bran <sup>1</sup> .....	15
Rice, husked <sup>1</sup> .....	6
Rice, polished rice <sup>1</sup> .....	1.5

<sup>1</sup> There are no U.S. registrations as of December 6, 2021.

(b)–(d) [Reserved]

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**SURFACE TRANSPORTATION BOARD**

**49 CFR Part 1180**

[Docket No. EP 282 (Sub-No. 21)]

**Petition for Rulemaking—Railroad Consolidation Procedures—Exemption for Emergency Temporary Trackage Rights**

**AGENCY:** Surface Transportation Board.

**ACTION:** Final rule.

**SUMMARY:** The Surface Transportation Board (Board) is adopting a final rule establishing a new class exemption for emergency temporary trackage rights. The final rule also makes certain other related changes to the class exemptions for trackage rights and temporary trackage rights.

**DATES:** The rule is effective December 30, 2021.

**FOR FURTHER INFORMATION CONTACT:** Nathaniel Bawcombe at (202) 245–0376. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** In 2003, the Board adopted a class exemption at 49 CFR 1180.2(d)(8) for temporary overhead trackage rights of not more than one year in duration. *See R.R. Consolidation Procs.—Exemption for Temp. Trackage Rts.*, EP 282 (Sub-No. 20) (STB served May 23, 2003), modified (STB served May 17, 2004). Under 49 CFR 1180.4(g)(1), exemptions sought under 49 CFR 1180.2(d)(8) (and various other class exemptions under 49 CFR 1180.2(d)) cannot become effective until at least 30 days after a railroad files a verified notice of exemption for the transaction. As a result, when a railroad seeks to have a temporary trackage rights exemption become effective in less than 30 days, the railroad must petition the Board for waiver of the 30-day period. In such cases, in addition to serving and publishing notice of the exemption in the **Federal Register**, the Board also

issues a separate decision acting on the waiver request and setting the effective date of the exemption. *See, e.g., Union Pac. R.R.—Temp. Trackage Rts. Exemption—BNSF Ry.*, FD 36424 et al. (STB served Aug. 10, 2020) (granting a waiver of the 30-day notice period for a trackage rights exemption under 49 CFR 1180.2(d)(8) and setting effective date); *Ala. & Gulf Coast Ry.—Temp. Trackage Rts. Exemption—Kan. City S. Ry.*, FD 36418 (STB served July 2, 2020) (same). In this final rule, the Board creates a new class exemption at 49 CFR 1180.2(d)(9) for emergency temporary trackage rights that eliminates the 30-day notice period in certain circumstances. The final rule also makes certain other related changes to the existing class exemptions for trackage rights and temporary trackage rights.

**Background**

On October 9, 2020, the Association of American Railroads (AAR) filed a petition requesting that the Board initiate a rulemaking proceeding to establish a new emergency temporary trackage rights class exemption for specific limited situations that would allow emergency temporary trackage rights to take effect within five days of a carrier filing a verified notice of exemption without requiring waiver of the 30-day notice requirement under 49 CFR 1180.4(g)(1). On November 4, 2020, Samuel J. Nasca, for and on behalf of SMART-Transportation Division-New York State Legislative Board (SMART/TD–NY), filed a reply in opposition to AAR’s petition. SMART/TD–NY argued that the Board should decline to institute a rulemaking proceeding because AAR’s proposed emergency temporary trackage rights exemption is unwarranted given the existing trackage rights exemptions and because the proposed exemption would threaten rail safety by allowing operation by carrier personnel unfamiliar with the line over which the trackage rights would be granted. (SMART/TD–NY Reply 3–4, Nov. 4, 2020.)

On May 28, 2021, after considering the petition and the responsive comment, the Board issued a Notice of Proposed Rulemaking. *Pet. for Rulemaking—R.R. Consolidation Procs.—Exemption for Emergency Temporary Trackage Rts.* (NPRM), EP 282 (Sub-No. 21) (STB served May 28, 2021). In the NPRM, the Board explained that SMART/TD–NY’s arguments were unpersuasive because the proposed class exemption would make the process of obtaining temporary trackage rights in an emergency more efficient and predictable, and the proposed rule would not affect rail

safety because it would not impact the existing Federal Railroad Administration (FRA) safety regulations, such as the regulation governing operations of more than one railroad over the same track, as in a trackage rights arrangement. *NPRM*, EP 282 (Sub-No. 21), slip op. at 4.

