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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Waterloo Railroad, LLC – Change of Operator Exemption with Interchange
Commitment – Union Pacific Railroad Company, FD 36798

Dear Ms. Brown:

On July 25, 2024, Waterloo Railroad, LLC (“WTRL”) filed a “Change of Operator Notice of Exemption” (“Notice”)¹ seeking to replace Iowa Northern Railway Company (“IANR”) as the lessee and operator of a 6.9-mile rail line owned by Union Pacific Railroad Company (“UP”) and located in Blackhawk County, Iowa (the “Line”). On the following day, IANR filed a letter (“IANR Letter”) with the Surface Transportation Board (the “Board”) expressing its objection to WTRL use of a Change of Operator exemption replacing IANR as the lessee and operator of the Line. IANR's Letter should not and cannot be used as a basis to reject the Notice or to hold it in abeyance. The regulations do not require that IANR, as the incumbent carrier, consent to its replacement via a Change of Operators notice of exemption. The Notice was fully consistent with the regulations and should take effect. Likewise, having failed to meet the stay standards set forth in Holiday Tours test,² the Board has no basis to hold the Notice in abeyance or to stay the effective date.

As the basis for its view that IANR's consent is required for WTRL to replace IANR via a Change of Operators exemption, IANR cites, not the regulations, but precisely one case. See

¹ See 49 CFR 1150.31(a)(3).

² Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (“Holiday Tours”).

SJRE-Railroad Series—Exemption Under 49 C.F.R. 1150.31—Rail Line in Harris County, Tex., FD 36279 (STB served April 5, 2019) (“SJRE Decision”). In that case, the Board stated that “SJRE [proposed operator] should show that SJTC [the incumbent operator] agrees to being replaced as the operator and also must demonstrate that notice has been provided to any shippers on the Line. See § 1150.32(b).” SJRE Decision slip op at 1.

Based upon this language, as the incumbent carrier, IANR claims that WTRL cannot use the change of operators exemption because IANR does not consent. But there are several problems with IANR's position. As an initial matter, the regulations at 49 C.F.R. 1150.33, which provide what information is required for a change of operator notice of exemption, do not require a statement that the incumbent carrier consents. Reading such a requirement into the regulations requires the Board to violate the Administrative Procedures Act by adding a new and substantive requirement in the regulation without a notice and comment period. See 5 U.S.C. § 553.³

Second, the SJRE Decision did not specifically hold that a change of operator exemption could not be used unless the incumbent carrier consents. It simply stated that in the context of that complicated and fact specific case, where it was unclear whether one or two carriers would continue to operate, in that situation, the Board wanted to know whether the incumbent carrier consented or not. Indeed, a review of STB precedent indicates that the SJRE Decision is an outlier. No other STB case has supported the idea that the incumbent carrier needs to consent for a change of operators exemption to be invoked.

Third, WTRL contends that should the Board give an overly broad reading of the SJRE Decision, not only would it violate the APA, but it would be bad policy. If that were the policy, any time an incumbent carrier wanted to continue to operate on the line, they could just refuse to consent. This, in turn, would force the landlord to file a long and complicated adverse discontinuance process, even if a court had ruled that the incumbent carrier no longer had any contract rights to be on the line. This would be unnecessary, expensive, time-consuming, and not consistent with the regulations.

Fourth, the Board cannot overlook that applying the SJRE Decision to the case at hand would effectively support IANR's potential breach of its contract with UP. As WTRL understands it, UP has given lawful notice to IANR to terminate the lease within 30 days. WTRL believes IANR is required by its lease with UP to get off the line after 30 days' notice and to cooperate with UP's decision to change operators. If accurate, any Board decision requiring IANR's consent would override UP's contract rights, which the Board should not do.

³ See Kisor v. Wilkie, 139 S. Ct. 2400, 2434-35 (2019) (“By the same logic, Congress’s specification in the APA of procedures for the creation of new substantive rules (like notice and comment) necessarily implies that an agency cannot amend a substantive rule without following those procedures. To hold otherwise...subverts the APA’s design.”); see also, Citizens for Resp. & Ethics in Wash. v. FEC, 993 F.3d 880, 891 (D.C. Cir. 2021) (When a statute or regulation “specifically enumerates” certain requirements in a list, the *expressio unius est exclusio alterius* canon counsels against adding any implicit requirements to the list.)

