

20547. Express mail is recommended for timely delivery.

Dated: December 16, 2004.

**Patricia S. Harrison,**

*Assistant Secretary for Educational and Cultural Affairs, Department of State.*

[FR Doc. 04-28391 Filed 12-27-04; 8:45 am]

BILLING CODE 4710-05-P

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### Aviation Proceedings, Agreements Filed the Week Ending December 10, 2004

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 412 and 414. Answers may be filed within 21 days after the filing of the application.

*Docket Number:* OST-2004-19872.

*Date Filed:* December 8, 2004.

*Parties:* Members of the International Air Transport Association.

*Subject:* PTC23 EUR-SEA 0193 dated 10 December 2004, TC23/TC123 Europe-South East Asia Expedited Resolutions 002ae, 015v r1-r5. Intended effective date: 1 February 2005.

*Docket Number:* OST-2004-19888.

*Date Filed:* December 10, 2004.

*Parties:* Members of the International Air Transport Association.

*Subject:*

PTC3 0789 dated 7 December 2004

TC3 Areawide Expedited Resolution 015v r1-r6

PTC3 0790 dated 7 December 2004

TC3 Within South Asian Subcontinent Expedited Resolution 002L r7-r13

PTC3 0791 dated 7 December 2004

TC3 Within South East Asia except between Malaysia and Guam Expedited Resolutions 002k, 070uu r14-r15

PTC3 0792 dated 7 December 2004

TC3 South East Asia-South Asian Subcontinent Expedited Resolution 002ww r16-r22

PTC3 0793 dated 7 December 2004

TC3 South Asian Subcontinent-South West Pacific Expedited Resolution 002pp r23-r28

PTC3 0794 dated 7 December 2004

TC3 Japan-Korea Expedited Resolution 002u r29-r31

PTC3-0795 dated 7 December 2004

TC3 Japan, Korea-South Asian Subcontinent Expedited Resolution 002g r32-r40

PTC3 0796 dated 7 December 2004

TC3 Japan, Korea-South East Asia except between Korea (Rep. of) and

Guam, Northern Mariana Islands Expedited Resolution 002cc r41-r44 PTC3 0797 dated 7 December 2004 TC3 Japan, Korea-South West Pacific except between Korea (Rep. of) and American Samoa Expedited Resolution 002q r45-r51

Intended effective date: 15 January 2005.

**Renee V. Wright,**

*Supervisory Dockets Officer, Alternate Federal Register Liaison.*

[FR Doc. 04-28406 Filed 12-27-04; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending December 10, 2004

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (*See* 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

*Docket Number:* OST-2004-19848.

*Date Filed:* December 6, 2004.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* December 27, 2004.

*Description:* Application of Starair (Ireland) Limited requesting a Foreign Air Carrier Permit to engage in foreign charter air transportation of persons, property and mail between a point or points in Ireland and a point or points in the United States, including service via intermediate stops, and to engage in other Fifth Freedom charter operations in foreign air transportation.

*Docket Number:* OST-2004-19849.

*Date Filed:* December 6, 2004.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* December 27, 2004.

*Description:* Application of Starair (Ireland) Ltd., requesting an exemption to permit it to operate foreign charter combination air transportation between a point or points in Ireland and a point or points in the United States, including

service via intermediate stops, and to conduct Fifth Freedom combination charter operations in foreign air transportation.

*Docket Number:* OST-2004-19850.

*Date Filed:* December 6, 2004.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* December 27, 2004.

*Description:* Application of Air Comet S.A. d/b/a Air Plus Comet, requesting a five year permit to engage in charter foreign air transportation of persons, property, and mail between points in the Kingdom of Spain and the United States.

*Docket Number:* OST-2004-19877.

*Date Filed:* December 8, 2004.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* December 29, 2004.

*Description:* Application of GoJet Airlines LLC requesting a certificate of public convenience and necessity to engage in interstate and foreign scheduled air transportation of persons, property and mail.

**Renee V. Wright,**

*Supervisory Dockets Officer, Alternate Federal Register Liaison.*

[FR Doc. 04-28402 Filed 12-27-04; 8:45 am]

BILLING CODE 4910-62-P

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2004-19882]

#### Section 222 of the Motor Carrier Safety Improvement Act of 1999; Clarification of Agency Policy Statement

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of clarification; agency policy statement.

