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July 18, 2017

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VIA E-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 18, 2017
Part of
Public Record

Re: **Docket No. FD 36127**
Grand Elk Railroad, Inc. – Acquisition Exemption –
Norfolk Southern Railway Company

Docket No. FD 36127 (Sub-No. 1)
Grand Elk Railroad, Inc. – Petition for Board Order
Pursuant to 49 U.S.C. § 1321

EXPEDITED CONSIDERATION REQUESTED

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceedings are a **Motion for Leave to File Rebuttal** and a separate **Rebuttal to July 3, 2017 Reply of CSX Transportation Inc.**, both dated July 18, 2017.

As previously has been set forth, Grand Elk Railroad, Inc. seeks expedited Board consideration of its petitions in these proceedings.

Should any questions arise regarding these filings, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Robert A. Wimbish
Attorney for Grand Elk Railroad, Inc.

RAW/ekf
Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127

GRAND ELK RAILROAD, INC.
-- ACQUISITION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY

DOCKET NO. FD 36127 (SUB-NO. 1)

GRAND ELK RAILROAD, INC.
-- PETITION FOR BOARD ORDER --
NORFOLK SOUTHERN RAILWAY COMPANY

**MOTION OF GRAND ELK RAILROAD, INC. FOR LEAVE TO FILE
REBUTTAL TO JULY 3, 2017 REPLY OF CSX TRANSPORTATION, INC.**

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**ATTORNEYS FOR GRAND ELK
RAILROAD, INC.**

Dated: July 18, 2017

BEFORE THE
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GRAND ELK RAILROAD, INC.
-- ACQUISITION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY

DOCKET NO. FD 36127 (SUB-NO. 1)

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**MOTION OF GRAND ELK RAILROAD, INC. FOR LEAVE TO FILE
REBUTTAL TO JULY 3, 2017 REPLY OF CSX TRANSPORTATION, INC.**

On June 12, 2017, Grand Elk Railroad, Inc. (“GDLK”) filed – (a) an Emergency Petition for Exemption for authority to acquire from Norfolk Southern Railway Company (“NSR”) incidental trackage rights over roughly 3.3 miles of railroad line (the “CSXT Line”) owned by CSX Transportation, Inc. (“CSXT”) in Grand Rapids, Michigan; and (b) a Petition for a Board Order Pursuant to 49 U.S.C. § 1321 restoring GDLK to the trackage rights it had exercised over the CSXT Line for some 7 years prior to its expulsion last summer.¹ Timely replies in support of the Petitions were filed by Brink Farms, Inc.; The Nugent Sand Company, Inc.; Sargent Sand Company; King Milling Company; Padnos; and the Michigan Agri-Business Association. On July 3, 2017, CSXT filed a consolidated reply opposing the Petitions.

GDLK hereby requests leave to file a rebuttal in support of its Petitions. GDLK submits that such a rebuttal is warranted and should be accepted in keeping with precedent. As

¹ Collectively, the Emergency Petition for Exemption and the Petition for a Board Order will be referred to herein as the “Petitions.”

this agency long has recognized, absent good cause, it will allow the party seeking relief under an individual petition for exemption, and those supporting the petitioner, to close the record in view of the burden of proof that the petitioner must carry.² In light of CSXT's mischaracterizations of GDLK's Petitions, the facts and the applicable law, a rebuttal is particularly warranted to ensure a just determination of the issues presented in what GDLK regards as a case of first impression.³

The Rebuttal accompanying the present motion provides for a more complete development of the issues and law in the interest of facilitating an expeditious decision on the merits of the Petitions in keeping with GDLK's (shipper-supported) request for prompt agency action.

WHEREFORE, GDLK respectfully requests leave to file the accompanying Rebuttal in Response to the July 3, 2017 Reply of CSX Transportation, Inc.

² See, e.g., Grand Trunk Western Railroad Company – Acquisition of Operating Easement – CSX Transportation, Inc., Docket No. FD 35661 (STB served Sep. 12, 2012) (Board-prescribed procedural schedule in an individual petition for exemption proceeding permitting rebuttal, upon the filing of which the record would close); Mid-Michigan Railroad, Inc. – Abandonment Exemption – In Kent, Ionia, and Montcalm Counties, MI, Docket No. AB-364 (Sub-No. 14X) (STB served Mar. 11, 2008) (instead of scheduling rebuttal up front, the Board would await any responses to the petitioner's request for abandonment authority, and, if any responses were lodged, the agency would entertain petitioner's request for leave to file a rebuttal); Wisconsin Central Ltd. – Abandonment Exemption – In Winnebago County, WI, Docket No. AB-303 (Sub-No. 2X) (ICC served Feb. 22, 1990) slip op. at 1, n. 1.

