

19. *South Central Arkansas Railway, Inc. (SCAR)*
 A. From El Dorado, Arkansas (milepost 99) to Ruston, Louisiana (milepost 154.77).
20. *Burlington Northern Railroad Company (BN)*
 A. At Burlington, Iowa (milepost 0 to milepost 2.06).
21. *Fort Worth and Denver Railway Company (FWD)*
 A. From Amarillo to Bushland, Texas, including terminal trackage at Amarillo, and approximately three (3) miles northerly along the old Liberal Line.
 B. At North Fort Worth, Texas (mileposts 603.0 to 611.4).
22. *Omaha, Lincoln and Beatrice Railway Company (OLB)*
 A. At Lincoln, Nebraska (milepost 559.16) to (milepost 561.37).
23. *Enid Central Railway Company, Inc. (ENIC)*
 A. From North Enid, Oklahoma (Milepost 0.12) to Ponca City, Oklahoma (Milepost 54.8).
24. *Texas North Western Railway Company (TNW)*
 A. From Hardesty, Oklahoma (milepost 119.20) to Liberal, Kansas (milepost 152.35) a distance of approximately 33.15 miles.
- + 25. *Colorado and Eastern Railway Company (COE)*
 A. From Colorado Springs, Colorado (milepost 602.7) to Limon, Colorado (milepost 530.75) a distance of approximately 72 miles.

* Changed.

+ Added.

[FR Doc. 83-12020 Filed 5-5-83; 8:45 am]

BILLING CODE 7035-01-M

49 CFR Part 1039

[Ex Parte No. 346 (Sub-8)]

Rail Carriers; Exemption From Regulation—Boxcar Traffic

AGENCY: Interstate Commerce Commission.

ACTION: Notice of final rules (exemption).

SUMMARY: The Commission is exempting, with certain exceptions (see Appendix), the rail transportation of all commodities in boxcars from 49 U.S.C. Subtitle IV. The Commission retains jurisdiction in the area of car hire and car service, except that it allows railroads to impose charges for storage or return of empty boxcars and to negotiate bilateral care hire agreements. The Commission also retains jurisdiction over rates for the transportation of nonferrous recyclable materials. The exemption is based on findings that regulation is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power by

railroads. The Commission also finds under 49 U.S.C. 11122 that the permitted actions affecting car charges will encourage efficient boxcar use.

DATE: The exemption is effective on November 7, 1983.

FOR FURTHER INFORMATION CONTACT:

Louis E. Gitomer, (202) 275-7245;

or

Thomas Gire, (202) 275-7759.

SUPPLEMENTARY INFORMATION:

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to T. S. InfoSystems, Inc., Room 2227, Interstate Commerce Commission, Washington, DC 20423, or call 289-4357 (D.C. Metropolitan area) or toll free (800) 424-5403.

List of Subjects in 49 CFR Part 1039

Agricultural commodities, Intermodal transportation, Railroads.

Authority: 49 U.S.C. 10321(a), 10505, and 11122.

Decided: April 29, 1983.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre, Simmons, and Gradison. Chairman Taylor and Commissioner Simmons dissented with separate expressions.

Agatha L. Mergenovich,

Secretary.

Chairman Taylor dissenting:

A thoughtful review of this decision, wherein the exemption of rail traffic moving in boxcars is approved, can only lead to the conclusion that the grant of such exemption is based upon wishful thinking and unverifiable predictions and assumptions, all of which rely more on theory than fact. This Commission has been charged by Congress with the duty of rationally deregulating the railroad industry in a manner consistent with the National Rail Transportation Policy. To this end, we have been given standards to consider, but reasonable conclusions predicated upon such standards cannot be drawn in the absence of adequate supporting evidence.

