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June 12, 2017

243739

VIA FEDEX

Ms. Cynthia T. Brown
Chief, Section of Administration - Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

ENTERED
Office of Proceedings
June 12, 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 an original and ten copies of an **Emergency Petition for Exemption of Grand Elk Railroad, Inc.** and a **Petition for Board Order Pursuant to 49 U.S.C. § 1321**, both dated June 12, 2017. A check in the amount of \$14,100, representing the appropriate fees for these filings (\$13,800 for the Emergency Petition and \$300 for the Petition for Board Order, respectively), and a compact disk containing the text of both Petitions in MS Word format also are enclosed.

Grand Elk Railroad, Inc. seeks expedited Board consideration of both of the enclosed Petitions.

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, LLC

RAW/ekf
Enclosures

FILED
June 12, 2017
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
June 12, 2017
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127

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

**VERIFIED EMERGENCY PETITION FOR EXEMPTION OF
GRAND ELK RAILROAD, INC.**

EXPEDITED CONSIDERATION REQUESTED

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

Dated: June 12, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127

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

**VERIFIED EMERGENCY PETITION FOR EXEMPTION OF
GRAND ELK RAILROAD, INC.**

EXPEDITED CONSIDERATION REQUESTED

Pursuant to 49 U.S.C. § 10502 and the regulations of the Surface Transportation Board (the “Board”) at 49 C.F.R. § 1121, Grand Elk Railroad, Inc. (“GDLK”) submits this Emergency Petition for an Exemption from the requirements of 49 U.S.C. § 10902 to authorize GDLK to acquire unextinguished rights and obligations currently held by Norfolk Southern Railway Company (“NSR”) pursuant to which NSR is both entitled and required to provide common carrier service over roughly 3.3 miles of railroad line (the “CSXT Line”) in Grand Rapids, Michigan, owned by CSX Transportation, Inc. (“CSXT”). This matter is related to an earlier proceeding in which the Board granted NSR’s assignment of incidental trackage rights over the CSXT Line to GDLK as an element of a larger transaction encompassing GDLK’s lease and operation of NSR-owned railroad lines in Michigan and Indiana.¹ Common to this proceeding and the earlier FD 35187 (Sub-No. 1) matter is CSXT’s ongoing obstruction, causing severe disruptions to freight customers in suddenly prohibiting GDLK’s operations over the

¹ 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) (“Grand Elk Notice”).

CSXT Line after roughly 7 years of uneventful and unchallenged GDLK operations and upsetting the longstanding competitive balance in Grand Rapids.

EXPEDITED CONSIDERATION

GDLK remains committed to the various customers that it serves in and through Grand Rapids. For over 7 years it fulfilled that commitment in cooperation with the other railroads operating in and through Grand Rapids, including CSXT. During its first 7 years of operation, GDLK maintained and grew its business base, and it established itself as a highly-competitive and resourceful service provider. In so doing, it developed the now-stranded Turner Yard, an erstwhile centerpiece of GDLK's Grand Rapids transload services and operations, an issue discussed in greater detail in the accompanying Petition for a Board Order ("PBO").

Quite suddenly, and over GDLK's appeal for a negotiated arrangement, CSXT barred GDLK from continued operations over the CSXT Line, severing GDLK's access to lines and customers in Grand Rapids. CSXT has expressed no willingness to reach a mutually-acceptable accord that would permit GDLK to be restored to the CSXT Line. Worse, CSXT has attempted to block GDLK's remedial efforts before this agency, has wrongly accused GDLK of knowingly violating Board regulatory processes, and has demanded that GDLK and its corporate parent be investigated, all while impugning the veracity of GDLK's Arthur E. McKechnie III. Throughout, CSXT has stonewalled and failed to provide any justification for why it has chosen to object so loudly and adamantly about what can and should be a relatively simple operating situation upholding the pro-competitive arrangements negotiated years ago by GDLK's and CSXT's predecessors.

Even more vexing, CSXT's actions reduce competition in the Grand Rapids metropolitan area to the detriment of the shipping public. In that regard, numerous stakeholders

have already spoken out in support of GDLK's desire for a swift resolution of the service disruption occasioned by the CSXT "lock out." Not one interested party has stepped forward in support of CSXT or its heavy-handed tactics.

No one, aside from CSXT, benefits from the current state of affairs. And, as GDLK will demonstrate in the simultaneously-filed PBO, the current situation, if not remedied, harms not only the shipping public but also GDLK irreparably. In the interest of an orderly and equitable disposition of this matter, GDLK has been diligent in its efforts toward an expeditious resolution, moving promptly to resolve its regulatory oversight with the Board, and seeking a resolution of state law issues simultaneously in another forum. GDLK believes that the Board approved of GDLK's two-pronged approach to solving the problem in the face of stark and unexplained CSXT hostility by seeking remedial regulatory authority here and adjudication of the underlying contractual issues in another forum. GDLK's efforts to resolve the service disruption through resort to state court have reached an end, and, at best, GDLK may only be marginally closer to a restoration of operations on the CSXT Line, depending upon what this agency chooses to do next in the face of the state court's decision.

Few, if any, cases call out for expeditious resolution as much as this one. While GDLK and the customers it serves and desires to serve wait (or, in the case of shippers, elect to suspend production or shift to alternative transportation where available), the public interest and transportation marketplace competition and efficiency suffer. For these reasons and others set forth in the accompanying Petition for Board Order, GDLK respectfully requests expedited consideration of, and favorable action upon, the subject Petition.

In support of this petition, GDLK submits the following:

I. BACKGROUND

As GDLK has explained in past proceedings before the Board, the present transaction relates to competition-preserving arrangements negotiated between CSXT and NSR predecessor railroads that had agreed in the 1980s to consolidate lines in Grand Rapids to accommodate urban development otherwise thwarted by the abundance of duplicative trackage within the city limits. For over thirty years, the arrangements negotiated for in the 1980s preserved an intended and healthy modicum of competition, ensuring until recently that the respective ability of CSXT and GDLK to compete in the Grand Rapids market was essentially as each had been before the track consolidations. Recently, however, CSXT has decided to take unilateral action to end the competitive and operational status quo to its benefit and to the detriment of the shipping public by expelling GDLK from the CSXT Line. In so doing, CSXT lines its pockets with added charges and drives traffic from a competitor.