³ See Holrail, LLC – Construction and Operation Exemption – In Orangeburg and Dorchester Counties, SC, Docket No. FD 34421, et al. (STB served Feb. 9, 2007) slip op. at 3-4.

Respectfully submitted,

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**ATTORNEYS FOR GRAND ELK
RAILROAD, INC.**

Dated: July 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2017, a copy of the foregoing

Motion of Grand Elk Railroad, Inc. for Leave to File Rebuttal to July 3, 2017 Reply of CSX

Transportation, Inc. was served by U.S. Mail, first class postage prepaid, or by more expeditious means of delivery upon the following parties of record:

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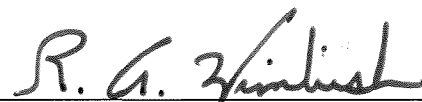
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Robert A. Wimbish

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127

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-- ACQUISITION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY

DOCKET NO. FD 36127 (SUB-NO. 1)

GRAND ELK RAILROAD, INC.
-- PETITION FOR BOARD ORDER --
NORFOLK SOUTHERN RAILWAY COMPANY

**REBUTTAL OF GRAND ELK RAILROAD, INC.
TO JULY 3, 2017 REPLY OF CSX TRANSPORTATION, INC.**

EXPEDITED CONSIDERATION REQUESTED

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**REBUTTAL OF GRAND ELK RAILROAD, INC.
TO JULY 3, 2017 REPLY OF CSX TRANSPORTATION, INC.**

EXPEDITED CONSIDERATION REQUESTED

For 35 years, Consolidated Rail Corporation, Norfolk Southern Railway Company (“NSR”) and then petitioner Grand Elk Railroad, Inc. (“GDLK”) exercised trackage rights over roughly 3.3 miles of railroad line (the “CSXT Line”) in Grand Rapids, Michigan, owned by CSX Transportation, Inc. (“CSXT”). For 7 of those years, GDLK exercised the trackage rights under color of assignment from NSR, unopposed and unconstrained by CSXT. Now, however, CSXT insists in its July 3, 2017 consolidated Reply to GDLK’s Verified Emergency Petition for Exemption and Petition for Board Order Pursuant to 49 U.S.C. § 1321 (the “CSXT Reply”), as it has before, that it is legally entitled to bar GDLK from the CSXT Line under the terms of now-expired trackage rights agreements, regardless of whether such an outcome is just and reasonable or consistent with the public interest.

CSXT has only one rationale for denying the subject petitions – that the Board must be bound by the assignment restrictions of the expired trackage rights agreements, must

apply CSXT's interpretation of those provisions here, and, in so doing, must allow CSXT's unjustified and vindictive refusal to permit assignment from NSR to GDLK to impose patently inefficient, uncompetitive and more costly railroad operations in the Grand Rapids area.

But the Board is not constrained by the terms of expired agreements as CSXT claims, nor must the agency accept CSXT's unjustified objection to the NSR-GDLK assignment. Rather, the Board has plenary authority and discretion to reach its own decision concerning the assignment standard, if any, to apply here. And it has the discretion to interpret and enforce its assignment order as it sees fit. In this case, the Board should take appropriate, just and reasonable action to restore GDLK's operations.

The Board has plenary authority to order the restoration of GDLK trackage rights operations upon terms as directed by the agency.

CSXT incorrectly claims that GDLK's relief depends upon the Board determining that – (1) NSR's rights under the expired trackage rights agreements are freely assignable; and, as a consequence, (2) CSXT is deprived of any opportunity to protect its interests against an unwarranted assignment. True, a basic convention of contract law is that contract rights are freely alienable absent contract restrictions,¹ and the Board ought to be guided by that principle, but GDLK did not argue in either of its recent petitions that CSXT must be categorically denied any protection against harmful or unwarranted assignment.²

¹ See Restatement (Second) of Contracts § 317(2).

² CSXT incorrectly claims that GDLK “argues that . . . NSR can assign its common carrier obligations to GDLK without obtaining CSXT's consent.” CSXT Reply at 3. That characterization of GDLK's position is only true by half. More accurately, GDLK contended that NSR's proposed assignment is transferable in light of the expiration of the original trackage rights agreements because CSXT's refusal to consent to the assignment is unreasonable and in bad faith. GDLK Verified Emergency Petition for Exemption at 21-22.

CSXT is similarly mistaken in claiming that agency law mandates that the terms of expired trackage rights contracts necessarily survive and must govern the ongoing relationship between line owner and trackage rights user. CSXT claims that Atchison, T. & S. F. Ry. Co. – Operating Agreement, 331 I.C.C. 367 (1967) (“Santa Fe”) dictates that the parties to a trackage rights arrangement must be bound to the terms of expired agreements going forward. Santa Fe provides otherwise -- that the Board may act in the presence of expired agreements to apply appropriate terms to the trackage rights relationship. Particularly where the record “reflect[s] shipper reliance upon joint service . . . [the Board] has plenary power in dealing with this kind of [trackage rights] transaction; and, under the circumstances of this case (where the transaction is not entirely volitional on the part of the carriers), it may prescribe whatever terms are just and reasonable.” Santa Fe, 331 I.C.C. at 370, 371. The Board is not so constrained as CSXT mistakenly insists that it must adhere to the terms of the expired agreement, and it need not apply them as CSXT would.