Advocates of the exemption in this proceeding consist of one railroad,¹ two government agencies, and a handful of shippers, most of whom do not even use boxcars. On the other hand, a multitude of parties opposed the exemption by the submittal of an enormous body of evidence demonstrating the fallacies inherent in the proposal. These parties included the railroads themselves (except for the Southern Pacific on the rate issue) and the general thrust of their opposition was that the boxcar exemption will radically alter both financial and operational relationships throughout the entire railroad industry. Accordingly, those opposing the exemption comprise virtually

¹ The Southern Pacific and its subsidiary the St. Louis Southwestern support only the rate exemption.

every group which participates in or depends upon our national railway system.²

Moreover, this exemption is totally unlike any other proposed by either the Commission or the railroad industry. It cannot be compared with a commodity exemption which deals with individual products moving in specific markets, thereby allowing for a rational analysis of the probable effects of the exemption.³ Nor can the TOFC/COFC exemption serve as precedent, since that exemption was specifically supported by the Staggers Act, 49 U.S.C. 10505(f), and its legislative history.⁴

To grant the exemption, the Commission must make certain findings in accordance with the statutory criteria set forth in 49 U.S.C. 10505 based upon the evidence of record. The almost complete lack of positive response to this exemption, coupled with the embarrassing paucity of supporting evidence, should have led to the conclusion that the proposal under consideration fails to satisfy any of the criteria of Section 10505. Consequently, a denial was clearly mandated, because the Commission cannot make the requisite findings to grant the exemption.

² It bears repeating here that denial of this proposed exemption was supported by: (1) Two branches of the government, the Departments of Defense and Agriculture, which, as large shippers, have legitimate commercial interests in the rail transportation business; (2) The Association of Western Railroads (including the Chicago & North Western Transportation Company, Burlington Northern Railroad Company, Denver & Rio Grande Western Railroad Company, Green Bay & Western Railroad Company, Illinois Central Gulf Railroad Company, Atchison, Topeka & Santa Fe Railway Company, Elgin, Joliet & Eastern Railway Company, Missouri-Kansas-Texas Railroad Company, Soo Line Railroad Company, Missouri Pacific Railroad Company, Western Pacific Railroad Company, Kansas City Southern Railway Company, and Union Pacific Railroad Company), one-third of the individual Class I railroads and about 20 short line railroads. (The American Association of Railroads also opposes the car service/car hire portion of the exemption.); (3) Eleven state and local agencies; (4) Nine private car owners; (5) Over 70 shippers, associations, and nonrail carriers; and (6) numerous members of Congress.

³ The railroads themselves have stated that the most logical and reasonable approach to exemptions is by commodity and not car type.

⁴ See H.R. Rep. No. 1035, 96th Cong., 2nd Sess. 60 (1980). Further, the special nature of TOFC traffic makes it highly competitive and versatile. TOFC/COFC operations are from a limited number of ramp origins to a limited number of ramp point destinations. In 1980, the number of boxcar loads shipped was about 200% of the TOFC car loadings. The predominant rate form for TOFC is FAK (Freight all kinds) and the commodity is the trailer—usually a 40 foot van. There is generally no rate differential on different kinds of goods sealed in the trailer. This enables shippers to switch modes at whim, and provides built-in controls against abuses and excessive rates.

The Statutory Criteria of 49 U.S.C. 10505(a)(2)

Limited Scope:

No one has made a serious effort to argue that a proposal affecting 40 percent of the total car miles in the U.S. is of limited scope. Various parties have noted that the exemption would encompass 25 percent of the national rail car fleet, 22 percent of the country's rail traffic, 25 percent of Conrail's total traffic, and 90 percent of the major commodity groups. Of the 35 major commodity classifications, 34 have boxcar movements. Of these 34, 14 move by boxcar at least 50 percent of the time. In 1981, there were 3,237,676 boxcar shipments in this country, and boxcar traffic accounted for 42 percent of total rail movements into and out of the Eastern Territory. Conrail originates and terminates more boxcars than any other railroad and has control over one out of every six boxcar shipments. Conrail serves 2,690 stations in the Northeast. These stations serve industrial areas which turn out 84 percent of the manufactured goods produced in that section of the country. Conrail also loads and unloads 54.1 percent of all boxcar traffic in that section. In light of these figures, a limited scope argument is clearly not available.

Abuse of market power: Nor can an appropriate finding be made with regard to the abuse of market power criterion. To determine whether market power is likely to be abused, an adequate definition of the market is necessary. But product markets are defined by commodities not car types, and it is the contents of a car, not the car type, that competes on the open market. The fundamental premise of the exemption proposed herein is that all commodities (except nonferrous recyclables), when transported in boxcars, move competitively. This assumption requires an enormous leap of faith, as boxcar freight is exceptionally diverse. It covers a wide range of commodities, rates, competitive situations, characteristics, locations, and destinations, all of which go into the definition of a market. Because of the lack of focus of this proposal, it is not possible for the Commission to make a finding that the application of every rate provision of the Interstate Commerce Act is no longer necessary for all boxcar transportation.