The transaction now presented to this Board for approval would reverse CSXT's determined efforts to reduce competition in the Grand Rapids metropolitan area, and it would restore an operating arrangement in which CSXT and GDLK actively cooperated for roughly 7 years without incident. By this petition GDLK is not seeking admission to a line to which it has never had access or over which CSXT consistently has objected to GDLK's access. CSXT has no good reason at this time to bar GDLK from its line, and it cannot with a straight face suggest that its recent maneuvers do anything but reduce competition and service, and increase costs to railroad customers when compared to the longstanding operational and service status quo that CSXT deliberately has chosen to disrupt. Rather, GDLK is seeking to be restored to a line over which CSXT – (a) long accepted GDLK's presence as a successor to other competitor railroads; and (b) had presumed that GDLK was entitled to operate; and over which customers have long

recognized as allowing GDLK and its predecessors to provide an effective competitive alternative to CSXT.

As such GDLK is not seeking a technical windfall or a back-door to track access to which it has or had no contractual claim. To the contrary, even the recently-concluded Michigan State Court (in a decision discussed below) acknowledged that CSXT's 7-year relationship with GDLK reflected CSXT's acceptance of GDLK's assumption of trackage rights over the CSXT Line from NSR as part of the larger Grand Elk Railroad lease transaction authorized in 2008. In short, approval of the transaction encompassed by the subject transaction will restore, rather than lessen, competition and transportation options for shippers in the area. It will also restore operations and service levels in keeping with an over 30-year-old pact among predecessor competitors to uphold competition in the Grand Rapids market, while at the same time eliminating duplicative track infrastructure to the benefit of the local community.

A. The Parties

Petitioner GDLK is a Class III common carrier by rail and an indirect subsidiary of WATCO Companies, LLC. See WATCO Companies, Inc. – Continuance in Control Exemption – Grand Elk Railroad, L.L.C., Docket No. FD 35188 (STB served November 17, 2008). GDLK commenced operations in 2009 upon leasing NSR's main line between Grand Rapids, Michigan, and Elkhart, Indiana, including a number of secondary line segments in Grand Rapids and elsewhere.² A map of the line segments that GDLK leases and operates in the vicinity of Grand Rapids, including the Kalamazoo Industrial Track, Comstock Industrial Track,

² Grand Elk Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company, Docket No. FD 35187 (STB served November 17, 2008) ("GDLK Lease").

and Richmond Street Connecting Track³ – which are relevant to the subject transaction – is attached hereto as Exhibit A.

The complete name and address of petitioner GDLK is as follows:

Grand Elk Railroad, Inc.
75 Mills Street
Kalamazoo, Michigan 49048
(269) 343-3461

The complete name and address of the rail carrier conveying to GDLK its common carrier rights and obligations over the CSXT Line is as follows:

Norfolk Southern Railway Company
Three Commercial Place
Norfolk, Virginia 23510-9241

The complete name and address of the rail carrier that owns the CSXT Line is as follows:

CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

B. The Transaction

NSR possesses rights to operate over the CSXT Line stemming from ICC-authorized⁴ trackage rights arrangements dating back to the 1980s. A state court in Michigan recently has ruled that the trackage rights agreements that had governed NSR's trackage rights relationship with CSXT (and, later, GDLK's relationship with CSXT by way of an asserted assignment of NSR's rights) have expired, and, thus, the terms of those agreements are no longer

³ See GDLK Lease at 1-2 (line segments 3 and 10). GDLK, like NS before it, can reach those leased line segments solely by operating over the CSXT Line.

⁴ Interstate Commerce Commission ("ICC").

enforceable as a matter of state law.⁵ GDLK maintains that it held or holds the trackage rights via prior assignment, the Michigan State Court having not ruled that NSR's pre-expiration assignment of its trackage rights to GDLK would not have been legally enforceable were the underlying contracts still applicable. NSR, on the other hand, possesses the federally-authorized right and obligation to conduct operations over the CSXT Line despite the lack of any surviving state law contract rights under the now-expired trackage rights agreements – a point of law that CSXT has expressly and repeatedly acknowledged.⁶

⁵ Michigan State Court Decision (June 1, 2017) attached as Exhibit B.

⁶ 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 45, 69 (exchange between Judge Christopher P. Yates and counsel for CSXT, David W. Center, Clark Hill PLC), selected pages attached as Exhibit C.

MR. CENTNER: No. Certainly Norfolk Southern can operate and must operate if asked on a reasonable request . . . Because they have a continuing common-carrier obligation that federal law imposes upon them because they were authorized by the ICC, now the S.T.B. --

...

THE COURT: All right. So, in other words, even though the contract's duration is 30 years, they have the right and duty in perpetuity to operate on the line if, essentially, they choose to do so?

MR. CENTNER: That's correct, up until there is a discontinuance.

THE COURT: Sure. And there's been a discontinuance for Norfolk Southern, I presume?

MR. CENTNER: No.

...

THE COURT: Right. Because we can all agree at one point Norfolk Southern had both pieces. It had the legal assignment, and it had the authorization from the Surface Transportation Board. So for all purposes analytically under this framework you've laid out, they were good and legal, and it sounds to me the way you're describing it is they're good and legal in perpetuity.

MR. CENTNER: Absolutely.

Because the trackage rights contracts have expired and are now unenforceable under applicable state law, NSR wishes to convey its federally-authorized rights to GDLK. The conveyance of such rights typically would be of minor regulatory and legal consequence, were it not for CSXT's recent objection to the arrangement after 7 years of actively permitting GDLK to operate over CSXT's property under the color of assignment from NSR. NSR's common carrier rights and obligations on the CSXT Line are, as a consequence of the state court's ruling, no longer subject to state law judicial remedies. Consequently, GDLK believes that whether it may consummate the proposed acquisition of NSR's surviving common carrier rights and obligations over the CSXT Line would depend upon favorable Board action on this Emergency Petition and, as may also be necessary, the accompanying Petition for a Board Order Pursuant to 49 U.S.C. § 1321 directing CSXT to honor that transfer.