At this point, with the Michigan state court having concluded that there is no extant trackage rights agreement for it to adjudicate, the trackage rights relationship amongst the involved carriers has become entirely a matter within the Board’s exclusive and plenary discretion. Accordingly, to the extent that the Board may find it appropriate to provide for a restriction on the assignment of NSR’s undisputed rights and obligations, such a restriction is for the Board to adopt and apply, not CSXT.³ Even if the Board were to refer to the prior agreements’ terms to inform its determination as to whether NSR’s rights and obligations can

³ See, e.g., Boston & Maine Corporation, et al. v. New England Central Railroad, Inc., Docket No. FD 34612 (STB served Jan. 10, 2006), slip op. at 3 (where the Board has ordered trackage rights terms, the Board may “provide guidance on the proper interpretation of the provision that the agency imposed”).

and should be assigned to GDLK, the Board is free to interpret those terms in keeping with agency precedent and in the furtherance of the public interest.

On that note, the Board need only address here – (a) whether to authorize GDLK’s assumption of NSR’s trackage rights, and, if it authorizes the assignment, (b) whether to compel CSXT to honor the assignment. In so doing, under Santa Fe and other cases discussed herein, the Board may adopt its own assignment-restrictive provision (or none), and it may choose to be informed by the provisions found in the expired trackage rights agreements. The Board’s own precedent supports an order directing that the line owner may not unreasonably withhold consent to the assignment of the user’s rights. See Amtrak – Conveyance of B&M in Conn River Line in VT & NH, 6 I.C.C.2d 539, 567 (1990) (in prescribing trackage rights terms in a heavily-contested matter, the Interstate Commerce Commission (the “ICC”) granted the trackage rights user the right to assign its rights to a third party with the line owner’s consent, which consent “shall not be withheld unreasonably”). Because the ICC deemed such a provision just and reasonable in that case, so also should the Board find such a good faith and fair dealing standard to be equally appropriate here.

CSXT refuses to restore GDLK’s trackage rights in bad faith; it has not and cannot provide a reasonable justification for withholding consent to the proposed assignment.

Throughout this proceeding, CSXT has depicted the prior trackage rights terms as according to itself unfettered discretion to withhold consent to NSR’s assignment for any reason or no reason. The Michigan state court never addressed whether CSXT would have breached any duty of good faith and fair dealing in withholding consent had the trackage rights agreements not expired, and GDLK has pointed out that, under analogous Michigan state law, CSXT could not

withhold consent in bad faith.⁴ GDLK has challenged CSXT to provide a reasonable explanation for why under the circumstances, where GDLK is merely sustaining more than 30 years of operations in Grand Rapids and stepping into the shoes of NSR, it is reasonable for CSXT to withhold its consent. Three times now, CSXT has had the opportunity to explain or justify withholding consent – before the Board in last year’s FD 35187 (Sub-No. 1) proceeding,⁵ before the Michigan state court, and in reply to GDLK’s Emergency Petition for Exemption. Three times, CSXT has failed to justify, or even attempt to justify, its actions.

And for good reason, GDLK submits. To begin with, 7 years of uninterrupted, CSXT-sanctioned use of the CSXT Line by GDLK (some 1,750 discrete train movements by GDLK’s estimate) belies any plausible suggestion that CSXT has reasonable, good faith grounds for withholding consent. Second, if CSXT joined the discussion by attempting to justify blocking GDLK’s access to the CSXT Line, CSXT would turn the focus to the true reasons for CSXT’s actions: Punishing GDLK for engaging in legitimate efforts to bypass a CSXT-imposed steel barrier to effect more cost-effective options with a GDLK short line partner.⁶

Simply, then, the Board could elect to rule that NSR’s rights are freely alienable in keeping with basic contract law principles. But, if it does not, then it could adopt an explicit

⁴ Indeed, the Michigan state court urged the parties to conduct themselves in a “commercially reasonable fashion” in the interest of interstate commerce. See Grand Elk Railroad, Inc., et al. v. CSX Transportation Inc., File No. 16-07855-CZB, 17th Judicial Circuit Court for the County of Kent, Michigan, Hearing on Plaintiffs’ Motion for Preliminary Injunction and Defendant’s Motion for Summary Disposition (January 13, 2017), Hearing Transcript at 111-112 (Judge Christopher P. Yates addressing the parties at the conclusion of the hearing):

THE COURT: The only thing I’d ask is that everybody try to act in a commercially reasonable fashion because the national rail system only works if everybody is willing to be at least moderately cooperative. Okay? Great.