Even were such a finding possible, the complete inadequacy of the record precludes the Commission from drawing the necessary conclusions.⁶ The

evidence presented by Conrail does not reflect or represent the rest of the country outside the Northeast.⁷ The Northeast differs from the rest of the country in number of cars terminated, manufacturing output, level of consumption, population, length of haul of shipments, and efficiency of rail carriers. The nationwide statistics on which the majority relies to fill the gaps are well over six years old.⁸ Moreover, the majority decision doesn't even attempt to show that these studies, conducted during the restrictive era of rail regulation, bear any relationship to the current railroad industry, which has changed so remarkably in the last few years, especially since enactment of the Staggers Act.

Also, much traffic that now moves in boxcars tends to be inherently rail oriented. But the broad brush methods of support used here ignore all but the most general figures. In spite of the fact that the Commission specifically requested disaggregated data to determine which markets were competitive, Conrail chose to rely on the Reebie study which is not broken down further than the three digit Standard Transportation Commodity Code (STCC). At this level, the data are too generic and not specific enough to enable an adequate analysis of the competition in any particular market.⁹

Another major objection to this proposal is that many commodities, which can be regarded as "boxcar traffic", also move in other types of railroad equipment, and such commodities will not compete in the same markets when moving in different types of railroad equipment. This situation presents the substantial likelihood that the deregulation of those commodities, when moving in boxcars, will affect their marketing merely because of an anomaly of regulatory policy.

Chesapeake and Ohio Railway Co. et al. v. United States of America, 7th Cir. Nos. 81-2286, 82-1625, and 82-1693 (April 4, 1983). The court held that there was not substantial evidence to support the conclusion that certain joint rate cancellations were consistent with the public interest because, among other things, the Conrail study on which the Commission relied heavily was deficient since (i) it considered only some of the traffic; i.e. that on which Conrail was a terminating carrier, and (ii) it was in grossly aggregated form.

⁶ See Appendix A, n.1 of majority decision.

⁷ See Appendix B, n.1.2 and Appendix C, n.1 of majority decision.

⁸ For example, STCC 331 covers steel works, rolling mill or other reduction plant products. The STCC is then further divided into 245 separate commodity groups. Another example is STCC 204, grain mill products, which, as Conrail has shown, travels 41.5% in boxcars. However, when this is expanded to the four digit level, there are six separate subgroups with boxcar shares of from 11.5 to 97.2 percent!

A perfect example is the movement of grain, soybeans, and sunflowers seeds. In our recent decision in Ex Parte 346 (Sub-No. 14), *Rail General Exemption Authority-Miscellaneous Agricultural Commodities* (not printed), decided Feb. 17, 1983, we specifically declined to include grain and soybeans. After considerable analysis, however, we also concluded that sunflower seeds should not be exempted. Now, with only a brief reference by the majority to grain generally, all these commodities will be exempt when transported in boxcars. Such an obvious undoing with the left hand of what the right hand has done is nonsensical to say the least.

Different rules and rates for different types of equipment surely will lead to a distortion in the demand for certain cars, because equipment choices will be influenced by the boxcar exemption rather than the efficiencies and benefits of particular equipment relative to any given movement. This is a special concern of shippers, because even though they may request a specific type of equipment, if they receive an unregulated boxcar, their choice may be to accept it or face unacceptable delays in receiving the requested equipment. It is ironic that this so-called "deregulatory" proposal will, in actuality, interfere with decisions based on natural market forces and perhaps even encourage the continued use of equipment which many in the railroad industry believe is eventually destined to become obsolete.

Thus, the proposed exemption fails the tests of both 10505(a)(2) (A) and (B). It is not of limited scope, and the record cannot support a finding that there will not be an abuse of market power, because there is no evidence to determine what the market is.

The Modified Car Hire/Car Service Proposal

To fully consider the relationship of this exemption to the statutory criteria and the National Rail Transportation Policy, it is first necessary to discuss the serious problems raised by the grant of the modified car hire and service proposal.