In particular, GDLK proposes to acquire NSR's duty and obligation to operate pursuant to trackage rights over the following railroad line, which is referred to herein as the CSXT Line:

A CSXT-owned railroad line in Grand Rapids, Michigan, extending from the connection with the NSR/GDLK Hughart Running Track at approximately CSXT milepost CH 151.3± at Pleasant Street through milepost CH 151.6/CGE 0.0 to milepost CGE 3.0± north of Ann Street, a distance of approximately route 3.3 miles.

A copy of the agreement governing the conveyance of NSR's rights to operate over the CSXT Line to GDLK is attached hereto as Exhibit D.

GDLK seeks to acquire NSR's trackage rights in order to re-integrate otherwise stranded GDLK railroad lines into a cohesive operation as had existed for over 30 years dating back to the Conrail-1 and Conrail-2 transactions described below. The subject transaction will

eliminate GDLK's current need to rely on inefficient and costly CSXT-mandated intermediate switching to bridge the CSXT-imposed gap in GDLK's leasehold.⁷

C. The Transaction Setting

Much of the history related to this transaction is set forth in GDLK's notice of exemption and petition for partial revocation filed last year in the Grand Elk Notice proceeding. In undertaking the 2009 GDLK Lease transaction, in which GDLK assumed an STB-authorized leasehold interest in NSR's railroad properties in and around Grand Rapids, GDLK and NS intended that GDLK would acquire by assignment NSR's trackage rights over the CSXT Line. The exercise of these rights was and is critical to the efficient and competitive flow of traffic to and from the otherwise-stranded Richmond Street Connecting Track, Kalamazoo Industrial Track, and Comstock Industrial Track, each of which connects to the balance of the GDLK system only via the CSXT Line as is shown in the map attached as Exhibit A. GDLK has explained before that it would not have undertaken the subject lease transaction without the acquisition of rights over the CSXT Line,⁸ and it is equally likely that NSR would not have engaged in the lease transaction, either, were the lease arrangement to isolate portions of the railroad leasehold and leave customers with no, or much more costly, service options.

NSR's trackage rights over the CSXT Line derived from agreements between NSR's predecessor in interest, Consolidated Rail Corporation ("Conrail"), and a CSXT corporate predecessor, Chesapeake and Ohio Railway Company ("C&O"), and were the product of a 1980s joint relocation project that removed certain Conrail trackage from downtown Grand Rapids to

⁷ As is explained in the affidavit of Randall W. Hunt filed in connection with the state court proceeding (the "Hunt Affidavit," attached hereto as Exhibit E), NSR operations over the CSXT Line would be entirely impractical under the circumstances. NSR conducts no rail operations in the Grand Rapids area, and has not done so since 2009.

⁸ FD 35817 (Sub-No. 1), GDLK Petition for Partial Revocation at 2-3.

facilitate urban development. In lieu of Conrail's own track through the area, a shared track agreement included, among other things, C&O's grant of trackage rights over the CSXT Line to Conrail. See Consolidated Rail Corporation – Trackage Rights Exemption – Over Chesapeake and Ohio Railway Company, Docket No. FD 30385 (ICC served February 7, 1984) (“Conrail-1”); Consolidated Rail Corporation – Trackage Rights Exemption – Over Chesapeake and Ohio Railway Company, Docket No. 30449 (ICC served April 24, 1984) (“Conrail-2”).⁹

In addition to allowing access to the Richmond Street Connecting Track, Kalamazoo Industrial Track, and Comstock Industrial Track, the trackage rights also have permitted GDLK to provide – (1) a direct interchange connection with the Grand Rapids Eastern Railroad, Inc. (“GRE”) via the Richmond Street Connecting Track; (2) an indirect interchange with Marquette Rail, LLC (“Marquette”), and (3) direct rail service to Padnos, an individual shipper of metal recyclables accessed directly from the CSXT Line. The trackage rights agreements that governed NSR's use of the CSXT Line also provided for CSXT's use of the Richmond Street Connecting Track, which serves as CSXT's conduit for interchanging traffic with GRE. Critically, as it turns out, those agreements expired on their terms in or about 2014. None of the involved parties here have negotiated new trackage rights terms, and it appears that none of the parties was aware of the expiration at the time it occurred.

Upon consummation of the NS-GDLK lease transaction in March of 2009, and under the color of assignment of NSR's rights, GDLK conducted operations over the CSXT Line approximately five days per week each week, one daily train movement in each direction, on average. At the same time, CSXT prorated and settled payments with NSR related to NSR's use

⁹ Corresponding Federal Register notices for the Conrail-1 and Conrail-2 proceedings are attached hereto as Exhibit F.

of the CSXT Line, ceasing such billing after the consummation of the lease transaction.¹⁰ CSXT was fully aware of and cooperated with GDLK in Grand Rapids, allowing literally thousands of trackage rights movements over the CSXT Line for 7 years, until August of 2016, at which time CSXT announced it was reversing course and would henceforth bar GDLK from the CSXT Line. CSXT has maintained that it is under no legal obligation to re-admit GDLK onto the CSXT Line because – (a) GDLK lacked federal regulatory authority to conduct operations on the line; and (b) the underlying trackage rights agreements dating back to the 1980s joint relocation project provided that NSR could assign its rights to a third party such as GDLK only upon the written consent of CSXT, which CSXT claims it has no record of ever having provided.¹¹

CSXT's refusal to allow GDLK to operate over the CSXT Line leaves stranded the Richmond Street Connecting Track, Kalamazoo Industrial Track, and Comstock Industrial Track, line segments in Grand Rapids over which GDLK had always operated as an integral part of its railroad line lease. To supposedly bridge the gap created by CSXT's unilateral action, CSXT has offered to provide intermediate switching services for GDLK traffic that traverses the CSXT Line, including for traffic originating or terminating with Padnos and traffic interchanged between – (a) GDLK and (b) GRE and Marquette. At the same time that CSXT barred GDLK

¹⁰ Hunt Affidavit §§ 10, 11.