As explained in the NPRM, the proposed rule differed in some respects from AAR’s petition request. The proposed exemption would be available only for “unforeseen” track outages expected to last more than seven days where there is no reasonable alternative to maintain pre-outage levels of service. *Id.* at 5. The Board also proposed a requirement that the verified notice provide a description of the situation that includes, to the extent possible, the following information: The nature of the event that caused the unforeseen outage; the location of the outage, the date that the emergency situation occurred; the date the track outage was discovered; and the expected duration of the outage. *Id.*

The proposed rule limited the emergency temporary trackage rights to an initial period not to exceed three months, with the option to request a renewal for an additional three months. *Id.* Under the proposed rule, the exemption would become effective not upon publication in the **Federal Register** but rather upon service of the Board’s notice, which would occur within five days after the railroad’s verified notice of exemption is filed. *Id.* at 6. The Board’s notice would be published in the **Federal Register** concurrently with service if possible, or as soon thereafter as practicable. *Id.* Additionally, the Board proposed that, should the track outage be resolved and use of the trackage rights become unnecessary prior to the expiration of the exemption period, carriers be required to file a notice stating that the outage has been resolved and that trackage rights are no longer needed, as well as the date on which use of the trackage rights ceased. *Id.* at 6.

The Board proposed not requiring a caption summary for exemptions under 49 CFR 1180.2(d)(9) and to eliminate the existing caption summary requirements for exemptions under 49 CFR 1180.2(d)(7) and 49 CFR 1180.2(d)(8). *NPRM*, EP 282 (Sub-No. 21), slip op. at 7. Under the proposed rule, the caption summary requirements would be replaced by a requirement that the parties provide in their verified notices the same information currently required in caption summaries. *Id.*

The proposed rule would also clarify that the Board’s regulation at 49 CFR 1180.4(g)(4), pertaining to interchange

commitments,<sup>1</sup> would not apply to transactions under the proposed new 49 CFR 1180.2(d)(9) or to trackage rights transactions under 49 CFR 1180.2(d)(7) or 49 CFR 1180.2(d)(8), an issue that has been the cause of some confusion among parties in the past. *NPRM*, EP 282 (Sub-No. 21), slip op. at 8.

#### Comments on the *NPRM*

In response to the *NPRM*, the Board received comments from the National Transportation Safety Board (NTSB) on July 9, 2021, and from AAR, SMART/TD-NY, and the American Short Line and Regional Railroad Association (ASLRRA) on July 11, 2021. AAR and SMART/TD-NY filed replies on August 11, 2021.

The NTSB states it is supportive of reducing the delay for track exemptions under existing regulations, but it “is concerned that the reduced time to grant waivers could reduce the level of safety, especially for railroad crews and others affected by trains operating in detour territories that may be unfamiliar.” (NTSB Comments 1.) The NTSB claims that the *NPRM* lacks discussion about existing FRA regulations that require a train engineer to be familiar with the territory. (*Id.* at 2.) According to the NTSB, a 30-day notice provides time for familiarization with the territory and regulations but the five-day period under the proposed rule may not provide such opportunity. (*Id.*) Therefore, the NTSB proposes that the verified notice of exemption required under the proposed rule be expanded to include a verification that safety hazards associated with unfamiliarity with the detour territory are identified and managed. (*Id.*) In addition, the NTSB proposes that verified notices be required to include a plan for addressing engineer familiarity with the detour territory on which they will be operating. (*Id.*)

SMART/TD-NY argues that the proposed exemption would adversely affect rail safety and reduce work opportunities for rail employees. (SMART/TD-NY Comments 6–7; SMART/TD-NY Reply 4–5, 7, 10, Aug. 11, 2021.) SMART/TD-NY claims that currently, in emergency situations, rail carriers seek an exemption under 49 CFR 1180.2(d)(8) and file a petition for a waiver of the 30-day period under 49

CFR 1180.4(g)(1) and that while they wait for the exemption to become effective, they operate pursuant to detour arrangements under which their operations are guided and directed by a pilot crewmember of the carrier that controls the line.<sup>2</sup> (SMART/TD-NY Reply 3, Aug. 11, 2021.) In contrast, according to SMART/TD-NY, the proposed rule would allow a carrier to begin operations over the line of a foreign carrier as soon as the Board serves its notice of exemption. (*Id.* at 4.) SMART/TD-NY argues that although the proposed rule requires that the Board serve its notice within five days after a carrier has filed a verified notice of exemption, “[i]t is inconceivable the Board would wait even one day, much less than five days.” (*Id.* at 5.) Therefore, according to SMART/TD-NY, emergency temporary trackage rights would become effective almost immediately and without the transition period of detour operations, thereby allowing carriers to operate with personnel insufficiently experienced in foreign territory operations and eliminating work opportunities associated with detour operations.<sup>3</sup> (SMART/TD-NY Comments 6; SMART/TD-NY Reply 4–5, 7, Aug. 11, 2021.)

