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July 30, 2018

246146

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

ENTERED
Office of Proceedings
July 30, 2018
Part of
Public Record

Re: **Docket No. FD 36179**
Lake State Railway Company -- Lease Exemption --
Line of Grand Trunk Western Railroad Company

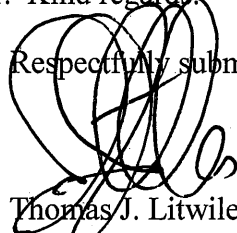
Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the **Reply of Lake State Railway Company to Petitions to Revoke**, dated July 30, 2018.

Please note the slight change in my firm's mailing address.

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,



Thomas J. Litwiler
Attorney for Lake State Railway Company

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36179

LAKE STATE RAILWAY COMPANY
-- LEASE EXEMPTION --
LINE OF GRAND TRUNK WESTERN RAILROAD COMPANY

**REPLY OF LAKE STATE RAILWAY COMPANY
TO PETITIONS TO REVOKE**

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**ATTORNEY FOR LAKE STATE
RAILWAY COMPANY**

Dated: July 30, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36179

LAKE STATE RAILWAY COMPANY
-- LEASE EXEMPTION --
GRAND TRUNK WESTERN RAILROAD COMPANY

**REPLY OF LAKE STATE RAILWAY COMPANY
TO PETITIONS TO REVOKE**

Lake State Railway Company ("LSRC") hereby submits this reply to the petitions to revoke filed by the International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division ("SMART-TD") and the Grand Trunk Western General Committee of Adjustment ("GTW/GCA") of the Brotherhood of Locomotive Engineers and Trainmen. LSRC's lease of a 3.9-mile rail line in Port Huron, Michigan from Grand Trunk Western Railroad Company ("GTW")¹ includes the drawbridge over the Black River, for which GTW has retained maintenance and repair responsibility. Any ambiguity in LSRC's disclosure of that retained GTW responsibility in LSRC's May 10, 2018 verified notice of exemption was not "false or misleading" under relevant standards and did not render LSRC's exemption void *ab initio*. The SMART-TD and GTW/GCA petitions should be denied.

Pursuant to a Track Lease for the Handling of Cars dated March 23, 2018 between LSRC and GTW, LSRC has leased GTW's rail line extending from approximately milepost 55.8 at the north side of Griswold Road to the end of track at approximately milepost 59.7 at the Dunn Paper switch in Port Huron (the "PH Track"). Section 7 of the Track Lease provides that LSRC is responsible for the ordinary repair and maintenance of the PH Track, with

¹ GTW is a wholly-owned, indirect subsidiary of Canadian National Railway Company.

the exception that GTW retains responsibility for the repair and maintenance of the Black River drawbridge located at approximately milepost 58.2.

In the interest of transparency, LSRC disclosed GTW's retention of maintenance responsibilities on the Black River drawbridge in LSRC's verified notice of exemption. LSRC Notice at 2.² That disclosure, however, indicated simply that GTW would "retain responsibility for the Black River drawbridge," without specifically referencing maintenance or repair. LSRC's notice nonetheless made clear that LSRC would be leasing and operating the entire PH Track, and the milepost limits provided for the PH Track included the portion of the line over the Black River drawbridge. LSRC Notice at 3 (addressing 49 C.F.R. § 1150.42(e)(3)). Nothing in the notice indicated that LSRC's train movements over the PH Track would be interrupted by intervening GTW operations on the Black River drawbridge in the middle of the line.

Notice of LSRC's exemption was served and published in the *Federal Register* on May 25, 2018, 83 Fed. Reg. 24384, and an earlier GTW/GCA petition for stay was denied by decision served June 7, 2018. LSRC consummated its lease of the PH Track from GTW on June 16, 2018.

The Black River drawbridge does not have a dedicated bridgetender, but is left in the "up" position until train movements occur on the PH Track. The bridge is then lowered and raised by the train crew to allow their train to pass. Since June 16th, LSRC train crews have performed this bridge operation. SMART-TD and, subsequently, GTW/GCA³ have now asserted that LSRC's performance of this function means that LSRC's notice was false and misleading, and thus LSRC's exemption must be declared void *ab initio*.