¹¹ In January of 2009, NSR wrote to CSXT to obtain its written consent to assignment. It appears that CSXT may never have responded directly to NSR's letter request. CSXT has stated that it can find no record of its written consent, and has indicated that it does not consent to GDLK's assumption of rights over the CSXT Line. CSXT has never attempted to show that its alleged withholding of consent (a point that the Michigan State Court did not find it necessary to resolve due to the intervening expiration of the underlying trackage rights contracts) was reasonable. However, CSXT's contemporaneous actions, as well as its communications and billing arrangements with NSR, only support its assent to the assignment. See Hunt Affidavit.

from using the CSXT Line, CSXT increased its intermediate switching charges in Grand Rapids from \$105/car in each direction to \$300/car in each direction.

Seeking to restore its longstanding access to the CSXT Line, GDLK has been and is willing to negotiate new terms of use, particularly in view of the expiration of the original underlying trackage rights agreements. CSXT thus far has refused any such invitation, showing no inclination to allow GDLK back onto the CSXT Line. CSXT has never explained why it has taken such an adamant and openly hostile position, evidently content to point to the contractual assignment provisions in the since-expired trackage rights agreements, which are now legally unenforceable as a matter of state law in any event.

By clarifying that it has never prohibited NSR from operating over the CSXT Line,¹² CSXT has expressly acknowledged that, in keeping with Texas Mexican¹³ and its progeny, NSR possesses unextinguished common carrier rights and obligations over the CSXT Line pursuant to the ICC-issued trackage rights entry authority that NSR's predecessor, Conrail, obtained in Conrail-1 and Conrail-2, just as CSXT continues to hold common carrier rights and obligations over the GDLK-leased Richmond Street Connecting Track. Thus, there is no dispute that CSXT could not bar NSR's access to and use of the CSXT Line, even though there is no longer an agreement governing any such NSR trackage rights.¹⁴

¹² FD 35187 (Sub-No. 1), CSXT Reply (September 16, 2016) at 9:

At no time has CSXT prohibited NS from operating over the Line pursuant to the trackage rights between . . . and the authority received from the ICC. As CSXT is well aware of the Board's federal licensing jurisdiction, CSXT has not sought discontinuance of NS's rights, nor has CSXT found a decision by the Board granting NS discontinuance authority and terminating its common carrier obligation . . .

(Emphasis as in original.)

¹³ Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946).

¹⁴ "[T]rackage rights that have been approved by this agency remain in effect until we either

Soon after CSXT refused GDLK continued access to the CSXT Line, GDLK and NSR resolved to take remedial action intended to restore efficient, competitive rail service to GDLK's customers. Specifically, on August 24, 2016, GDLK and NSR joined in filing a complaint in the 17th Judicial Circuit Court for Kent County, Michigan – Civil Division (the “Michigan State Court”) asserting that as a matter of state contract law NSR's assignment of its trackage rights interests in the CSXT Line to GDLK was legally enforceable. In addition, GDLK (with NSR's support) initiated on August 25, 2016, the GDLK Notice proceeding by filing a notice of exemption and simultaneously-filed petitions for partial revocation of the subject class exemption and waiver of the agency's employee notice requirements.

GDLK has acknowledged that the assignment of NSR's trackage rights over the CSXT Line was not included in the filings GDLK made with the Board at the time it sought regulatory authority in the 2008 GDLK Lease proceeding to lease NSR's Grand Rapids – Elkhart line. GDLK's Chief Commercial Officer, Arthur E. McKechnie III, twice has verified that omitting mention of the conveyance of NSR's trackage rights interests in Grand Rapids to GDLK from the GDLK Lease exemption filing was inadvertent.¹⁵ The GDLK Notice filings were intended to correct this inadvertent omission. On November 1, 2016, over strenuous CSXT objection, GDLK obtained conditional authority to acquire by assignment the subject trackage

approve a new agreement or permit discontinuance. It does not matter that the agreement has expired by its own terms. A&M's argument that it has no [continuing] legal obligation to provide MP trackage rights and that it may therefore deny MP use of its property is incorrect. A&M must obtain discontinuance authority before it can exclude MP.”

Arkansas & Missouri R. Co. v. Missouri Pacific R. Co., 6 I.C.C.2d 619, 622 (1990) citations omitted).

¹⁵ Before this agency and the state court, CSXT has impugned Mr. McKechnie's testimony by suggesting, without offering its own witness or any evidence, that GDLK's omission was intentional, and that the allegedly-intentional omission was driven by some nefarious objective known only to GDLK and perhaps also NSR.

rights. Following compliance with the Board's partially-waived labor notice requirements at 49 C.F.R. 1150.42(e), GDLK's permissive authority to acquire by assignment NSR's trackage rights interests in the CSXT Line took effect on November 23, 2016.

GDLK included with its 2016 remedial filings a petition for partial revocation of the Board's class exemption procedures at 49 C.F.R. §§ 1150.41, et seq., whereby GDLK sought to have the Board authorize the trackage rights conveyance retroactively to the commencement of lease operations in 2009. Absent the partial revocation of the class exemption GDLK had invoked, GDLK could not have requested, and the Board could not have granted, retroactivity. GDLK feared that, with only prospective Board authority (which would take effect after the expiration of the trackage rights agreements), the state court might conclude that the absence of extant trackage rights contracts deprived GDLK and NSR of a state law remedy. GDLK was concerned that, if the state court agreed that GDLK's state contract claims depended upon the exemption's retroactivity due to the intervening expiration of the disputed trackage rights contracts, then the Board's acceptance and issuance of the class exemption without retroactivity would undercut GDLK's state law assignment claims. GDLK's concerns proved well-founded.