Any such contract claims belong in court, not at the STB.⁴ Because notices of exemption are permissive only,⁵ if UP did not have the contract right to terminate IANR's lease, then IANR should be able to obtain an injunction within the next 30 days, which will prevent WTRL from consummating the permissive transaction. The Board need not and should not wait for any resolution of IANR's contract rights, if any, before allowing the Notice to take effect.⁶

Finally, if IANR's main concern is facilitating a smooth transition, WTRL commits to working in good faith with both UP and IANR to ensure a smooth transition by the effective date of the Notice. WTRL believes it will be ready to operate by Day 30, but if not, it does not object to allowing IANR to continue to operate for a brief time or conducting dual operations (with appropriate operating protocols) until such time as a smooth transition can take place.

In conclusion, holding the Notice in abeyance to seek more information is not warranted in this case. Nor is rejection.⁷ Here, WTRL followed the regulations to the letter. Notice was

⁴ See V&S Railway, LLC—Petition for Declaratory Order—Railroad Operations in Hutchinson, Kan., FD 35459, slip op. at 5 (STB served July 12, 2012) (The Board would not address the parties' operating rights agreement noting that "[i]ssues concerning the continued validity or effect of the Operating Rights Agreement on the current dispute should be resolved by the district court, applying state law."); see also Gen. Railway Corporation, d/b/a Iowa Northwestern Railroad--Exemption for Acquisition of Railroad Line--In Osceola & Dickinson Counties, Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007) (noting that state courts are the proper venue for resolving contract disputes).

⁵ See Central Illinois Railroad Company – Operation Exemption – Rail Line of The City of Peoria and the Village of Peoria Heights in Peoria and Peoria Heights, Peoria County, IL, FD 34518, slip op. at 5 (STB served February 23, 2005) (The Board notes that "the operating authority granted by [an] exemption is permissive and conveys no specific property or contractual rights...")

⁶ If any contract rights have not yet been resolved before the consummation deadline, there is nothing preventing both IANR and WTRL from operating on the Line until such rights are resolved. See Ohio River Partners LLC—Acquisition and Operation Exemption—Hannibal Development, LLC, FD 35984, slip opinion at 4 (STB served April 1, 2016)(the Board indicated that dual operations may be appropriate in certain circumstances, and that the lack of information in a notice of exemption "concerning dual operations and how such operations might be coordinated... does not warrant rejection of the notice.").

⁷ IANR has not met the standards enunciated in Holiday Tours to justify a stay of the effective date. Absent meeting those standards, there no legal basis for the Board to hold the Notice in abeyance in violation of the regulation that requires the Notice to become effective in 30 days absent a rejection or a stay. Kiamichi Railroad Company, Inc. -- Exemption Acquisition And Operation -- Certain Lines Of Burlington Northern Railroad Company, FD 31082, 1987 ICC Lexis 210 (ICC served July 21, 1987).

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given to shippers. The Notice did not contain any false or misleading information so as to be rejected.⁸ The Notice should be allowed to take effect.

If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@mullinslawgroup.net.

Sincerely,

/s/ William A. Mullins

Attorney for Waterloo Railroad, LLC

cc: Parties of Record

⁸ IANR did not request rejection of the Notice nor would rejection be justified. The Notice was consistent with the regulations, does not raise unanswered questions, and all of the information was presented and was not incomplete. Therefore, rejection is not warranted. See FPN-USA, Inc.—Operation Exemption—Tijuana-Tecate Shortline, FD 35155, slip op. at 3 (STB served Aug. 8, 2008); see also Pro-Go Corp.—Operation Exemption—in Suffolk County, N.Y., FD 35120 (STB served Mar. 13, 2008) (rejecting notice of exemption for failing to submit sufficient information to determine whether the transaction qualified for class exemption); Wash. & Idaho Ry.—Lease & Operation Exemption—BNSF Ry., FD 35370 (STB served Apr. 23, 2010) (rejecting notice of exemption for failing to submit complete version of lease agreement).