If the car hire and car service issues occupy such a prominent place in the record, it is with good cause, as they lie at the heart of this Conrail-initiated proceeding, which is really concerned with how the car hire and distribution system has worked and how it should work. Under the current system, both the provider and user of cars are restricted in their decisionmaking. The owner has no control when the car is off line, and users are restricted in terms of

⁹ Compare the aggregated data for the Northeast supplied by Conrail in this proceeding with No. 30676, *Changes in Routing Provisions—Conrail—July 1981*, 385 ICC 753 (1982) (remanded).

car supply availability. Therefore, it has been properly argued that some effort should be made to move toward a more market-based system.

The problem with the modified Conrail proposal,* as I see it, is that while the individual steps proposed, taken in isolation, seem to be key ingredients of a market based system, when superimposed over the current system, they turn out to be logically incompatible.

Consider first the imposition of empty mileage charges and reclaim per diem after 3 days. This puts using roads in a position to make car use decisions that affect a third party's costs. Using roads will control whether the owning road incurs empty movement charges, on excess cars to remote points, by deciding what cars to load for given shipments.

This is the key to the objections registered by both large and small carriers. As the majority recognizes, shortline railroads will be severely affected by Conrail's modified proposal. For instance, a shortline could purchase cars for the use of its shippers and then load these cars for termination on another line in the same region. But that latter line could then send the reloaded cars thousands of miles away. If the original road needed the cars for its shippers, it would have to pay the empty mileage charge to secure return.

Another problem of even greater magnitude for the shortlines is that their share of the freight revenues may not even equal the empty mileage charges assessed. The long haul road, on the other hand, will receive the benefit of both the greater share of the revenue plus all the empty mileage charges. In many instances, it would even be to the holding road's advantage to move this equipment the longest route possible in order to maximize the mileage charges. Moreover, it certainly seems peculiar to allow a terminating carrier to assess demurrage on shippers who do not timely release cars, and then allow such terminating carrier to also assess charges on the carrier that owns the cars once they are empty. Whether the

*I would like to point out that the notice of this proposal was made under the auspices of 49 U.S.C. 10505, which authorizes exemptions from regulation. This proposal, which will authorize the authority to assess charges at certain levels and to store empty cars while reclaiming car rental charges, is a regulation—not an exemption. Certainly 49 U.S.C. 11122 would permit such regulations, but only after proper notice. Respondents who commented on this proposal, as noticed by the Commission under 10505, were clearly denied the opportunity to address it under 11122. These sections have different purposes and different standards. The courts have consistently found procedural defects of this nature to be fatal for lack of proper notice.

shortlines can survive until they reach the majority's nirvana of having equal bargaining power with Conrail is indeed problematical.

Keeping in mind the Commission's retention of reciprocal switching obligations, the majority's effort to graft a little "free market" onto regulation can be expected to produce some serious difficulties. Regardless of whether there is an agreement between the parties, compulsory interchange will require Conrail and other roads to accept whatever car is tendered for further movements—no matter what its expense. The receiving road cannot refuse to accept a car.

Equally shaky are the majority's predictions regarding the incentive to own boxcars. 49 U.S.C. 11122(a) requires the Commission to encourage the purchase, acquisition, and efficient use of freight cars. However, the investment risk that owners would be subject to by virtue of Conrail's modified proposal is clearly unwarranted, especially as control of the cars has not been offered as a quid pro quo. One does not move in and out of the freight car business on short notice. Any disincentive to invest in freight cars can result in later shortages, since there is a built in time lag of many months between the time a car is ordered and the time it is delivered.

High car costs and empty car miles are an important concern, not only to Conrail, but also to many other railroads. The solution is not to reward one at the expense of all the others. Clearly, a process which penalizes owners, be they shippers, railroads, or third parties (who after all are largely supplying the debtor roads such as Conrail with car capacity) is not what Congress envisioned. The Commission, the AAR, and all other interested parties should be directing their efforts toward finding an overall solution, not a makeshift one.

The Rail Transportation Policy of 49 U.S.C. 10101a

After considering all the individual issues in an exemption proposal, the Commission must then bring them together for a balancing of the many goals set forth in the National Rail Transportation Policy.

The broad policy arguments used to support the exemption herein proposed are the same ones that are generally relied upon to support every deregulatory action, e.g., less paperwork and pricing flexibility. However, the necessity of individual agreements with every shipper and car owner should more than offset the reduced amount of

paperwork that must be filed with the Commission, and without resort to the exemption, an abundance of price flexibility is already available under the current statutory system. With particular reference to pricing flexibility, one need only review the many protests and complaints filed in the last year by shippers and carriers regarding cancellations of joint rates and routes to understand that existing flexibility is already producing serious shipper and carrier concern.¹⁰ Thus, the majority is correct that the exemption will eliminate, at least with respect to boxcar movements, "litigation and other expensive procedural obstacles" placed in a railroad's way by Congress. In any event, such general "benefits," even if balancing allows them to be characterized as such, cannot outweigh the needs of our national rail system as a whole.