In its pleadings to the Michigan State Court, CSXT pointed to the Board's November 1, 2016 decision ("November 1 Decision") to grant GDLK's exemption but deny retroactivity as a pivotal development fatal to the GDLK/NSR state law contract claims. It appeared to GDLK, however, that the Board did not share GDLK's concerns about the ramifications of denying retroactivity. In allowing GDLK's class exemption to take effect, the Board remarked (ironically, in retrospect) that the trackage rights contract matters were appropriately before the state court, suggesting that the STB did not regard denial of GDLK's retroactivity request as mooted GDLK's and NSR's state court claims.

With the November 1 Decision in hand, GDLK and NSR returned to the state court on December 2, 2016, seeking a preliminary injunction under which GDLK might be restored to the CSXT Line pending a decision on the merits of their contract claims. CSXT, on the other hand, sought summary disposition (summary judgment) of the GDLK/NSR claims on the basis that the Board's refusal to allow GDLK's class exemption authority to take effect retroactively was fatal the plaintiffs' contract cause of action.

In a decision dated June 1, 2017, the Michigan State Court granted CSXT's request for summary disposition. (Copy attached as Exhibit B.) In so doing, the court reasoned that the Board acted as it had on November 1 because GDLK's and NSR's "rights depend largely upon state law," although that assessment overlooked the fact that either NSR or GDLK possesses rights over the CSXT Line under Texas Mexican. The court also remarked as follows:

- CSXT actively cooperated with GDLK in connection with the latter's use of the CSXT Line for many years;
- the Board's November 1 Decision, in denying GDLK's request for retroactivity, "knocked one of the two legs out from under [GDLK]'s argument that it retained a right of access" over the CSXT Line;
- the Court was unconvinced that state law grants GDLK trackage rights "that the [Board] was unwilling to award in response to [GDLK]'s petition for partial revocation;"
- the trackage rights agreements that would have served as the predicate for the disputed trackage rights assignment had expired, "unfortunately for the plaintiffs," because they "failed to take the contractually prescribed steps necessary to renew their trackage rights;"
- CSXT "engaged in a pattern of conduct that reflected an acceptance of [GDLK]'s receipt of the assignment of trackage rights from [] NSR;"
- nevertheless, CSXT's "actions cannot support the . . . extension of the [since-expired] trackage rights agreements;" and most critically
- even assuming that GDLK's acquisition of trackage rights may have been legally enforceable as a matter of state law (and the Court did not rule explicitly on that

issue), GDLK's contract rights expired in 2010 and 2014, "leaving [GDLK and NSR] with no basis for asserting a contractual right to the 3.3-mile stretch of track at issue in this case."

In short, the Court ruled that neither NSR nor GDLK has a contractual right to operate over the CSXT Line due to the expiration of the underlying trackage rights contracts. As such, the Court has ruled that it sees no extant contract among the parties to be adjudicated, and, thus, it granted CSXT's request for summary disposition of the case. The Court also extended to GDLK and NSR 21 days to amend their complaint to come up with a "viable legal theory" for relief under state law, but both railroads have concluded that no such alternative legal theory exists under the Board's November 1 Decision.

The state court's decision removes any question as to whether there remain any contract law issues to be adjudicated. NSR's and GDLK's respective state law contract rights with respect to the CSXT Line (and, by logical extension, CSXT's contract rights over the Richmond Street Connecting Track as well) ceased to exist at the time the underlying trackage rights agreements expired. All that remains are issues tied to the survival and transferability of federally-authorized common carrier rights – issues that are, under the circumstances here, within the exclusive jurisdiction of the Board. Consequently, just as the Board alone is entrusted to authorize GDLK's operations on the CSXT Line, so now the Board alone may order the restoration of GDLK service.

II. PROCEDURAL AND OTHER THRESHOLD MATTERS

A. GDLK's 2016 class exemption probably does not extend to this transaction

GDLK understands that the exemption authority it obtained in the Grand Elk Notice proceeding covered the incidental assignment of trackage rights created under contracts that, as a matter of state law, have expired and thus are no longer enforceable. Accordingly, that

exemption most likely does not extend to the transfer of trackage rights now proposed, and so GDLK is returning to the Board for authorization to acquire NSR's "Texas Mexican rights," rights and obligations that exist as a matter of federal law.

B. NSR has common carrier rights to convey to GDLK

In light of the state court's ruling, NSR is the only federally-authorized user on the CSXT Line aside from CSXT itself. (The Court has ruled, in effect, that the expiration of the underlying trackage rights agreements coupled with the Board's decision to deny GDLK's retroactivity request in the FD 35187 (Sub-No. 1) proceeding renders the contested assignment of NSR's prior contract rights to GDLK moot.) Accordingly, the common carrier rights that NSR now possesses to operate over the CSXT Line exist strictly as a product of federal railroad common carrier law deriving from Texas Mexican and its progeny, but those rights do exist even if the Michigan State Court did not so acknowledge. The central issue here is whether those rights may be transferred as a matter of agency law and practice. As is discussed below, Board precedent supports authorization of the subject transaction.

C. 49 U.S.C. § 10902 is the appropriate vehicle for authorizing the transfer of NSR's surviving rights to operate the CSXT Line

Pursuant to 49 U.S.C. § 10902(a), GDLK, a Class III railroad carrier, may "operate an extended or additional rail line under this section . . . if the Board issues a certificate authorizing such activity." Here, GDLK is seeking authority to operate an additional railroad line in keeping with the statute. Moreover, the Board deemed Section 10902 as an appropriate vehicle for GDLK's acquisition of incidental trackage rights in last year's GDLK Notice decision. GDLK's invocations of Section 10902 last year and this year serve the same objective – to integrate otherwise disconnected pieces of the GDLK leasehold as NSR and GDLK originally had intended.