SMART/TD-NY also argues that the proposed exemption is unwarranted because the existing exemption and waiver process is sufficient to address emergency situations and is not unduly inefficient. (SMART/TD-NY Comments 4–5; SMART/TD-NY Reply 6–7, Aug. 11, 2021.) SMART/TD-NY claims that the current process is not inefficient because verified notices of exemption and petitions for waiver are short documents that are easy to prepare, that the notice is “self-executing” and does not need to be approved by the Board, and that the petitions for waiver are routinely granted. (SMART/TD-NY Reply 6, Aug. 11, 2021.) SMART/TD-NY also asserts that there have previously been no claims that the current process is inefficient. (*Id.* at 7.) According to SMART/TD-NY, these facts demonstrate that the “claimed

serious inefficiency” of the current process is a “hoax.” (*Id.* at 6.)

SMART/TD-NY opposes the Board’s proposal not to require a caption summary in verified notices of exemption filed under 49 CFR 1180.2(d)(9) and to eliminate the caption summary requirement for notices filed under 49 CFR 1180.2(d)(7) and (d)(8). (SMART/TD-NY Reply 11–12, Aug. 11, 2021.) SMART/TD-NY claims that removing the caption summary requirement is inconsistent with the requirement that notice of the emergency temporary trackage rights be published in the **Federal Register**. (*Id.* at 12.)

AAR supports the proposed rule but asks the Board to clarify several issues. AAR argues that the regulatory text should include examples of the types of events that would constitute an unforeseen track outage under proposed 49 CFR 1180.2(d)(9) and that the Board should clarify that pursuing an exemption under proposed 49 CFR 1180.2(d)(9) would not preclude a subsequent exemption under 49 CFR 1180.2(d)(8) if the circumstances of the unforeseen event require more than six months to restore the outage.<sup>4</sup> (AAR Comments 5–6.)

Responding to the arguments made by SMART/TD-NY, AAR also argues that the proposed exemption—which would remove regulatory requirements in limited circumstances—is warranted because the existing exemption and waiver process is inefficient. (AAR Reply 2–4.) AAR claims that the exemption would make the process of obtaining a trackage rights exemption in an emergency more efficient, that it advances the rail transportation policy (RTP) of 49 U.S.C. 10101 in several ways, and that, by removing regulation in certain emergency situations, it furthers the statutory directive in 49 U.S.C. 10502 that the Board exempt rail carriers from regulation “to the maximum extent” consistent with the law. (*Id.* at 3–4.)

In addition, AAR argues that, contrary to the claims made by SMART/TD-NY and the NTSB, the proposed exemption would not adversely impact rail safety. (AAR Comments 10–12; AAR Reply 4–6.) AAR claims that the exemption would not impact the application of FRA safety regulations, including those that require an engineer to be properly

<sup>1</sup> 49 CFR 1180.4(g)(4) provides that parties seeking Board approval for transactions under 49 CFR part 1180 must certify “whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means.”

<sup>2</sup> SMART/TD-NY explains that detour operations differ from trackage rights operations in that trackage rights operations involve a carrier using only its own employees to operate over a line controlled by another carrier, whereas in detour operations the engineer of the carrier operating over a line controlled by another carrier is guided by an experienced crewmember of the carrier that controls the line. (SMART Reply 3, Aug. 11, 2021.)

<sup>3</sup> SMART/TD-NY further argues that the proposed rule should not be enacted because it would be an “extension of [Board] regulation, over and above, what has been traditional railroad self-regulation for emergency temporary trackage operations” through detour arrangements. (SMART/TD-NY Comments 5.)