**SUMMARY:** The Federal Motor Carrier Safety Administration (FMCSA) clarifies its September 8, 2000 policy statement implementing section 222 of the Motor Carrier Safety Improvement Act of 1999. Section 222 requires the agency to assess maximum statutory penalties if a person is found to have committed a pattern of violations of critical or acute regulations, or previously committed the same or a related violation of critical or acute regulations. This notice clarifies the agency use of previous violations to assess maximum penalties under section 222. It also discusses the notification procedures and extraordinary circumstances that may warrant assessment of less than the maximum penalty.

**DATES:** December 28, 2004.

**FOR FURTHER INFORMATION CONTACT:**

Mary Pat Woodman, Chief of the Enforcement and Compliance Division (MC-ECE), (202) 366-9699, FMCSA, 400 Seventh Street, SW., Washington, DC 20590. You may also e-mail [marypat.woodman@fmcsa.dot.gov](mailto:marypat.woodman@fmcsa.dot.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

*Statutory Authority*

Section 222 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA), (Public Law 106-159, 113 Stat. 1748, 1769, Dec. 9, 1999; codified in 49 U.S.C. 521 note) directed the Secretary of Transportation to:

(a) Ensure that motor carriers operate safely by imposing civil penalties at a level calculated to ensure prompt and sustained compliance with Federal motor carrier safety and commercial driver's license laws.

(b) Establish and assess minimum civil penalties for each violation of laws referred to under (a) above; and, assess the maximum civil penalty for each violation by any person who is found to have committed a pattern of violations of critical or acute regulations or to have previously committed the same or a related violation of critical or acute regulations.

(c) If the Secretary determines and documents that extraordinary circumstances exist which merit the assessment of any civil penalty lower than any level established above, the Secretary may assess such lower penalty. Further, in cases where a person has been found to have previously committed the same or a related violation of critical or acute regulations, extraordinary circumstances may be found to exist when the Secretary determines that repetition of such violation does not demonstrate a failure to take appropriate remedial action.

*September 8, 2000, Policy Statement*

On September 8, 2000, FMCSA sent a policy memorandum changing its fine assessment policy to meet the requirements of section 222 to its Field Administrators, Enforcement Team leaders, and State Directors. The memorandum defined a *pattern of violations* or *previously committed violations* as three cases within the last six years. The policy memorandum, in pertinent part, states: (Page 1, third paragraph, beginning with the second sentence)

The three cases will consist of two cases which have been closed followed by

discovery of new violations, all of which involve the same Part (*e.g.* Part 395). The six year period is measured from the end of the first to the end of the third compliance review (CR). If a case is appealed, the time needed to process the appeal *should not* be included as part of the six year period. If the third CR (and subsequent CRs) reveals violations of the same Part cited in two previous CRs within the last six years, a "pattern of violations" or "previously committed violations" is established and the claim letter should assess the maximum penalty for that count(s).

An electronic copy of the policy memorandum is available through DOT's Docket Management System (DMS) Web site at <http://dms.dot.gov>, by using the docket number of this notice, FMCSA-2004-19882. The DMS facility is located on the Plaza Level of the Nassif Building, 400 Seventh Street, SW., Washington, DC.

**General Discussion of Questions**

We received several questions on the interpretation and implementation of FMCSA's policy memorandum. The agency addresses these questions and clarifies its implementation policy.

*1. Will the Agency use Enforcement Cases Closed Before Issuance of the Policy Memorandum To Support Assessment of the Maximum Penalty?*

MCSIA was signed into law on December 9, 1999, and FMCSA was created effective January 1, 2000. However, FMCSA did not provide guidance regarding implementation of section 222 until its September 8, 2000, policy memorandum was issued. We believe fairness to the motor carrier industry will be best served by using enforcement cases closed after September 8, 2000, as prior violations to support assessing maximum penalties under section 222 of MCSIA. Therefore, the agency will not use enforcement cases closed before September 8, 2000.

*2. What Type of Agency Action Constitutes a Finding That a Violation was Committed for Purposes of Assessing the Maximum Penalty Under Section 222?*

The policy memorandum provided that section 222 of MCSIA applies when there are two closed cases followed by discovery of new violations of the same Code of Federal Regulations (CFR) Part within a 6-year period, measured from the end of the first Compliance Review (CR) to the end of the third CR. It stated that the previous cases had to be closed but did not indicate whether an agency adjudication of the violations is required before a closed enforcement case is used as the basis for assessing the maximum civil penalty. We

interpret section 222 as requiring that a previous enforcement case include either: (1) An explicit adjudicatory finding of a violation by the agency (Assistant Administrator or a DOT Administrative Law Judge); (2) an express admission of liability by the respondent in its reply to the Notice of Claim (NOC) and in a settlement agreement; or (3) a Final Agency Order issued under 49 CFR 386.14(e), based on respondent's failure to reply to the NOC.<sup>1</sup>

A settlement agreement lacking in language admitting liability will not be considered a prior violation for purposes of section 222. Therefore, in response to a NOC advising respondent that payment will constitute an admission of the violations set forth in the NOC, payment of a civil penalty will constitute an express admission of liability. In response to a NOC that lacks such an advisory, payment of a civil penalty will not be construed as a prior violation for purposes of section 222, unless accompanied by a written admission of violations alleged in the NOC.