Ordinarily, GDLK would have elected simply to invoke the class exemption from Section 10902 set forth at 49 C.F.R. part 1150, subpart E, to secure authorization to acquire NSR's rights to operate over the CSXT Line (in keeping with the GDLK Notice proceeding). But GDLK presumes that CSXT will continue its unjustified and anticompetitive campaign to deny GDLK's resumption of service over the CSXT Line. For that reason, and because this case presents arguably novel facts and issues, GDLK deemed it prudent to forego the class exemption and allow for a more procedurally-flexible administrative review under the more extensive (and costly) individual exemption procedures despite the much higher filing fee.

D. Authorizing the transfer of NSR's rights is a necessary prerequisite to an order directing CSXT to admit GDLK back onto the CSXT Line

Simultaneously with this Petition, GDLK has filed the aforementioned PBO pursuant to the agency's statutory authority under 49 U.S.C. § 1321(b)(4), requesting the Board to direct CSXT to re-admit GDLK onto the CSXT Line. Petitioning for an order under Section 1321(b)(4), rather than embedding that request for relief into this Petition, avoids the question of whether the agency may compel action under its exemption authority at 49 U.S.C. § 10502.¹⁶ This Petition seeks the prerequisite authorization only. Because the Michigan State Court has found that there no longer is a contract to adjudicate as among GDLK, CSXT, and NSR, the STB necessarily becomes the one and only forum that is available to supply the remedy that GDLK seeks in the sister filing.

¹⁶ See Brae Corp. v. United States, 740 F.2d 1023 (D.C.Cir. 1984) ("Brae Corp."); Southern Pacific Rail Corporation – Abandonment Exemption – In Garfield, Eagle, and Pitkin Counties, Co., Docket No. AB-12 (Sub-No. 190X) (STB served Jun. 10, 1996) (the agency may not use its exemption authority to impose new regulatory burdens on carriers); and Gateway Western Railway Company and CSX Transportation, Inc. – Joint Relocation Exemption, Docket No. FD 31923 (ICC served Sept. 16, 1992) (under Brae Corp., the agency's exemption procedures can be used to deregulate but not to regulate, and thus cannot be used to adjust regulatory entitlements between carriers).

As demonstrated in the PBO, CSXT's persistent refusal to re-admit GDLK on to the CSXT Line only adds to the irreparable injury GDLK and its customers already have suffered and will continue to experience. Issuance of an appropriate order would be in the public interest without question. GDLK recognizes, however, that a Board order compelling the restoration of GDLK operations over the CSXT Line absent the requisite operating authority might put the cart before the horse, procedurally speaking. Accordingly, GDLK appeals to the Board for swift and favorable action on the merits of this Petition and, preferably, a decision on the related PBO at the same time.

E. There is analogous precedent supporting Board authorization of the transaction

Where one railroad is seeking to convey common carrier rights and obligations over the lines of a second railroad to yet a third railroad, the parties, and possibly also the Board, ordinarily would look to the contract terms governing the incumbent's use of the "landlord's" line to determine under what conditions such a transfer might be accomplished. But the facts here are not ordinary. The original trackage rights agreements governing access to the CSXT Line have expired and are no longer enforceable under state law; the assignment provisions of those contracts have expired along with them; and yet Texas Mexican dictates that NSR (if not GDLK) holds common carrier rights and obligations over the line, which survive the expiration or termination of the foundational agreements. The surviving rights and obligations are of no benefit to anyone so long as they are not made available for use by the operator of the surrounding lines to which they connect, so, in keeping with the intent of NSR and GDLK in entering into the STB-approved 2008 railroad line lease agreement, NSR desires to transfer its federally-sanctioned common carrier rights and obligations over the CSXT Line to GDLK.

GDLK believes that, if the parties (including CSXT) all agreed at this time to the transfer of NSR's rights, the Board would allow GDLK to invoke the Section 10902 class exemption to accomplish the transaction, subject, presumably, to the appropriate negotiation in due course of new track use terms. But GDLK is unaware of any case with remotely similar facts where, as here – (a) the host carrier (CSXT) acknowledges the incumbent's (NSR's) common carrier rights and obligations under Texas Mexican; (b) the host railroad did not raise any objection to the incumbent's assignment of the trackage rights or use of the trackage rights by the assignee (GDLK) for roughly 7 years; (c) the host carrier conveniently raised its objection only after the expiration of the trackage rights contracts which had contained assignment-restricting language; and (d) the host continues, without justification or valid reason to object to the transfer of the user's rights and obligations.

The latter point above warrants additional attention: CSXT has never attempted to prove that its asserted past withholding of consent to assignment (the Michigan State Court did not rule on the issue, but noted considerable evidence of CSXT's constructive assent to GDLK's exercise of trackage rights prior to the expiration of those contracts) was undertaken in in good faith and was reasonable. CSXT merely claims that it did not, and does not, consent, assuming that it had and has the unfettered right before the expiration of the trackage rights agreements and now to refuse the assignment for any reason or no reason. CSXT's failure, indeed inability, plausibly to justify and explain its withholding of consent bespeaks bad faith and unfair dealing. Moreover, CSXT's apparent continued insistence that it can continue to refuse honor NSR's assignment of its trackage rights without explanation or justification is contrary to prevailing

principles of contract law, under which CSXT would be expected to show that withholding of consent is reasonable and in good faith.¹⁷

This Petition seeks authorization for the following: For NSR, the holder of federally-authorized common carrier rights and obligations over a line or railroad stemming from expired contracts between NSR and CSXT to convey its rights and interests as recognized under Texas Mexican to GDLK as integral to a lease transaction between GDLK and NSR entered into in 2008. The facts here are novel, but analogous STB precedent and practice indicate that the Board can and should grant the Petition.¹⁸ The common carrier rights that NSR possesses and seeks to transfer to GDLK are akin to the right to reactivate service on a rail-banked line currently subject to a notice or certificate of interim trails use. In trails use situations, the holder of what is sometimes viewed as a “residual” common carrier right of reactivation has been allowed to transfer the reactivation right to a third party, and the Board has explained that the agency may permit a third party to exercise the reactivation right under certain circumstances.¹⁹ So, too, here, should the Board sanction the conveyance of common carrier rights and obligations.