<sup>4</sup> SMART/TD-NY argues that AAR’s proposal to allow carriers to utilize the temporary trackage rights exemption under 49 CFR 1180.2(d)(8) after obtaining emergency temporary trackage rights under 49 CFR 1180.2(d)(9) demonstrates that the existing temporary trackage rights exemption is sufficient. (SMART/TD-NY Reply 11, Aug. 11, 2021.)

certified for joint operations and require that train crews be familiar with the territory over which they operate. (AAR Comments 10–11; AAR Reply 5–6.) AAR states that these requirements would not be waived or otherwise affected if carriers were to obtain emergency temporary trackage rights under the proposed exemption. (AAR Comments 11; AAR Reply 6.)

ASLRRRA supports the proposed rule and agrees with the Board's findings that the proposed exemption is consistent with the requirements of 49 U.S.C. 10502 and promotes the RTP by making the process of obtaining trackage rights in emergency situations more efficient and predictable. (ASLRRRA Comments 2.)

#### Final Rule

After considering the comments and replies received in response to the *NPRM*, the Board is adopting the rule proposed in the *NPRM* as a final rule. Under 49 U.S.C. 10502, the Board is required, to the maximum extent consistent with 49 U.S.C. subtitle IV part A, to exempt a person, class of persons, or a transaction or service from regulation whenever it finds that: (1) Regulation is not necessary to carry out the RTP of 49 U.S.C. 10101, 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. As explained in the *NPRM* and further below, the new emergency temporary trackage rights exemption would make the process of obtaining trackage rights to restore service in an emergency more efficient and predictable, thereby promoting the RTP by providing for the expeditious handling and resolution of proceedings, 49 U.S.C. 10101(15); encouraging the efficient management of railroads, 49 U.S.C. 10101(9); and promoting the continuation of a sound rail system, 49 U.S.C. 10101(4), and coordination between carriers, 49 U.S.C. 10101(5). (*NPRM*, EP 282 (Sub-No. 21), slip op. at 4.) In addition, as explained in the *NPRM*, the new class exemption is limited in scope, both in terms of the duration of the rights and the circumstances in which the exemption would apply, and regulation is not needed to protect shippers from an abuse of market power because the temporary trackage rights would be for overhead operations only and would benefit shippers by enhancing the ability of carriers to maintain service in emergency situations. (*Id.*)

As noted above, AAR requests that the regulatory text in the final rule include examples of the types of events that would constitute an unforeseen track

outage. The Board finds that the regulatory language proposed in the *NPRM* is sufficiently clear without a list of examples and therefore declines to make the change requested by AAR. However, the Board clarifies here that several of the examples suggested by AAR in its comments—natural disasters, severe weather events, flooding, accidents, and washouts—are among the types of events contemplated by the final rule. The Board notes, however, that a term like “incident,” which was also suggested by AAR, (AAR Comments 5), is too broad to include as an example of an event that would constitute an “unforeseen” track outage since an incident is simply an event or occurrence and not necessarily something unforeseen. Similarly, “bridge or tunnel damage,” another example suggested by AAR as an “unforeseen” track outage, is too broad, as it could encompass damage that results from normal wear and tear and therefore is not unforeseen. To the extent that an outage resulting from bridge and tunnel damage would qualify for the new exemption, it would have to be caused by an unforeseen event such as a natural disaster, a severe weather event, etc.

AAR also asks that the Board clarify that if a carrier were to obtain an exemption under 49 CFR 1180.2(d)(9), it would not be precluded from later seeking an exemption under 49 CFR 1180.2(d)(8) in the event that resolving the track outage takes longer than the maximum six months allowed under the proposed 49 CFR 1180.2(d)(9). The Board agrees that in situations where a carrier has obtained an emergency temporary trackage rights exemption under 49 CFR 1180.2(d)(9) and the track outage cannot be resolved in six months, the carrier should have the option of seeking a temporary trackage rights exemption under 49 CFR 1180.2(d)(8). To preclude the use of exemptions under 49 CFR 1180.2(d)(8) in such situations would leave carriers without the ability to obtain a potentially necessary trackage rights exemption despite a continuing track outage.

The NTSB and SMART/TD–NY suggest that the emergency temporary trackage rights exemption could adversely affect rail safety. The NTSB and SMART/TD–NY argue that the reduction in time for carriers to obtain emergency trackage rights authority might result in carriers beginning operations before their engineers have had time to familiarize themselves with territory over which they will be

operating.<sup>5</sup> However, while the new exemption will generally speed up the process for authorizing trackage rights in an emergency, the Board notes that the timing difference will be fairly minor, particularly given the current practice regarding waiver petitions. Currently, when a carrier files a verified notice of exemption under 49 CFR 1180.2(d)(8) combined with a petition to waive the 30-day notice period under 49 CFR 1180.4(g)(1), the Board typically serves a notice and a decision waiving the 30-day notice period within a few business days of the carrier's filing of its verified notice.<sup>6</sup> Under the new 49 CFR 1180.2(d)(9) process where exemptions will become effective upon the Board's service of a notice, service of such a notice will be required within five days of the verified notice's filing date, but the Board anticipates that service will occur within one or two business days in most cases.<sup>7</sup> Accordingly, in practice, the time frames under each approach are not drastically different.