The goal of the National Rail Transportation Policy is to promote and ensure the continuation of a healthy railroad system. To this end, regulation is recognized as a legitimate function of the Federal government to (i) prevent discrimination against shippers or connecting carriers, (ii) facilitate the establishment of single factor through rates, (iii) publicize rail rates, (iv) assure shippers that traffic will move efficiently, and (v) provide incentives for investment.

49 U.S.C. 10101a, subparagraphs (1), (3), (4), (5), and (6), emphasize the importance of competition, stress the need for reasonable rates and adequate revenues, and accentuate the necessity of maintaining a financially sound and integrated rail system. However, the very nature of the boxcar exemption is inapposite to all these goals. True competition relies on a rational system of decision making based upon market realities—not on whether a commodity moves in a boxcar. Reasonable rates and adequate revenues should go together to benefit both shipper and carrier—and not just Conrail. Ratemaking decisions should be based on more than the type of equipment used. In addition, it cannot be said that the proposed exemption will encourage equipment investment or the efficient movement of traffic. What can be predicted is that boxcars will simply become the joker in the deck, with their own special compensation rules grafted onto the current system.

¹⁰See, for example, No. 39176, *The Chlorine Institute, Inc. v. Atchison, Topeka & Santa Fe Railway Co., et al.*; No. 38676, *Changes in Routing Provisions, supra, n.5.*

The National Rail Transportation Policy also instructs the Commission to cooperate with the States on transportation matters. 49 U.S.C. 10101a(9). In spite of having recently forced the States to accede to federal exemptions as the price for certification of intrastate railroad jurisdiction, the majority has not even attempted an analysis of the effect of this massive boxcar exemption on intrastate rail transportation.

Certainly the proposed exemption will not encourage (per 49 U.S.C. 10101a(10)), the elimination of noncompensatory rates, as many smaller carriers will be forced to that level to retain any traffic at all. Nor can it be argued (per 49 U.S.C. 10101a(13)) that the proposed exemption will prohibit predatory pricing and practices, avoid undue concentrations of market power, and prohibit unlawful discrimination, because there will be no forum to which a carrier or shipper may bring a complaint. Lastly, contrary to 49 U.S.C. 10101a(4), the proposed exemption will seriously endanger our rail transportation system, whose healthy continuation Congress, through its stated policy, wishes to maintain.

Summary

I have strongly supported and openly invited resort to the Commission's exemption authority as a means of leading, perhaps even pushing the railroad industry toward more reliance on themselves and the marketplace. To date, I believe such efforts have been crowned with success, in that the industry's requests for exemptions, together with the Commission's responses, have been genuinely responsible in every instance that comes to mind. Today, however, the majority has mandated a step backward by allowing deregulatory zeal to impose an unworkable system on an unwilling public. This is the kind of irresponsibility which can only serve the interests of those who are patiently searching for reasons to justify reregulation. I deeply regret the ammunition provided by the majority's decision in this proceeding.

Commissioner Simmons, dissenting:

A grant of Conrail's exemption from regulation of rates on boxcar traffic flies in the face of the evidence of record and the criteria of section 10505.

Of particular concern to me is that no persuasive arguments have been raised which demonstrate that we can state for certain that there is absolutely no potential for abuse of market power. The Commission is required to make an affirmative finding that continued regulation is not needed to protect

shippers from the abuse of market power. A number of shippers have presented persuasive data to demonstrate that the likelihood of market power abuse is great on a significant amount of traffic. Conrail and other supporters of the exemption have not amply contradicted those assertions. Instead, Conrail has submitted evidence limited to the Northeast and fails to present any picture of the country as a whole or of specific classes or types of commodities.

An exemption of boxcars from car hire and car service regulation would not be consistent with the national rail transportation policy. The evidence suggests that such an exemption would only serve the parochial interest of Conrail at the expense of the shippers, the other railroads, and the public.