² LSRC had previously made a similar disclosure in its 60-day advance labor notice posted, served and filed pursuant to 49 C.F.R. § 1150.42(e). LSRC Notice, Exhibit C.

³ GTW/GCA filed its petition to revoke two days after the filing of the SMART-TD petition to revoke, and makes substantially similar arguments to SMART-TD.

Nothing in the Board's regulations required LSRC to provide information in its notice of exemption regarding ongoing responsibility for the maintenance and repair -- or for the lowering and raising -- of the Black River drawbridge, and such information is not relevant to the availability of the class exemption at 49 C.F.R. § 1150.41 that LSRC invoked through that notice. As the Board has explained in comparable situations:

Each of the statements that UTU challenges concerns matters extraneous to whether the transaction fits within the class exemption. Under Board precedent, whether a party invoking a class exemption has provided false and misleading information turns on whether the party has, in its notice, claimed that it may lawfully invoke the class exemption when, in fact, it cannot. The fact that a party has provided incorrect information in a notice does not justify rejection unless the information is material to whether the transaction qualifies for the class exemption. While we expect applicants to provide accurate information, the speed limits on the line acquired here are not relevant to the issue of whether the acquisition of the line qualifies for the class exemption.

Grand Elk Railroad, L.L.C. -- Lease and Operation Exemption -- Norfolk Southern Railway Company, Docket No. FD 35187 (STB served July 13, 2009) at 3 (footnotes and citations omitted); see also, e.g., Union Pacific Railroad Company -- Abandonment -- In Harris, Fort Bend, Austin, Wharton and Colorado Counties, Tex., Docket No. AB-33 (Sub-No. 156) (STB served Jan. 8, 2016) at 2 (in applying void *ab initio* standard of 49 C.F.R. § 1150.42(c), "the Board examines the false or misleading information to determine whether it is material to the exemption sought."); Berkshire Scenic Ry. Museum, Inc. v. ICC, 52 F.3d 378, 381-382 (1st Cir. 1995) (rejecting interpretation of agency regulations that any false or misleading information should lead to an exemption being void *ab initio*).

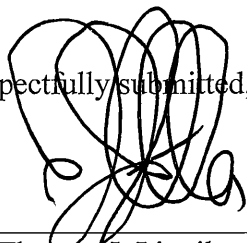
Particularly given the reaction from SMART-TD and GTW/GCA, LSRC could have been clearer in the wording used to describe the nature of GTW's retained maintenance responsibilities for the Black River drawbridge. But LSRC's statements -- made in an effort to

provide full disclosure -- were not false, and certainly did not pertain to any material factor in the qualification of the LSRC-GTW lease transaction for the relevant class exemption.

Nor does it appear that any party was misled by the language of LSRC's notice. SMART-TD in particular indicates that it was aware "that the bridge would be under the [operational] control of LSRC once the transaction was approved" SMART-TD Petition to Revoke at 3, n.1. Neither SMART-TD nor GTW/GCA indicates what, if any, withheld arguments they would have made if LSRC's notice had added a single word and stated that "GTW will retain maintenance responsibility for the Black River drawbridge located at milepost 58.2 on the PH Track." See LSRC Notice at 2. In these circumstances, LSRC's notice does not contain false and misleading information that would render LSRC's exemption void *ab initio* or otherwise affect the validity of that exemption.

WHEREFORE, LSRC respectfully requests that the SMART-TD and GTW/GCA petitions to revoke be denied.

Respectfully submitted,

By: 

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**ATTORNEY FOR LAKE STATE
RAILWAY COMPANY**

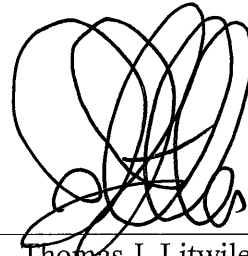
Dated: July 30, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2018, a copy of the foregoing **Reply of Lake State Railway Company to Petitions to Revoke** was served by electronic mail and first-class mail, postage prepaid, upon:

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A handwritten signature in black ink, appearing to read 'Thomas J. Litwiler', is written over a horizontal line.

Thomas J. Litwiler