¹⁷ See Restatement (Second) of Contracts § 205 (1981); see also, e.g., Lowe’s Home Centers, Inc. v. LL & 127, LLC, 147 Fed.Appx. 516, 523-24 (6th Cir. 2005); Sims v. Buena Vista School Dist., 138 Mich.App. 426, 431 (Mich.Ct.App. 1984).

¹⁸ GDLK awaits CSXT’s tired refrain that equates “unprecedented” with legally unsupportable and unwarranted, which, as GDLK will show, is nothing more than a convenient but false equivalence. In any event, CSXT’s attempts legally to justify objecting to GDLK’s operations after 7 years of CSXT’s continuous acceptance of GDLK’s trackage rights presence is at least equally “unprecedented.”

¹⁹ See, e.g., City of Pickens, S.C. and City of Easley, S.C. – Acquisition Exemption – Pickens Railway Company, Docket No. FD 35748 (STB served Jul. 18, 2013) (voluntary transfer of reactivation right on line authorized for abandonment); King County, WA – Acquisition Exemption – BNSF Railway Company, Docket No. FD 35148 (STB served Sep. 17, 2009) (explaining that the right to reactivate rail service on a rail banked line was not exclusive to the abandoning railroad or the entity to which it might transfer the right, and that another bona fide petitioner could seek to reactivate service under appropriate circumstances).

In addition, denying the subject Emergency Petition would be illogical. GDLK currently operates a network of railroad lines suddenly disconnected by CSXT's malfeasance. CSXT well knows that NSR cannot provide efficient service over the CSXT Line in place of GDLK. Yet CSXT also knows, and would have to concede that, legally, if GDLK agreed to return operation of its leasehold lines to NSR, then service and competition in the Grand Rapids market would return to pre-March 2009 conditions. CSXT could not, for example, legally deny NSR access to the CSXT Line – but if it feels it could, then surely GDLK also could expel CSXT from the Richmond Street Connecting Track. Moreover, if there had never been an NSR-GDLK lease arrangement, then surely if the parties were newly pursuing such a lease transaction now (including the assignment of NSR's rights over the CSXT Line, of course) rather than in 2008-09, GDLK submits that the Board would authorize the transaction despite some open questions concerning the assignment of rights established under now-expired contracts that have not since been replaced with new agreements. It would make little sense then, to bar GDLK's current efforts to restore service and competition over the CSXT Line due to a possible, and highly-technical, timing issue.

III. JURISDICTION AND STATUTORY STANDARDS

A Class III railroad carrier such as GDLK may acquire or operate an extended or additional rail line if the Board issues a certificate authorizing such a transaction pursuant to a formal application. See 49 U.S.C. §§ 10902(a) and (c). Under 49 U.S.C. § 10502, however, the Board must exempt a transaction from regulation under Part A of Subtitle IV of Title 49 of the U.S. Code (including Section 10902) if it finds that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction is of limited scope or (b) regulation is not necessary to protect shippers from the abuse of market power.

In enacting the Staggers Rail Act of 1980, Congress made clear its expectation that the Interstate Commerce Commission would use its expanded exemption authority under former 49 U.S.C. § 10505 (now Section 10502) to free certain transactions and service from the administrative and financial costs associated with continued regulation:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation.

H.R. Conf. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980). Congress reaffirmed this policy in the conference report accompanying the ICC Termination Act of 1995, which reenacted the existing exemption provisions as Section 10502. H.R. Conf. Rep. No. 422, 104th Cong. 1st Sess. 168-169 (1995).

An individual exemption from the application requirements of 49 U.S.C. § 10902 permitting GDLK to acquire NSR's rights to operate over the CSXT Line would be wholly consistent with the standards set forth in Section 10502. Detailed scrutiny of the transaction through formal application under Section 10902 would be unnecessary to carry out the rail transportation policy of 49 U.S.C. § 10101. In fact, exemption from such review and approval would further several of the objectives established in the transportation policy. Moreover, the proposed transaction is of limited scope and will not result in any abuse of market power. Indeed, were it not for CSXT's ongoing refusal to cooperate in the restoration of GDLK trackage rights operations that CSXT actively permitted for over 7 years, the subject transaction could be presented controversy-free under the established class exemption at 49 C.F.R. § 1150.41, *et seq.*

GDLK's Petition should not be viewed as giving credence to CSXT's objection. GDLK believes that there is no genuine controversy, but it recognizes that the individual exemption procedures extend to the Board greater procedural flexibility to address the issues here and in resolving the underlying dispute as appropriate.

IV. EXEMPTION CRITERIA

A. Regulation Is Not Necessary to Carry Out the Rail Transportation Policy of 49 U.S.C. § 10101

The Board should exempt from regulation the above-described transaction in keeping with the rail transportation policy outlined at 49 U.S.C. § 10101. The transaction will restore dual operations over the CSXT Line in keeping with the competition-preserving arrangements originally negotiated by NSR's and CSXT's respective predecessors over 30 years ago. Moreover, the transaction will allow GDLK to resume operations that it had for over 7 years conducted with CSXT's full knowledge and cooperation to the benefit of the shipping public. Granting the requested exemption will promote the continuation of a sound rail system to meet the needs of the public. 49 U.S.C. § 10101(4). The transaction also will facilitate efficient coordination of GDLK-CSXT operations in Grand Rapids, enhancing effective rail management and yielding economic benefits of improved service and reduced handling. Thus, this transaction will promote efficiency, coordination among rail carriers and competition with other transport modes. See 49 U.S.C. §§ 10101(5) and (9).