Appendix

PART 1039—[AMENDED]

Part 1039 of Chapter X of Title 49 of the Code of Federal Regulations is amended by the addition of a new § 1039.14 as follows:

§ 1039.14 Boxcar transportation exemption.

(a) The Rail transportation of all commodities in boxcars is exempt from the provisions of 49 U.S.C. Subtitle IV except as otherwise provided in this section.

(b) The Commission retains jurisdiction in the following areas:

- (1) Car hire and car service.
- (2) Mandatory interchange of equipment.
- (3) Reciprocal switching or joint use of terminal facilities.
- (4) Car supply.
- (5) Rates for the transportation of recyclable or recycled materials other than iron and steel.
- (6) Freight car pooling agreements.

(c) Rail carriers are authorized to take the following actions with respect to boxcar equipment use:

- (1) Assess charges for empty movement of cars where movements are made at the request of the car owner, the Association of American Railroads, or the Commission. The empty mileage charge is subject to a maximum of 35 cents per mile, as adjusted for inflation or deflation using the rail cost adjustment factors published periodically by the Commission in Ex Parte No. 290 (Sub-No. 2), *Railroad Cost Recovery Procedures*. In applying those factors, the figure of 35 cents shall be treated as having been in effect on October 1, 1982.

- (2) Store empty cars and reclaim car hire payments beginning at the

expiration of a 72-hour grace period after the car is made empty.

(3) Negotiate bilateral agreements governing car hire rates, empty movements, and storage.

(d) Carriers must continue to comply with Commission accounting and reporting requirements. Railroad tariffs pertaining to the exempted transportation of commodities in boxcars will no longer apply. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Commission.

(49 U.S.C. 10321(a), 10505 and 11122)

[FR Doc. 83-12023 Filed 5-5-83; 8:45 am]

BILLING CODE 7305-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 642

[Docket No. 30503-74]

Coastal Migratory Pelagic Resources of the Gulf of Mexico and the South Atlantic

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Rule-related notice; closure.

SUMMARY: The Secretary of Commerce issues this notice to close the commercial fishery for king mackerel conducted by vessels fishing hook-and-line gear in the fishery conservation zone in the South Atlantic and Gulf of Mexico on May 6, 1983. The Director, Southeast Region, National Marine Fisheries Service has determined that the commercial hook-and-line quota of 3,877,200 pounds of king mackerel has already been reached. This action will ensure that the quotas for king mackerel are not exceeded during the current fishing year.

EFFECTIVE DATE: Closure is effective from 2400 hours, Eastern Daylight Time, on May 6, 1983.

FOR FURTHER INFORMATION CONTACT: Jack T. Brawner (Director, Southeast Region, National Marine Fisheries Service), 9450 Koger Boulevard, St. Petersburg, Florida 33702; telephone 813-893-3141.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and the South Atlantic (FMP) was developed by the Gulf of Mexico and South Atlantic Fishery Management Councils under authority of the Magnuson Fishery

Conservation and Management Act, as amended. Rules to implement the FMP were promulgated on February 4, 1983 (48 FR 5270). The Secretary is required under § 642.22(a) of these regulations to close any segment of the king or Spanish mackerel fishery when its annual quota has been harvested, by publishing a notice in the *Federal Register*. The regulations at § 642.21(a)(1)(ii) specify an annual commercial hook-and-line quota of 3,877,200 pounds of king mackerel.

The Regional Director has determined, based on the most recently reported catch figures, that commercial fishermen using hook-and-line gear have already harvested 3,990,000 pounds of king mackerel. Hence, commercial fishing for king mackerel with hook-and-line gear must cease at 2400 hours on May 6, 1983.

This action is required by 50 CFR § 642.22(a), and complies with Executive Order 12291.

(16 U.S.C. 1801 *et seq.*)

List of Subjects in 50 CFR Part 642

Fish, Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: May 3, 1983.

Joseph W. Angelovic,
*Acting Deputy Assistant Administrator for
Science and Technology, National Marine
Fisheries Service.*

[FR Doc. 83-12236 Filed 5-4-83; 10:08 am]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register

Vol. 48, No. 89

Friday, May 6, 1983

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 CFR Ch. III

Exceptions Processes, Reopening of Comment Period

AGENCY: Administrative Conference of the United States; Committee on Regulation.

ACTION: Reopening of comment period.