Furthermore, regardless of how quickly trackage rights exemptions become effective, FRA safety regulations governing joint operations determine whether a carrier can operate on another carrier's line using only its own engineer or whether detour operations involving a pilot engineer are required. See 49 CFR 240.229. The NTSB suggests that the Board should add a requirement that parties include a verification that safety hazards associated with

<sup>5</sup> (See NTSB Comments 2 (“A 30-day notice provides time for familiarization with the territory and regulations; a [five]-day period may not provide such opportunity . . . .”); SMART/TD–NY Reply 4–5, Aug. 11, 2021 (expressing support for NTSB's concern that reducing the time between filing of a verified notice and the effective date of the exemption to five days would adversely affect safety).)

<sup>6</sup> See, e.g., *Union Pac. R.R.*, FD 36424 et al. (granting waiver of 30-day notice period within two business days after carrier filed verified notice of exemption); *Ala. & Gulf Coast Ry.*, FD 36418 (granting waiver of 30-day notice period one day after carrier filed verified notice of exemption); *Norfolk S. Ry.—Temp. Trackage Rts. Exemption—Kan. City S. Ry.*, FD 36359 (STB served Oct. 11, 2019) (granting waiver of 30-day notice period within two business days after carrier filed verified notice of exemption); *Kan. City S. Ry.—Temp. Trackage Rts. Exemption—Norfolk S. Ry.*, FD 36314 et al. (STB served June 13, 2019) (granting waiver of 30-day notice period within four business days after carrier filed verified notice of exemption).

<sup>7</sup> SMART/TD–NY claims it is “inconceivable” that the Board will not serve notices on the same day it receives verified notices under 49 CFR 1180.2(d)(9). (SMART/TD–NY Reply 5, Aug. 11, 2021.) However, this argument ignores the time it takes for Board staff to review the notice for compliance with applicable regulatory requirements, draft and review a notice for service, and complete the administrative processes involved with service and publication. Regardless, as discussed elsewhere in this decision, the Board does not consider the time between filing and service of a notice of exemption a cause for concern.

unfamiliarity with the detour territory are identified and managed and that verified notices include a plan for addressing engineer familiarity with the detour territory upon which they will be operating. (NTSB Comments 2.) But the FRA, rather than the Board, exercises primary authority over matters of rail safety,<sup>8</sup> and because the new emergency temporary trackage rights exemption does not waive or nullify the application of FRA safety regulations governing these topics, additional Board regulations imposing essentially the same requirements would be unnecessarily duplicative.

The Board also finds unpersuasive SMART/TD–NY’s argument that the proposed rule should be rejected because emergency situations can be dealt with efficiently enough using the current process of filing notices of exemption under 49 CFR 1180.2(d)(8) combined with a petition to waive the 30-day notice period under 49 CFR 1180.4(g)(1). Although waiver petitions are generally not lengthy and are routinely granted, it is nonetheless more efficient to eliminate the burden associated with these petitions and the accompanying administrative processes. Moreover, although the new emergency temporary trackage rights exemption will not dramatically speed up the process for authorizing trackage rights in an emergency, any time saved in an emergency situation where service needs to be quickly restored is valuable.<sup>9</sup> In short, the Board does not agree with the assertion that creating a more efficient and predictable process, and in turn providing benefits to shippers, carriers, and the public, is unwarranted because trackage rights operations can be authorized under the less efficient and predictable existing regulations.<sup>10</sup>

<sup>8</sup> See, e.g., *Ass’n of Am. R.R.—Pet. for Declaratory Ord.*, FD 36369, slip op. at 16 (STB served Dec. 30, 2020).

<sup>9</sup> As explained in the *NPRM*, the emergency temporary trackage rights exemption will also make the process more predictable for carriers. Under the current process, the Board typically issues a waiver decision within a few business days, but there is no regulatory deadline requiring the Board to do so, and carriers therefore cannot predict when a waiver decision will be issued. Under the new emergency temporary trackage rights exemption, carriers will know that the Board must issue a notice within five days and will be able to plan accordingly.