⁵ Grand Elk Railroad, Inc. – Acquisition of Incidental Trackage Rights Exemption – Norfolk Southern Railway Company, Docket No. FD 35187 (Sub-No. 1) (STB served Nov. 1, 2016).

⁶ See GDLK Petition for Board Order at 15.

reasonableness standard, consistent with agency precedent, to govern the assignment of rights under the continuing trackage rights relationship. Under the latter approach, the Board has a sufficient record to find that – (a) CSXT’s ongoing withholding of consent is unreasonable, in bad faith, and thus unenforceable under agency law; and (b) a just and reasonable arrangement – one that upholds the public interest – demands that CSXT acknowledge the assignment of NSR’s rights to GDLK.

There are past agreements upon which GDLK’s trackage rights operations can be based; either is a suitable platform for the restoration of trackage rights.

CSXT goes on to contend that there can be no assignment of NSR’s rights in the absence of an executed agreement, claiming, in turn, that “there is no agreement.” CSXT Reply at 10. CSXT’s has both the law and the facts wrong. The agency has recognized in the very case upon which CSXT has relied – Santa Fe – that where the Board directs the continuation of trackage rights under agency-ordered terms, the parties need not have an executed agreement. In language that rings true here, the ICC stated as follows:

There is no requirement . . . that terms and conditions imposed by [the agency] in trackage rights proceedings be reduced to writing in the form of an agreement between carriers, and there appears little likelihood that either of the carriers would adopt the terms the other proposes . . . Under the circumstances of this case, our order will have compulsive effect . . . Putting [the terms of the agency’s trackage rights order] into a contract for execution by the parties would be a vain and unnecessary act.

331 I.C.C. at 382.

The other half of CSXT’s false contention, involving an entirely fabricated scenario under which GDLK would operate over the CSXT Line in “wild west” fashion with no rules or provisions in place to ensure safe operations or adequately to protect CSXT against liability (see CSXT Reply at 10-11), ignores the facts. In reality, there are two platforms under which GDLK operations could readily resume. First, the Board could if it chose direct GDLK to

operate pursuant to the relevant terms of the since-expired trackage rights agreements, which CSXT has insisted continue to apply in the first place. Second, there is *already* an agreement between GDLK and CSXT, negotiated last year, that is well-suited to serve as a platform for GDLK's trackage rights going forward.

CSXT and GDLK recognized that the terms of 30-year-old agreements may not well reflect contemporary circumstances and may not best govern a situation where a short line (GDLK) operates over the lines of a Class I (CSXT). And so, prompted by the emergence of this dispute, on or about July 13, 2016, GDLK and CSXT entered into a provisional agreement under which, for a brief period of time thereafter, CSXT allowed GDLK to continue to exercise trackage rights over the CSXT Line, the only unresolved issue being compensation. CSXT insisted in the transmittal of the provisional agreement that its terms not be disclosed to any third party, *including the Board*, without CSXT's consent (which would not be unreasonably withheld). With CSXT's consent, GDLK gladly and promptly will supply to the Board this provisional agreement, which, in CSXT's own words, contains "reasonable and industry standard conditions" to govern GDLK's trackage rights operations pending a resolution of the dispute or the negotiation of new terms. GDLK remains willing to abide by the terms of the provisional arrangement, and, as such, CSXT's contention that the Board cannot act because there is no agreement is plainly false.

Shipper reply comments in support of GDLK underscore the severity of the CSXT-initiated service disruption and the need for expeditious remedial action by the Board.

Various shippers affected by the disruption in GDLK service have taken the time to express their concerns on the record in this proceeding, and to urge the Board to remedy the situation. All of them have pointed to CSXT's actions as impairing their rail service options and imposing new costs. Not one of these shippers, incidentally, supports CSXT's baseless and self-

serving suggestion that it may be other external factors (such as increases in NSR and/or GDLK rates) that are the source of hardship, rather than CSXT. See CSXT Reply at 16.

These shipper reply statements in support of GDLK and urging a restoration of critical operations upon which these customers traditionally have depended reinforce the urgency of the situation and GDLK's prayer for expedited (and favorable) consideration of the pending petitions.

Board action to restore GDLK's longstanding operations over the CSXT Line would be just and reasonable and in plain furtherance of the public interest. The Board should order such relief immediately.

Respectfully submitted,

By: R. A. Wimbish

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Dated: July 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2017, a copy of the foregoing

Rebuttal of Grand Elk Railroad, Inc. to July 3, 2017 Reply of CSX Transportation, Inc.

was served by U.S. Mail, first class postage prepaid, or by more expeditious means of delivery upon the following parties of record:

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