SUMMARY: The Administrative Conference Committee on Regulation is considering a proposed recommendation on the subject of "administrative exceptions processes". This topic includes agency procedures involved in the granting of waivers, exemptions, variances, or other individualized exceptions to rules of general applicability. Views and supporting factual material are requested to be submitted to aid the Committee in its consideration. The original request for comments (48 FR 14910) is hereby extended for an additional 60 days.

DATE: Comment Deadline: July 6, 1983. One copy is sufficient. Comments received after the deadline will be considered to the extent feasible.

ADDRESS: Send Comments To: William C. Bush, Administrative Conference of the United States, 2120 L Street, N.W., Suite 500, Washington, D.C. 20037.

FOR FURTHER INFORMATION CONTACT: William C. Bush, Administrative Conference of the United States, 2120 L Street, N.W., Suite 500, Washington, D.C. 20037; telephone (202) 254-7065.

SUPPLEMENTARY INFORMATION: The Administrative Conference Committee on Regulation is working toward development of a recommendation concerning agency procedures and practices in the operation of federal agency exceptions processes. The Committee's proposed recommendation, reproduced below, is based largely on a report by our consultant, Professor Peter Schuck of Yale Law School. Copies of

Professor Schuck's report, *When the Exception Becomes the Rule: Regulatory Equity, the Exceptions Process, and the Formulation of Energy Policy* (February 16, 1983), are available on request.

Although the consultant's report deals mainly with a study of the Office of Hearings and Appeals at the Department of Energy, the Committee has attempted to derive from the study such recommendations as appear to be useful government-wide. The Committee is particularly interested in the views of those who have had direct experience with exceptions processes in other regulatory agencies.

The Committee decided that the original 21-day comment period did not allow sufficient time for a full public airing of the issues treated in the proposed recommendation. All comments received during the initial period will receive full consideration.

The Committee will meet shortly after the extended comment deadline to consider all comments received and to determine whether and in what form to propose a final recommendation to the full Administrative Conference in December. Notice of that meeting will appear in the *Federal Register*.

All comments submitted to the Committee will be placed in a file available for public inspection during normal business hours (9:00 a.m. to 5:30 p.m. Monday through Friday, excluding federal holidays) at the Office of the Chairman of the Administrative Conference, 2120 L Street, N.W., Suite 500, Washington, D.C. 20037.

Activities of the Committee on Regulation are subject to the Federal Advisory Committee Act (Pub. L. 92-463).

Proposal on Which Comments Are Requested

Proposed Recommendation

Administrative Exceptions Processes

A. Congressional Oversight

1. Congress should review the effectiveness, procedural fairness, and political accountability of the administrative exceptions processes established under existing legislation, including the adequacy of legislative, administrative, and judicial controls over those processes. This may be accomplished during the course of

periodic congressional oversight of agency programs.

2. Congress should prescribe the equitable or other criteria that shall govern an agency exceptions process. Congress should also require that agencies issue regulations further defining those criteria and prescribing the procedures to be used in exceptions proceedings.

3. Congress should determine whether and to what extent agencies are circumventing rulemaking requirements by excessive reliance upon exceptions processes. If an exceptions process is being used by an agency to resolve questions of broad policy significance, Congress should consider requiring that the official in charge of that process be subject to Senate confirmation.

4. Where an exceptions process is part of what was originally an emergency program, Congress should determine whether and to what extent the courts should continue to take the emergency into account in reviewing the legal validity of exceptions decisions.

B. Agency Procedures

1. Each agency with an exceptions program should establish procedures governing exceptions cases that reflect an analysis of the need for particularized regulatory equity in the applicable program. The procedures provided for relatively routine "hardship" applications and for those cases of broader policy significance should differ to take account of the differing demands for information, fairness, and legitimacy.

2. The procedures should provide for adequate notice to all interested members of the public of an application for exceptions relief. Relief should be granted or denied only after an opportunity for the development of relevant factual and policy issues. The degree of formality of the adjudicatory procedures used should depend upon the magnitude of the public and private interests at stake, the need for expeditious decision, the number of interested parties, the kinds of issues to be resolved, and the kinds of procedures that were originally employed to generate the "rule" from which relief is being sought. The agency should assume responsibility for ensuring that all significantly affected interests are in fact represented in the exceptions proceedings.