<sup>10</sup> SMART/TD–NY also argues that because detour arrangements are voluntary and not regulated by the Board, the new exemption would constitute an extension of rail regulation because it would be used in lieu of detour operations. (SMART/TD–NY Comments 5.) The new exemption does not represent an extension of rail regulation. Rather, it reduces the regulatory burden on parties by providing a more streamlined alternative for carriers to obtain an exemption from the regulatory process for approval of temporary trackage rights,

SMART/TD–NY’s opposition to the elimination of caption summaries appears to be based on a misunderstanding of the role of caption summaries. SMART/TD–NY’s arguments suggest that it believes if parties are not required to submit caption summaries for trackage rights transactions that the Board will no longer publish notices of exemption for these transactions in the **Federal Register**, (SMART/TD–NY Reply 12, Aug. 11, 2021), but that is not the case. It is true that the purpose of the caption summary requirement was to facilitate **Federal Register** publication by providing the Board with a document that could be published as the Board’s notice.<sup>11</sup> However, as explained in the *NPRM*, caption summaries have not routinely been used for that purpose. *NPRM*, EP 282 (Sub-No. 21), slip op. at 7. Rather than relying on parties for caption summaries, the Board prepares its own notices for publication in the **Federal Register** to ensure that they are accurate and contain all relevant information. The requirement for parties to draft and submit caption summaries has become unnecessary.<sup>12</sup> The Board will continue to draft and publish notices in the **Federal Register** for trackage rights exemptions after the final rule becomes effective.

For the foregoing reasons, the Board will adopt as a final rule the amendments to 49 CFR part 1180 as proposed in the *NPRM*, without modification.<sup>13</sup> The text of the final rule is set forth below.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant

and, for the reasons explained above, it should have little to no effect on whether parties choose to use detour operations.

<sup>11</sup> The caption summary regulations originally indicated that caption summaries themselves would be published in the **Federal Register**. *R.R. Consolidation Procs.—Exemption for Temp. Trackage Rts.*, EP 282 (Sub-No. 20), slip op. at 9 (STB served May 23, 2003); *R.R. Consolidation Procs.—Trackage Rts. Exemption*, 1 I.C.C. 270, 283 (1985).

<sup>12</sup> As noted in the *NPRM*, the caption summary requirements will be replaced by a requirement that the parties provide in their verified notices the same information currently required in caption summaries. *NPRM*, EP 282 (Sub-No. 21), slip op. at 7.

<sup>13</sup> The final rule’s adoption without modification of the proposed amendments to 49 CFR part 1180 includes those that affect existing class exemptions. As discussed above, the *NPRM* proposed requiring parties to provide certain information in the body of their verified notices rather than in a separate caption summary and proposed clarifying that 49 CFR 1180.4(g)(4)’s requirement to provide certifications regarding interchange commitments does not apply to trackage rights transactions.

economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation’s impact; and (3) make the analysis available for public comment. 601–604. In its final rule, the agency must either include a final regulatory flexibility analysis, 604(a), or certify that the proposed rule would not have a “significant impact on a substantial number of small entities,” 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of impacts on small entities only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities “whose conduct is circumscribed or mandated” by the proposed rule. *White Eagle Coop. v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009).

In the *NPRM*, the Board certified that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.<sup>14</sup> The Board explained that the proposed change is intended to make the process of obtaining Board approval of temporary trackage agreements in emergency situations more efficient and predictable and does not mandate the conduct of small entities. Currently, if small entities wish to receive temporary trackage rights in emergency situations, they must file for a notice of exemption in addition to filing a petition for waiver. The *NPRM* explained that the proposed rule would provide a more expedited procedural mechanism for carriers to quickly obtain approval for trackage rights in emergency situations without having to obtain a waiver of the 30-day notice period under 49 CFR 1180.4(g)(1). The regulations would require the carrier utilizing the trackage

<sup>14</sup> For the purpose of RFA analysis for rail carriers subject to the Board’s jurisdiction, the Board defines a “small business” as only including those rail carriers classified as Class III rail carriers under 49 CFR 1201.1–1. See *Small Entity Size Standards Under the Regul. Flexibility Act*, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of \$40.4 million or less in 2019 dollars. Class II rail carriers have annual operating revenues of less than \$900 million in 2019 dollars. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its website. 49 CFR 1201.1–1; *Indexing the Annual Operating Revenues of R.Rs.*, EP 748 (STB served July 12, 2021). As the Railroad Price Index remained the same from 2019 to 2020, there was no adjustment to the thresholds for 2020. *Indexing the Annual Operating Revenues of R.Rs.*, EP 748, slip op. at 2 n.2.

