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December 27, 2016

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W., Room 1034
Washington, DC 20006

Re: Delmarva Central Railroad Company – Lease and Operation Exemption with Interchange Commitment – Norfolk Southern Railway Company, FD 36071

Dear Ms. Brown:

Delmarva Central Railroad Company (“DCR”) hereby replies to the two letters written by Mr. James Mallon, SMART-TD, State Legislative Director-Delaware (“Mallon”).¹ In his letters, Mr. Mallon requests that the Surface Transportation Board (“Board” or “STB”) revoke the authority granted to DCR to lease and operate an approximately 161.59 mile rail line owned and previously operated by Norfolk Southern Railway Company (“NSR”) extending between Porter, DE and Pocomoke, MD and between Harrington, DE and Frankford, DE, including various industrial tracks (the “Line”). The Board should deny the request.

Via a notice of exemption filed on November 17, 2016 and published on December 2, 2016, absent a stay request and a grant of a stay, DCR was authorized to consummate its lease of

¹ Mallon originally filed a letter, dated December 9, 2016, but accepted by the STB and posted on December 13. Because the letter requested that the notice of exemption be revoked, the delay in the posting was presumably due to the failure of Mallon to file the requisite filing fee for a petition to revoke. Curiously, that letter is no longer available on the Board’s website. Instead, the Board, on December 14, posted another letter written by Mallon, dated December 12 but not received by DCR counsel until December 19. This letter likewise requested revocation. As it appears that the only “official” letter is now the December 14 posted letter, DCR is replying to that letter.

Ms. Cynthia T. Brown
December 27, 2016
Page 2

the Line on December 17, 2016. No stay request was filed nor was a stay issued. Accordingly, DCR and NSR consummated the lease transaction on December 17, 2016.

Mallon requests revocation of the notice of exemption that authorized DCR to lease the Line. The Board “may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.” 49 U.S.C. §10502(d). Mallon has the burden of showing that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. §10101 (“RTP”) and his request must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary. See Consol. Rail Corp.--Trackage Rights Exemption--Mo. Pac. R.R., FD 32662 (STB served June 18, 1998). Mallon has failed to meet these standards.

Mallon cites to RTP (8) and claims that revocation is necessary for the line to be operated safely and without detriment to the public health. He cites no specific evidence for this, but claims that the bridges are in disrepair and will need substantial rehabilitation that DCR cannot afford. As an initial matter, the Line can and will be operated safely. DCR is owned by Carload Express, Inc. (“Carload”), which is a non-carrier holding company that already owns and operates other short line railroads. As such, DCR’s owners, managers, and personnel are quite familiar with the safety regulations administered by the Federal Railroad Administration (“FRA”). DCR must operate the Line in accordance with those regulations and is committed to doing so.² Indeed, a search of the FRA’s safety database indicates that Carload’s other railroads have average to above average safety records. Mallon presents no evidence or even argument that DCR will be operated in an unsafe manner; yet alone in a manner that would require revoking the transaction.³

As for the argument that the bridges are in need of significant rehabilitation that DCR cannot afford to repair, this too must fail. The bridges are not in need of significant rehabilitation. NS has maintained these bridges in full compliance with FRA standards and safe operating practices. With respect to the bridge that Mallon’s letter alleges had difficulties turning for 30 days, Mallon’s claims are misleading if not disingenuous. While it is true that the bridge was closed for 30 days to make routine scheduled maintenance repairs to the bridge, the

² In fact, as part of the contractual relationship between DCR and NSR, DCR is obligated to not only comply with FRA standards for operations, but also to maintain the tracks at standards specified by NSR. In the unlikely event that DCR fails to comply with such standards, NSR has the right to make repairs necessary to bring the Line into compliance and DCR shall reimburse NSR for the cost of such repairs.

³ Also, as part of the contractual relationship between DCR and NSR, DCR is obligated to maintain certain insurance policies to cover incidents that should arise in connection with its operation of the Line.