3. Where the program allows for emergency, interim relief, the procedures should include suitable mechanisms—such as an escrow fund, interest obligation, or expiration date for interim orders—to restore the *status quo ante* insofar as possible in the event that such relief is subsequently determined to be inappropriate.

4. The form and independence of the tribunal that is to decide exceptions cases should depend chiefly upon the regulatory policy significance of the exceptions decision and the value of exceptions relief to applicants. The greater the precedential and policy significance of an exceptions decision and the greater the advantage (competitive or otherwise) that the decision confers upon an applicant, the more closely the tribunal should be integrated into the policy-sensitive and politically-accountable decision processes of the agency. The more the exceptions decision is routine, without precedential significance, and purely equitable or "hardship" in nature, the more readily it may be delegated to other decision processes.

C. Coordination With Rulemaking

1. Where there is a relatively high degree of organizational independence between an agency's exceptions process and its rulemaking process, the two should be closely coordinated to ensure that important policy decisions and situation-specific equitable decisions are made using the procedures most appropriate to each.

2. When it appears to the exceptions tribunal that a decision under consideration is likely to have broad policy significance, it should promptly inform the agency office with primary rulemaking responsibility in order to give the rulemakers an opportunity to supplement or supplant the exceptions proceeding. Ordinarily, the exceptions tribunal should not decide such a case until the rulemaking office indicates that it does not intend to proceed.

3. If the exceptions tribunal proceeds to decide a case with broad policy significance, it should conduct the proceeding much as a rulemaker would, broadening participation in the pending adjudication and inviting public comments on all significant policy, factual, and remedial issues in the case. In addition, the exceptions tribunal should be expanded to include additional members drawn from the agency's policymaking organs, and the politically responsible agency head

should review and sign personally the orders in such cases.

Richard K. Berg,
General Counsel.

May 2, 1983.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1040

[Docket No. AO-225-A35]

Milk in the Southern Michigan Marketing Area; Emergency Decision on Proposed Amendment to Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This decision adopts on an emergency basis a proposed amendment to the Southern Michigan milk marketing order. The order change would provide handlers with limited transportation credits from the marketwide pool for certain Class III milk transferred to unusually distant outlets for surplus disposal. The change, which would apply only through August 31, 1983, was considered at a public hearing on April 7, 1983, in Romulus, Michigan (Detroit). The order change was requested by a cooperative association that represents a substantial proportion of the dairy farmers who supply milk to the Southern Michigan market.

The adopted order change is necessary to reflect current marketing conditions and to insure that all producers in the market share more equitably the costs of disposing of unusually large supplies of surplus milk that are expected during the months of May through August 1983. Marketing conditions are such that prompt amendatory action is required. For this reason, a recommended decision and the opportunity to file exceptions thereto have been omitted. The adopted amendment must be approved by at least two-thirds of the producers in the market before it can become effective.

FOR FURTHER INFORMATION CONTACT: Martin Dunn, Marketing Specialist, Dairy Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, D.C. 20250, 202-447-7311.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Section 556 and 557 of Title 5 of the United States Code and,

therefore, is excluded from the requirements of Executive Order 12291.

William T. Manley, Deputy Administrator, Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. The amendment will promote more orderly marketing of milk by producers and regulated handlers.

Prior document in this proceeding: Notice of Hearing: Issued March 22, 1983; published March 28, 1983 (48 FR 12721).

Preliminary Statement

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the Southern Michigan marketing area. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice (7 CFR Part 900), at Romulus, Michigan (Detroit), on April 7, 1983. Notice of such hearing was issued March 22, 1983 (48 FR 12721).

Interested parties were given until April 14, 1983, to file post-hearing briefs on the proposals as published in the notice of hearing and on whether these proposals should be considered on an expedited basis.

The material issues on the record of the hearing relate to:

1. Whether the order should be amended to provide handlers with transportation credits from the marketwide pool on certain shipments of surplus milk during May, June, July and August 1983.

2. Whether emergency marketing conditions in the regulated area warrant the omission of a recommended decision and the opportunity to file written exceptions thereto.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. *Transportation credits on surplus milk shipments.* The Southern Michigan milk order should be amended to provide handlers with limited transportation credits from the pool on certain movements of bulk fluid milk and condensed milk (whole or skim) to distant manufacturing plants. The credits should be made available as soon as possible and should continue through August 1983. Such credits are not now operative in the order.

Michigan Milk Producers Association (MMPA), a dairy farmer cooperative