

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

THOMAS J. LITWILER
(312) 252-1508
tlitwiler@fletcher-sippel.com

302285

ENTERED
Office of Proceedings
May 7, 2021
Part of
Public Record

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

May 7, 2021

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: **Docket No. FD 36503**
Grand Elk Railroad, Inc. -- Acquisition Exemption --
Lines of Wisconsin Central Ltd. in Michigan

Docket No. FD 36504
Fox Valley & Lake Superior Rail System, L.L.C. -- Acquisition and
Operation Exemption -- Lines of Wisconsin Central Ltd. in Wisconsin

Dear Ms. Brown:

Attached for filing in the above-captioned proceedings are the **Response Comments of Wisconsin Central Ltd.**, dated May 7, 2021.

If you have any questions regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,

/s/ *Thomas J. Litwiler*

Thomas J. Litwiler
Attorney for Wisconsin Central Ltd.

TJL:tl

Attachment

cc: All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36503

GRAND ELK RAILROAD, INC.
-- ACQUISITION AND OPERATION EXEMPTION --
LINES OF WISCONSIN CENTRAL LTD. IN THE STATE OF MICHIGAN

DOCKET NO. FD 36504

FOX VALLEY & LAKE SUPERIOR RAIL SYSTEM, L.L.C.
-- ACQUISITION AND OPERATION EXEMPTION --
LINES OF WISCONSIN CENTRAL LTD. IN THE STATE OF WISCONSIN

**RESPONSE COMMENTS OF
WISCONSIN CENTRAL LTD.**

Kathryn J. Gainey
Counsel – U.S. Regulatory Affairs
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 347-7840

Thomas J. Litwiler
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

**ATTORNEYS FOR
WISCONSIN CENTRAL LTD.**

Dated: May 7, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36503

GRAND ELK RAILROAD, INC.
-- ACQUISITION AND OPERATION EXEMPTION --
LINES OF WISCONSIN CENTRAL LTD. IN THE STATE OF MICHIGAN

DOCKET NO. FD 36504

FOX VALLEY & LAKE SUPERIOR RAIL SYSTEM, L.L.C.
-- ACQUISITION AND OPERATION EXEMPTION --
LINES OF WISCONSIN CENTRAL LTD. IN THE STATE OF WISCONSIN

**RESPONSE COMMENTS OF
WISCONSIN CENTRAL LTD.**

Wisconsin Central Ltd. (“WCL”)¹ hereby files this response pursuant to the Board’s decision in these dockets served April 27, 2021. While the April 27th decision was directed to Fox Valley & Lake Superior Rail System, L.L.C. (“FOXY”) and Grand Elk Railroad, Inc. (“GDLK” and, collectively with FOXY, “Applicants”), WCL has a strong interest in these proceedings as the seller of the lines in question and is submitting these comments as to matters that it is particularly situated to address.

WCL and the Applicants have entered into an agreement for WCL to convey a collection of low-density rail lines in central and northern Wisconsin and the Upper Peninsula of Michigan to Applicants. Upon consummation of the proposed transactions, FOXY and GDLK will be responsible for providing service to customers on the subject rail lines, and will act as

¹ WCL is a wholly-owned indirect subsidiary of Canadian National Railway Company (“CNR”). See *Canadian National Ry. Co. – Control – Wisconsin Central Transp. Corp.*, 5 S.T.B. 890 (2001) (“CN/WC”). WCL and the other U.S. rail carrier subsidiaries of CNR report to the Board on a consolidated Class I basis under the name of Grand Trunk Corporation. See *Consolidated Reporting By Commonly Controlled Railroads*, 5 S.T.B. 1050 (2001), codified at 49 C.F.R. § 1201(1-1)(b)(1).

“handling carriers” for WCL – with WCL continuing to quote line-haul transportation rates for WCL interline traffic originating and terminating on the lines. The Applicants will be responsible for providing all optional services for customers on the lines, as well as for demurrage and accessorial charges for those services. Unlike many other similar line sales, the proposed transactions do not include any interchange restrictions or “paper barriers.”

Applicants are subsidiaries of Watco Holdings, Inc., an established and leading national operator of short line railroads. Watco is well-known in the region through its existing Wisconsin & Southern Railroad L.L.C. (“WSOR”) subsidiary and its GDLK subsidiary that currently operates in Michigan. Watco has a long track record of preserving and developing service on low-density rail lines.