Ms. Cynthia T. Brown
December 27, 2016
Page 3

extended closure was necessitated (and approved by the Coast Guard) due to construction delays caused by weather conditions. Furthermore, contrary to Mallon's unfounded claims, all bridges on the Line are in good condition, structurally sound, and fully capable of handling the anticipated traffic needs. DCR also has inspected those bridges and is fully aware of their conditions. DCR has the resources and knowledge to maintain the bridges in a safe manner and plans to do so. Indeed, because the bridges are a necessary component of DCR's operating plan, it is in DCR's economic self-interest to ensure that no bridge becomes unusable or unsafe.

Mallon has simply not met his burden to establish that revocation is necessary to maintain safe operating conditions consistent with the public's health. His main argument seems to be that because a Class I has more financial resources, the Board should not allow short line spin-offs. Of course, he has not cited to a single case where the Board has revoked a Class I lease of a line to a short line operator on the sole basis that the Class I has significantly more financial resources than the short line operator. If that served as the standard for revocation, there could never be another short line sale or lease. Indeed, the Board has rejected similar unsubstantiated arguments in the past. In 2005, Brotherhood of Locomotive Engineers & Trainmen ("BLET") made a similar argument expressing in part concerns over employee wages, safety, and suitable working conditions.⁴ The Board denied the Petition to Revoke. It should do so here as well. DCR will operate in full compliance with the goals set forth by RTP (8) and there is no need to revoke the exemption to ensure DCR's compliant with that section..

Mallon also claims that revocation is necessary to carry out the goal of RTP (11), which is to "encourage fair wages and safe and suitable working condition." While it is generally true that employees of Class I railroads have higher pay and more expansive benefits when compared to short line railroads, that does not mean that DCR's wages aren't fair. DCR pays more than "fair" wages and offers some of the best wages and benefits of any employer in the Delmarva Peninsula. DCR requires its employees to abide by all safety rules and offers suitable working conditions. It is for these reasons that DCR had no problems finding and hiring qualified railroad personnel ready to operate the Line on Day 1. In fact, DCR received many more applications than available positions. Finally, as noted, Carload railroads have strong safety records and there have been no FRA or STB reported allegations that its short line employees are treated unfairly or required to operate in unsafe conditions. As such, there is no reason to revoke the exemption in order to ensure compliance with RTP (11).⁵ The lease transaction is fully consistent with the (8) and (11) provisions of the RTP and there is no need to revoke the exemption to ensure that these goals are continued.

⁴ Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption – CSX Transportation, Inc., FD 34536 (STB served August 23, 2005).

⁵ See East Brookfield & Spencer Railroad, LLC – Lease and Operation Exemption – CSX Transportation, Inc., FD 34505 (Sept. 15, 2005)(denying a petition to revoke based on labor concerns that the subject transaction was allegedly undertaken to shift jobs from union to nonunion labor, which would deprive employees of benefits and wages).

BAKER & MILLER PLLC

Ms. Cynthia T. Brown
December 27, 2016
Page 4

While Mallon's letter petition focuses on RTP (8) and (11), it ignores the other RTP goals that the transaction furthers. For example, the exemption furthered the goal of RTP (2) and (7) by ensuring that Federal regulatory control over the transactions was minimized, that STB approval was accomplished in a fair and expeditious manner, and the regulatory barriers to entry into the marketplace were reduced. By not burdening DCR with expensive and sometimes cumbersome Class I pay scales and works rules, the transaction allows DCR to earn adequate revenues consistent with RTP (3). Likewise, consistent with RTP (4), it allows for reduced costs in operating the Line so as to ensure effective competition with trucks and waterways, which are the primary competing modes for the commodities handled by DCR, and ensures sound economic conditions for effective competition and coordination consistent with RTP (5). Revoking the exemption as requested by Mallon would be contrary to these goals.

Sincerely,



William A. Mullins
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Attorneys for Delmarva Central Railroad Company.

cc: Parties of Record
John Ashbridge
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