rights to file a notice if the carrier ceases to use the trackage rights prior to when the exemption period would have otherwise expired. However, because such notices would consist of a brief statement that use of the trackage rights has ceased and the date on which use of the trackage rights ceased, the Board stated in the *NPRM* that it did not believe that the burden associated with these notices would outweigh the reduction in burden associated with eliminating the requirement to file a petition for waiver of the 30-day notice period under 49 CFR 1180.4(g)(1). Accordingly, the Board concluded that the impact of the proposed rule should slightly reduce the paperwork burden for small entities. The Board also found that the economic impact of the proposed rule, if any, would be minimal, as the burdens associated with obtaining approval of temporary trackage rights agreements in emergencies would be slightly reduced and the rule would likely provide some economic benefit by expediting, in some cases, the process of approving trackage rights agreements necessary to restore service at pre-outage levels. Therefore, the Board certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

The Board is adopting as a final rule the amendments to 49 CFR part 1180 as proposed in the *NPRM*, without modification. Therefore, the Board certifies under 5 U.S.C. 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.<sup>15</sup> This decision will be served upon the Chief Counsel for Advocacy, Offices of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

#### *Paperwork Reduction Act*

In this proceeding, the Board is modifying an existing collection of information that is currently approved by the Office of Management and Budget (OMB) through November 30,

<sup>15</sup> As noted above, the final rule adopts the proposals to require parties to file certain information in the body of their verified notices rather than in a separate caption summary and to clarify that 49 CFR 1180.4(g)(4) does not apply to trackage rights transactions. Requiring parties to provide certain information in verified notices rather than in caption summaries and clarifying that certifications regarding interchange commitments are not required for trackage rights transactions will not increase the economic impact on parties. Therefore, these requirements do not alter the conclusion that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

2023, under the collection of Statutory Licensing Authority (OMB Control Number: 2140-0023). In the *NPRM*, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501-3521, and OMB regulations, 5 CFR 1320.8(d)(3), regarding: (1) Whether the collection of information, as modified in the proposed rule and further described in the Appendix to the *NPRM*, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. No comments were received pertaining to the collection of this information under the PRA.

This modification to an existing collection will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11.

#### *Congressional Review Act*

Pursuant to the Congressional Review Act, 5 U.S.C. 801-808, the Office of Information and Regulatory Affairs has designated this rule as non-major, as defined by 5 U.S.C. 804(2).

#### **List of Subjects in 49 CFR Part 1180**

Administrative practice and procedure, Railroads, Reporting and recordkeeping requirements.

#### *It is ordered:*

1. The Board adopts the final rule set forth in this decision.
2. Notice of this decision will be published in the **Federal Register**.
3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
4. This decision is effective on December 30, 2021.

Decided: November 28, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

**Raina White,**  
*Clearance Clerk.*

#### **Code of Federal Regulations**

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend part 1180 of title 49, chapter X, of the Code of Federal Regulations as follows:

#### **PART 1180—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES**

- 1. The authority citation for part 1180 continues to read as follows:

**Authority:** 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 1321, 10502, 11323-11325.

- 2. Amend § 1180.2 as follows:

- a. Revise the first sentence of paragraph (d) introductory text;
- b. In paragraph (d)(8):
  - i. Remove “(i)”, “(ii)”, “(iii)”, and “(iv)” and add in their place “{i}”, “{ii}”, “{iii}”, and “{iv}”, respectively;
  - ii. Remove the words “49 CFR 1180.4(g)(2)(iii)” and add in their place the words “49 CFR 1180.4(g)(1)(ii)”; and
  - iii. Remove the words “these rules” and add in their place the words “this paragraph (d)(8)”; and
  - c. Add paragraph (d)(9).