As the record in these proceedings amply demonstrates, the proposed transactions have broad support of rail customers, industry trade groups and governmental entities. Additional such stakeholders have conveyed their support after meetings and conversations with Watco and WCL. And in response to the comments of certain parties, WCL has clarified, succinctly and on the record, that nothing in the proposed sale of WCL rail lines to the Applicants will affect whether or how conditions arising from the 2001 CN/WC proceeding apply for customers on the lines. WCL reiterates those representations here. Any *bona fide* concerns have been fully satisfied, and there is no basis to stay or revoke Applicants’ exemptions. WCL accordingly requests that the Board allow the FOXY and GDLK exemptions in these dockets to become effective by June 7, 2021.

I. Rail Customers and Other Stakeholders Broadly Support Both the Transactions and Timely Approval by the Board.

There is broad support for the exemptions to become effective so that Applicants and WCL can consummate their transactions as planned on June 30, 2021 without delay. Most

recently, The National Industrial Transportation League and Packaging Corporation of America stressed in their respective May 6, 2021 filings that the Board should “enable Watco and CN to complete their transaction in a timely and efficient manner.” A wide gamut of other customers on the subject rail lines similarly support the proposed transactions. Graymont, the principal customer on one of the lines, has explained that “[w]e believe the proposed transaction will help assure the continuation of such [local] service and preserve and enhance our ability to efficiently reach the national rail network.”² The Wisconsin Paper Council, a principal representative of that industry, indicated in its April 16, 2021 support statement that the transaction is a “great move” toward the securement and growth of rail service. Park Falls Pulp and Paper, a mill operator receiving both outbound and inbound rail service expressed a similar sentiment, as did Domtar and United Cooperative – which has 7 critical agricultural processing facilities on the lines.³

Similarly, federal, state and local government stakeholders support the transactions. U.S. Congressman Tom Tiffany issued a press release expressing optimism that the transactions “will safeguard future commerce and access across the U.P. [Upper Peninsula] and throughout the region.”⁴ The Wisconsin Department of Transportation (“WisDOT”) has voiced its support both for the transactions and for the STB exemption process.⁵ The Clark County Economic Development Corporation and Tourism Bureau observed that the transaction “would

² Graymont April 21, 2021 letter, submitted with Applicants’ April 26, 2021 filing.

³ See Applicants’ April 15, 2021 and April 26, 2021 filings, submitting these and other support statements.

⁴ <https://tiffany.house.gov/media/press-releases/lawmakers-hopeful-about-prospects-improved-rail-service>. Representative Tiffany later expressed certain concerns to the Board, and Applicants and WCL have addressed those concerns in the record.

⁵ WisDOT April 12, 2021 letter filing.

mean not only continued freight rail service . . . but . . . also presents . . . an opportunity to attract industries.”⁶

In addition, Applicants and WCL have actively engaged customers and stakeholders to discuss the transactions and in preparation for the transition of service. Those conversations resolved nearly all of the very few concerns that were initially expressed. Thus, Wisconsin Central Group (“WCG”), Lake State Shippers Association (“LSSA”), Northwoods Rail Transit Commission and the Western Upper Peninsula Planning & Development Regional Commission all now support the transactions.

II. The Transactions Have No Impact on the Conditions Arising from the 2001 CN/WC Control Proceeding.

In supporting the transactions, Wisconsin DOT asked whether there would be any impact on the conditions imposed by the Board in *CN/WC*, 5 S.T.B. at 918. As WCL shortly thereafter communicated to WisDOT,⁷ nothing in the proposed sale of WCL rail lines to the Applicants will affect the 2001 STB conditions or change whether or how those conditions apply for customer on the lines. Upon closing of the proposed line sales, FOXY and GDLK will serve as “handling carriers” for WCL, and WCL will continue to quote and invoice linehaul freight rates to customers on those lines which will seamlessly include the FOXY/GDLK transportation charge. Customers will retain a direct commercial relationship with WCL, and will have the same routing access to WCL gateways and rate-making interface with WCL that they do today.

WCL shared this communication by filing it in the FOXY docket (FD 36504) in response to the Wisconsin DOT’s letter filing in that docket and so all parties of record would

⁶ Clark County Economic Development Corporation and Tourism Bureau April 14, 2021 letter, submitted with Applicants’ April 15, 2021 filing.