*3. How is the 6 Year Period Calculated for Determining When the Maximum Penalty Will Be Assessed?*

The 6 year period is determined by starting with the closing date of the CR or roadside inspection in the third enforcement case and determining whether there are two prior closed enforcement cases against the respondent involving violations of the same CFR Part during the immediately preceding 6 years. Because we are requiring an adjudication or admission of liability before using a previous enforcement case as a finding of a committed violation, a case will be considered closed as of the date of the Final Agency Order.<sup>2</sup> In the event the case is resolved without a Final Agency Order, the relevant date will be the date of the response to the NOC enclosing payment of the civil penalty or the date the settlement is executed by both parties, whichever is later.<sup>3</sup>

<sup>1</sup> A Notice of Claim (NOC) becomes a Final Agency Order if the respondent fails to reply to the NOC within the time prescribed by 49 CFR 386.14. Under these circumstances, the NOC becomes the Final Agency Order 25 days after it is served.

<sup>2</sup> The case is considered closed following issuance of the Final Agency Order and the exhaustion of any post order notions such as a Petition for Reconsideration. However, if a Petition for Reconsideration of the Final Agency Order in a previous case is pending before the agency, the case should not be considered closed.

<sup>3</sup> If a settlement agreement concludes a case pending before an Administrative Law Judge or the Assistant Administrator, the closing date would be

#### 4. *What Extraordinary Circumstances Warrant Assessment of Less Than the Maximum Penalty?*

Requests to reduce the penalty based on extraordinary circumstances will be considered on a case-by-case basis. Section 222 of MCSIA does not define the term "extraordinary circumstances," but expressly provides that extraordinary circumstances meriting a reduction in the maximum penalty may be found to exist if we determine and document that repetition of the violation does not demonstrate a failure to take appropriate remedial action. Although the statute does not limit application of the extraordinary circumstances factor, we do not believe it is appropriate to attempt to define all possible potential extraordinary circumstances, except as indicated in the next section. The respondent carries the burden to demonstrate that extraordinary circumstances merit a reduction in the maximum penalty in response to the NOC and during the adjudication of the case.

#### 5. *What Type of Notice Will Be Required Before Assessing the Maximum Penalty?*

Although section 222 of MCSIA does not specifically require prior notice to offenders that future violations may result in the imposition of maximum penalties, the September 8, 2000, policy statement provided that offenders should be given such notice as part of the close-out of the second CR. This guidance is now modified and the agency may assess maximum penalties in all appropriate cases. To address this issue, we (1) modified our standard NOC to advise respondents of the requirements of section 222 of MCSIA, and (2) published this amended policy statement in the **Federal Register** and posted it on FMCSA's Web site at <http://www.fmcsa.dot.gov>. No additional notice requirements are necessary.

#### 6. *Do FMCSA Service Centers Have Authority To Settle Cases Subject to Section 222 for Less Than the Maximum Penalty?*

Section 222(a) of MCSIA provides that the Secretary "should ensure that motor carriers operate safely by imposing civil penalties at a level calculated to ensure prompt and sustained compliance with Federal motor carrier safety and commercial driver's license laws" (emphasis added). Section 222(b)(2) requires the Secretary to assess the maximum penalty in appropriate circumstances. A question was raised on

the date the settlement agreement is accepted by the decisionmaker.

whether Service Centers may settle cases subject to section 222 for less than the maximum penalty, provided the maximum penalty is assessed in the NOC.

Civil Penalties are "assessed" in the NOC and are "imposed" in an agency Order or settlement agreement. Since the literal language of the statute requires that maximum penalties be assessed (but not necessarily imposed) in section 222 cases, this would arguably permit settlement of cases below the maximum penalty, provided the negotiated penalty (the penalty actually imposed) is calculated to ensure prompt and sustained compliance with the Federal Motor Carrier Safety Regulations. To ensure uniformity in implementing section 222, FMCSA Service Centers will not, at this time, be permitted to settle section 222 cases for less than the maximum penalty assessed. However, settlement agreements establishing terms of payment will be permitted. As the agency gains more experience in applying section 222, this settlement limitation will be evaluated.