The revision and addition read as follows:

#### **§ 1180.2 Types of transactions.**

\* \* \* \* \*

(d) A transaction is exempt if it is within one of the nine categories described in paragraphs (d)(1) through (9) of this section. \* \* \*

\* \* \* \* \*

(9) Acquisition of emergency temporary trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are: {i} Based on written agreements, {ii} not filed or sought in responsive applications in rail consolidation proceedings, {iii} for overhead operations only, {iv} scheduled to expire on a specific date not to exceed three months from the effective date of the exemption, and {v} sought in response to an unforeseen track outage and expected to last more than seven days where there is no reasonable alternative to maintain pre-outage levels of service. If during the exemption period, the outage is resolved and use of the temporary emergency trackage rights ceases to be necessary to maintain service at pre-outage levels, the rail carrier must file a notice stating that the outage has been resolved and that use of the trackage rights has ceased and identifying the date on which use of the trackage rights ceased. Such a notice should be filed within 5 business days of the date on which use of the trackage rights ceased. The emergency temporary trackage rights authority expires upon the official filing date of the notice. If the operations contemplated by the exemption will not be concluded within the initial exemption period, the rail

carrier may, prior to expiration of the period, file a request for a renewal of the temporary rights for an additional period of up to 3 months, including the reason(s) therefor. 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 § 1180.4(g)(1)(ii). All transactions under this paragraph (d)(9) will be subject to applicable statutory labor protective conditions.

- 3. Amend § 1180.4 as follows:
- a. Revise paragraph (g)(1);
- b. Remove paragraph (g)(2);
- c. Redesignate paragraphs (g)(3) and (4) as paragraphs (g)(2) and (3); and
- d. Amend newly redesignated paragraph (g)(3) by removing the subject heading and revising the first sentence of paragraph (g)(3)(i).

The revisions read as follows:

**§ 1180.4 Procedures.**

\* \* \* \* \*

(g) \* \* \*

(1) To qualify for an exemption under § 1180.2(d), a railroad must file a verified notice of the transaction with the Board. Except for verified notices filed under § 1180.2(d)(9), all verified notices under § 1180.2(d) must be filed at least 30 days before the transaction is consummated, indicating the proposed consummation date. Verified notices filed under § 1180.2(d)(9) will become effective upon service of notice of the transaction by the Board. Before a verified notice is filed, the railroad shall obtain a docket number from the Board's Section of Administration, Office of Proceedings.

(i) All notices filed under § 1180.2(d) shall contain the information required in § 1180.6(a)(1)(i) through (iii), (a)(5) and (6), and (a)(7)(ii), and indicate the level of labor protection to be imposed.

(ii) Notices filed under §§ 1180.2(d)(7), 1180.2(d)(8), or 1180.2(d)(9) shall also contain the following information:

- (A) The name of the tenant railroad;
- (B) The name of the landlord railroad;
- (C) A description of the trackage rights, including a description of the track. For notices under § 1180.2(d)(8) and (9), the notice must state that the trackage rights are overhead rights. For notices under § 1180.2(d)(7), the notice must state whether the trackage rights are local or overhead;
- (D) The date the trackage rights transaction is proposed to be consummated;
- (E) The date temporary trackage rights will expire, if applicable; and
- (F) For notices under § 1180.2(d)(9), a description of the situation resulting in the outage in sufficient detail to allow the Board to determine an emergency exits, including, to the extent possible, the nature of the event that caused the unforeseen outage, the location of the outage, the date that the emergency situation occurred, the date the outage was discovered, and the expected duration of the outage.

(iii) Except for notices filed under § 1180.2(d)(9), the Board shall publish a notice of exemption in the **Federal Register** within 16 days of the filing of the notice. For notices filed under § 1180.2(d)(9), the Board shall serve a notice of exemption on parties of record within 5 days after the verified notice of

exemption is filed and shall publish that notice in the **Federal Register**. The publication of notices under § 1180.2(d) will indicate the labor protection required.

(iv) If the notice contains false or misleading information that is brought to the Board's attention, the Board shall summarily revoke the exemption for that carrier and require divestiture.

(v) The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of an exemption. Except for notices filed under § 1180.2(d)(9), stay petitions must be filed at least 7 days before the exemption becomes effective. For notices filed under § 1180.2(d)(9), stay petitions should be filed as soon as possible before the exemption becomes effective.

(vi) Other exemptions that may be relevant to a proposal under this provision are codified at 49 CFR part 1150, subpart D, which governs transactions under 49 U.S.C. 10901.

\* \* \* \* \*

(3)(i) Except for notices filed under §§ 1180.2(d)(7), 1180.2(d)(8), or 1180.2(d)(9), the filing party must certify whether a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means ("interchange commitment"). \* \* \*

\* \* \* \* \*