⁷ WCL April 21, 2021 correspondence to WisDOT, submitted with WCL’s April 22, 2021 letter filing in Docket No. FD 36504.

receive it. WCL reaffirms its representation here and attaches it as Exhibit A, so that there is no question that it is equally applicable to the lines in Michigan which are the subject of Docket No. FD 36503. *See* Exhibit A. For their part, WCG and LSSA have specifically recognized CN's confirmation that the *CN/WC* conditions are not impacted by the proposed transactions.⁸

III. Comments Filed by Northwoods Distribution Services and Branch Line Railroad Are Not Credible and Do Not Warrant Delay.

A single transload operator on the lines in Rhinelander, Wisconsin and an amorphous non-carrier entity that identifies itself as "Branch Line Railroad" (but which neither owns nor operates any rail carrier assets or services) are virtually the sole exception to the chorus of support for the proposed transaction. The Board is familiar with these entities, as within the past month the agency rejected a confused effort by BLR to insert itself as a rail carrier within and around the NDS facility in Rhinelander – an effort which BLR has not pursued further.⁹ It is ironic that BLR now opposes the use of the same class exemption procedure that it so recently (and unsuccessfully) sought to invoke for its own benefit.

For its part, NDS levels unsubstantiated contentions about the alleged inadequacy of its current rail service from WCL – allegations which have limited relevance to Applicants' notices of exemption to acquire the lines and which are, in any event, not even minimally credible. The rail line on which NDS is located currently receives 5-days a week service from WCL. This is to the apparent satisfaction of Park Falls Pulp and Paper – a supporter of the transaction – which reopened a paper mill on the line within the last year. Traffic levels also belie NDS claims about the inadequacy of WCL's service: overall carloads have increased on

⁸ WCG/LSSA April 23, 2021 Comments at 4.

⁹ *See* Northwoods Distribution Services, Inc. ("NDS") and Branch Line Railroad, Inc. ("BLR") April 12, 2021 jointly-filed comments.

the Rhinelander line over the last 10 years, including at NDS.¹⁰ None of NDS/BLR's unsupported allegations credibly detract from the broad customer and public consensus supporting the transactions.

IV. The Discontinued Lines Should Retain that Status After the Consummation of the Transaction.

As FOXY and GDLK noted in their respective notices of exemption, approximately 225 miles of the subject rail lines proposed to be conveyed to the Applicants have been previously discontinued by WCL pursuant to requisite authorization from the Board. In each instance, the lines were discontinued pursuant to the class exemption procedures of 49 C.F.R. § 1152.50, applicable to out-of-service rail lines which have had no local traffic for at least two years. In many instances, the discontinued WCL lines had been without any traffic for significantly longer than that. The exact same class exemption procedures and criteria would have allowed WCL to abandon and remove those rail lines, in which case those lines obviously would not be available for sale and possible reactivation of service. But that is not the approach that WCL took. Instead, WCL retained and maintained the discontinued lines as part of the national rail network, thus preserving the possibility of their eventual return to service. Applicants now seek to acquire these inactive and discontinued rail lines with the goal and intent of restoring rail service on those lines in the future if demand for rail service is present.

Applicants have cited agency precedent recognizing that acquisition exemptions may be used to acquire rail lines in their discontinued state. WCL wants to emphasize the underlying policy justification supporting this longstanding recognition by the agency. A Board determination that would inhibit the use of the exemption process for sale of discontinued lines

¹⁰ Overall traffic figures exclude shipments of coal which an on-line customer no longer consumes. The factual matters discussed here are supported by the attached verification of Brian Buchanan, WCL's Manager – Business Development.

or that would saddle Applicants with an active common carrier obligation on rail lines that have had no rail traffic in many years would create the wrong incentives. It would incentivize the abandonment, rather than the mere discontinuance, of inactive branch lines – thus contradicting the very principles of preservation and continuation of rail service that the Board generally and its acquisition class exemption procedures specifically profess to promote. It would penalize rail carriers like WCL that have incurred the out-of-pocket and opportunity costs of retaining discontinued assets in their unused state by making those assets harder to sell – a particularly unwarranted example of no good deed going unpunished. There is no valid reason for preventing the Applicants from acquiring those rail lines in their discontinued state through the exemption process.

WHEREFORE, WCL respectfully requests that the Board allow the FOXY and GDLK exemptions in these dockets to become effective by June 7, 2021.