Issued on: December 16, 2004.

**Annette M. Sandberg,**

*Administrator.*

[FR Doc. 04-28343 Filed 12-27-04; 8:45 am]

**BILLING CODE 4910-EX-P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[STB Finance Docket No. 34617]

#### **Patrick D. Broe and OmniTRAX, Inc.—Continuance in Control Exemption—Kettle Falls International Railway, LLC**

Patrick D. Broe (Mr. Broe) and OmniTRAX, Inc. (OmniTRAX) (collectively, applicants) have filed a verified notice of exemption to continue in control of Kettle Falls International Railway, LLC (KFR), upon KFR's becoming a Class III rail carrier.

The transaction was scheduled to be consummated on or shortly after December 10, 2004.

This transaction is related to a concurrently filed verified notice of exemption in STB Finance Docket No. 34616, *Kettle Falls International Railway, LLC—Acquisition Exemption—The Burlington Northern and Santa Fe Railway Company*, wherein KFR seeks to acquire by purchase and lease from The Burlington Northern and Santa Fe Railway Company (BNSF) rail lines in the State of Washington. The rail lines being purchased are between: (1) milepost 4.7, near West Kettle Falls,

WA, and milepost 34.375, at the United States-Canadian border; and (2) milepost 48.79, at the United States-Canadian border, and milepost 77.14, at San Poil, WA.<sup>1</sup> The rail lines being leased are between: (1) milepost 0.0, near Kettle Falls, WA, and milepost 4.7, near West Kettle Falls; and (2) milepost 61.0 near Chewelah, WA, and milepost 139.71, at the United States-Canadian border.<sup>2</sup> In addition, KFR will acquire incidental overhead trackage rights over the rail line between milepost 0.0 near Kettle Falls, and milepost 4.7, near West Kettle Falls. While KFR is leasing that 4.7-mile line, KFR is acquiring the incidental trackage rights to ensure continued access to BNSF for interchange at Kettle Falls from the rail line KFR is purchasing, in the event the lease of the line between Kettle Falls and West Kettle Falls expires or is terminated.

Mr. Broe is a noncarrier individual who directly controls OmniTRAX, a noncarrier company. OmniTRAX currently controls ten Class III rail carriers: Chicago Rail Link, LLC (CRL); Georgia Woodlands Railroad, LLC (GWRC); Great Western Railway of Colorado, LLC (GWR); Great Western Railway of Iowa LLC (CBGR); Manufacturers' Junction Railway, LLC (MJ); Newburgh & South Shore Railroad Limited (NSR); Northern Ohio & Western Railway, LLC (NOW); Panhandle Northern Railroad, LLC (PNR); Alliance Terminal Railroad, LLC (ATR); and Fulton County Railway, LLC (FCR).<sup>3</sup>

Mr. Broe and OmniTRAX also recently filed a notice of exemption to continue in control of Alabama & Tennessee River Railway, LLC (ATN), a noncarrier, upon ATN's becoming a

<sup>1</sup> The rail line that KFR is purchasing is located between milepost 4.7, near West Kettle Falls, and milepost 77.14, at San Poil. While the termini of this line are located in the State of Washington, the segment of the line between milepost 34.375 and milepost 48.79 is located in British Columbia, Canada. Consequently, the Board has jurisdiction only over the acquisition of the two segments in the United States described above.

<sup>2</sup> The rail segment that KFR is leasing is located between milepost 61.0, near Chewelah, and milepost 144.0, near Columbia Gardens, British Columbia, Canada. The segment of the Chewelah-Columbia Gardens line between mileposts 139.71 and 144.0 is located in British Columbia. Consequently, the Board has jurisdiction only over the lease of the line segment in the United States described here. BNSF is retaining restricted trackage rights over the segment of the line KFR is leasing between milepost 61.0, near Chewelah, and milepost 96.0, near Kettle Falls.

<sup>3</sup> CRL's lines are located in Illinois; GWRC's line is located in Georgia; GWR's lines are located in Colorado; CBGR's lines are located in Iowa; MJ's lines are located in Illinois; NSR's lines are located in Ohio; NOW's line is located in Ohio; PNR's line is located in Texas; ATR's lines are located in Texas; and FCR's lines are located in Georgia.