Respectfully submitted,

/s/ Thomas J. Litwiler

By: _____

Kathryn J. Gainey
Counsel – U.S. Regulatory Affairs
CN
Suite 500, North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 347-7840

Thomas J. Litwiler
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

**ATTORNEYS FOR
WISCONSIN CENTRAL LTD.**

Dated: May 7, 2021

EXHIBIT A

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

THOMAS J. LITWILER
(312) 252-1508
tlitwiler@fletcher-sippel.com

April 22, 2021

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: **Docket No. FD 36504**
Fox Valley & Lake Superior Rail System, L.L.C. -- Acquisition and
Operation Exemption -- Lines of Wisconsin Central Ltd. in Wisconsin

Dear Ms. Brown:

On April 12, 2021, the Wisconsin Department of Transportation ("WisDOT") filed a support statement in the above-captioned proceeding. I am attaching for the information of the Board and other parties correspondence from Wisconsin Central Ltd., the seller in the proposed transaction, to WisDOT addressing a matter in that support statement.

I certify that a copy of this filing has been served by electronic mail on all parties of record in this docket.

Respectfully submitted,

/s/ *Thomas J. Litwiler*

Thomas J. Litwiler
Attorney for Wisconsin Central Ltd.

TJL:tl

Attachment

cc: David F. Rifkin, Esq.
All Parties of Record

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

THOMAS J. LITWILER

(312) 252-1508
tlitwiler@fletcher-sippel.com

April 21, 2021

VIA ELECTRONIC MAIL

Hon. Craig Thompson
Secretary-designee
Wisconsin Department of Transportation
4822 Madison Yards Way, S903
Madison, WI 53705

Re: **Docket No. FD 36504**
Fox Valley & Lake Superior Rail System, L.L.C. -- Acquisition and
Operation Exemption -- Lines of Wisconsin Central Ltd. in Wisconsin

Dear Secretary Thompson:

Wisconsin Central Ltd. (WCL) appreciates your statement of support filed at the Surface Transportation Board on April 12th regarding the recently-announced sale of WCL branch rail lines in Wisconsin to Fox Valley & Lake Superior Rail System, L.L.C. (FOXY), a subsidiary of the Watco Companies. On behalf of WCL, I am writing to address the question raised in your support statement regarding certain conditions imposed by the STB in the 2001 proceeding in which Canadian National Railway Company was authorized to obtain control of WCL. I have represented WCL as a regulatory attorney on matters before the STB and its predecessor, the Interstate Commerce Commission, for 30 years, both before and after WCL's 2001 acquisition by CN.

Nothing in the proposed sale of WCL rail lines to FOXY will affect the 2001 STB conditions or change whether or how those conditions apply for shippers on the lines. Upon closing of the WCL-FOXY line sale, FOXY will serve as a "handling carrier" for CN, and CN will continue to quote and invoice linehaul freight rates to customers on those lines which will seamlessly include FOXY's transportation charge. Customers will retain a direct commercial relationship with CN, and will have the same routing access to WCL gateways and rate-making interface with CN that they do today. In addition, the WCL-FOXY transaction includes no "paper barriers" that would penalize FOXY for interchanging traffic with a carrier other than CN where such routings are available.

FLETCHER & SIPPEL LLC

Hon. Craig Thompson
April 21, 2021
Page 2

If there are further questions that we can address regarding these matters, please feel free to contact me or David Woodruff, CN's Assistant Vice President, U.S. Public & Government Affairs, at (202) 821-6525 or David.Woodruff@cn.ca.

Kind regards.

Very truly yours,

/s/ *Thomas J. Litwiler*

Thomas J. Litwiler

TJL:tl

cc: David D. Woodruff, CN

VERIFICATION

I, Brian Buchanan, verify under penalty of perjury that the facts in the foregoing filing of Wisconsin Central Ltd. are true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to make this verification.

Executed on May 6, 2021

A handwritten signature in black ink that reads "Brian Buchanan". The signature is written in a cursive style with a horizontal line underneath the name.

Brian Buchanan
Manager – Business Development

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2021, a copy of the foregoing **Response Comments of Wisconsin Central Ltd.** was served by electronic mail delivery upon all parties of record in Docket Nos. FD 36503 and 36504.

/s/ Thomas J. Litwiler

Thomas J. Litwiler