The proposed transaction also will reverse CSXT's blatant market power grab in the Grand Rapids metropolitan area, which has disrupted a long-standing rail service arrangement under which GDLK, NSR and its predecessors for years provided a competitive alternative to CSXT. Refusing to allow GDLK to operate over the CSXT Line, and failing to provide any genuine explanation for continuing to refuse to cooperate with GDLK to restore

service, CSXT has “offered” to bridge the gap in the GDLK system by handling traffic for a switching fee of \$300/car in each direction, treble the amount that CSXT charged prior to CSXT’s “eviction” of GDLK. The switching charges impose substantial additional costs upon GDLK and its customers, and CSXT is aware that the switching charges seriously impair GDLK’s ability to compete in the Grand Rapids market, and its ability to attract and preserve freight traffic. The inflated switching charges also undercut GDLK’s efforts to operate a profitable railroad that is capable of earning adequate revenues. Accordingly, the petition should be granted in furtherance of the objectives of 49 C.F.R. §§ 10101(1), 10101(3), and 10101(12).

By unnecessarily inserting itself into what had been seamless GDLK transportation in Grand Rapids, CSXT’s intermediate switching arrangement is not only driven by anti-competitive animus, but it results in inefficient extra handling of railroad traffic to the extent that CSXT’s ploy has not driven away GDLK traffic opportunities. The current situation therefore erodes GDLK’s business goodwill. The additional traffic interchanges and handling occasioned thereby increases threats to public health and safety and is wasteful of energy resources. The proposed transaction, once implemented, would reverse all of that. As such, GDLK’s petition advances the RTP objectives set forth at 49 U.S.C. §§ 10101(8) and (14).

Swift and favorable Board action on the Petition minimizes federal regulatory control over the rail transportation system, facilitates critical entry into and exit from the rail transportation industry, and advances the Congressional mandate that this agency should resolve proceedings such as this one expeditiously. See 49 U.S.C. §§ 10101(2), (7) and (15).²⁰ The only

²⁰ The statutory exemption contained in Section 10502 obviates the need for the expensive and time-consuming processes attendant to a proceeding under Section 10902. By limiting the level of regulatory review of this transaction and by relying upon the adequate and more expeditious exemption procedure, the Board would minimize the burden of unnecessary regulation on this transaction. E.g., Livonia, Avon & Lakeville Railroad Corporation –

two RTP objectives not specifically advanced by the subject Petition are those set forth at 49 U.S.C. §§ 10101(10) (favoring individual, rather than general, rate increases) and 10101(13) (regarding cost information), but then the proposed transaction does not thwart those objectives, either. In short, none of the RTP objectives is compromised by the proposed transaction.

B. Regulation Is Not Necessary to Protect Shippers From an Abuse of Market Power

GDLK's acquisition of NSR's rights will not harm competition. Rather, the transaction will reverse CSXT's efforts to reduce and eliminate competition in the Grand Rapids metropolitan area. No shipper will lose access to rail service as a result of the transaction. Instead shippers will find GDLK restored as an effective and competitive alternative to CSXT, just as GDLK had been for over 7 years, and as NSR and Conrail had been before that.

The consolidation of Grand Rapids trackage in the 1980s that serves as the genesis of this transaction was carefully designed to ensure that the participating carriers preserved their competitive presence in the Grand Rapids market while at the same time accommodating planned municipal improvements. CSXT's unexplained refusal to allow GDLK to operate over the CSXT Line is in direct conflict with that longstanding arrangement and thus undercuts the competitive status quo. Hence, approval of the subject transaction will restore, rather than lessen, competition and transportation options for shippers in the area. The transaction therefore satisfies the market abuse standard at 49 U.S.C. § 10502(a)(2)(B).

C. The Transaction Is Limited in Scope

Because regulation of the transaction is not necessary to protect shippers from an abuse of market power, GDLK does not need to demonstrate that the transaction is of limited

Acquisition and Operation Exemption – Line of Consolidated Rail Corporation, Docket No. FD 32754 (STB served March 11, 1996) at 4.

scope, also. 49 U.S.C. § 10502(a)(2); Fort Worth & Western Railroad Company, Inc. – Lease Exemption – St. Louis Southwestern Railway Company, Docket No. FD 32955 (STB served September 5, 1996) at 3. Nevertheless, it is clear that the transaction satisfies this criterion as well. The transaction involves a transfer of rights to operate over roughly 3.3 miles of track at a single location. Accordingly, the Board may find, if it needs to, that the transaction is of limited scope within the meaning of Section 10502(a)(2)(A).

V. LABOR PROTECTION

The Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of employees.²¹ Under 49 U.S.C. § 10902(d), however, this transaction is not subject to the imposition of labor protection conditions. In any event, potentially affected NSR employees (if any) already have been notified of NSR's plans to convey its rights to operate over the CSXT Line by virtue of the posting and service of notice to potentially affected NSR employees and their representative labor unions accomplished as of November 11, 2016 in the GDLK Notice proceeding.

VI. ENVIRONMENTAL ASSESSMENT

A petition for exemption must comply with the Board's environmental reporting requirements, if applicable. 49 C.F.R. § 1121.3(b). Under 49 C.F.R. § 1105.6(c)(2), however, the subject transaction is exempt from environmental reporting requirements. Specifically, the will not result in significant changes in carrier operations, i.e., changes that exceed the thresholds of 49 C.F.R. § 1105.7(e)(4) or (5).

Under 49 C.F.R. § 1105.8(b)(2) and (3), the transaction also is exempt from historic impact reporting requirements. The transaction has not and will not produce any

²¹ 49 U.S.C. § 10502(g).

significant operating changes on GDLK or NSR (and, in fact, will restore recently-suspended operations), nor will it result in any substantial changes in the level of railroad property maintenance on any of the aforementioned railroads. Further Board approval would be required as a prerequisite to any abandonment by any of the involved railroad carriers, and there are no plans in connection with this transaction to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older.

WHEREFORE, GDLK respectfully requests that the Board expeditiously grant an exemption from the provisions of 49 U.S.C. § 10902 permitting GDLK to acquire and exercise NSR's unextinguished rights to operate over the CSXT Line in Grand Rapids.

Respectfully submitted,

By: 

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Dated: June 12, 2017

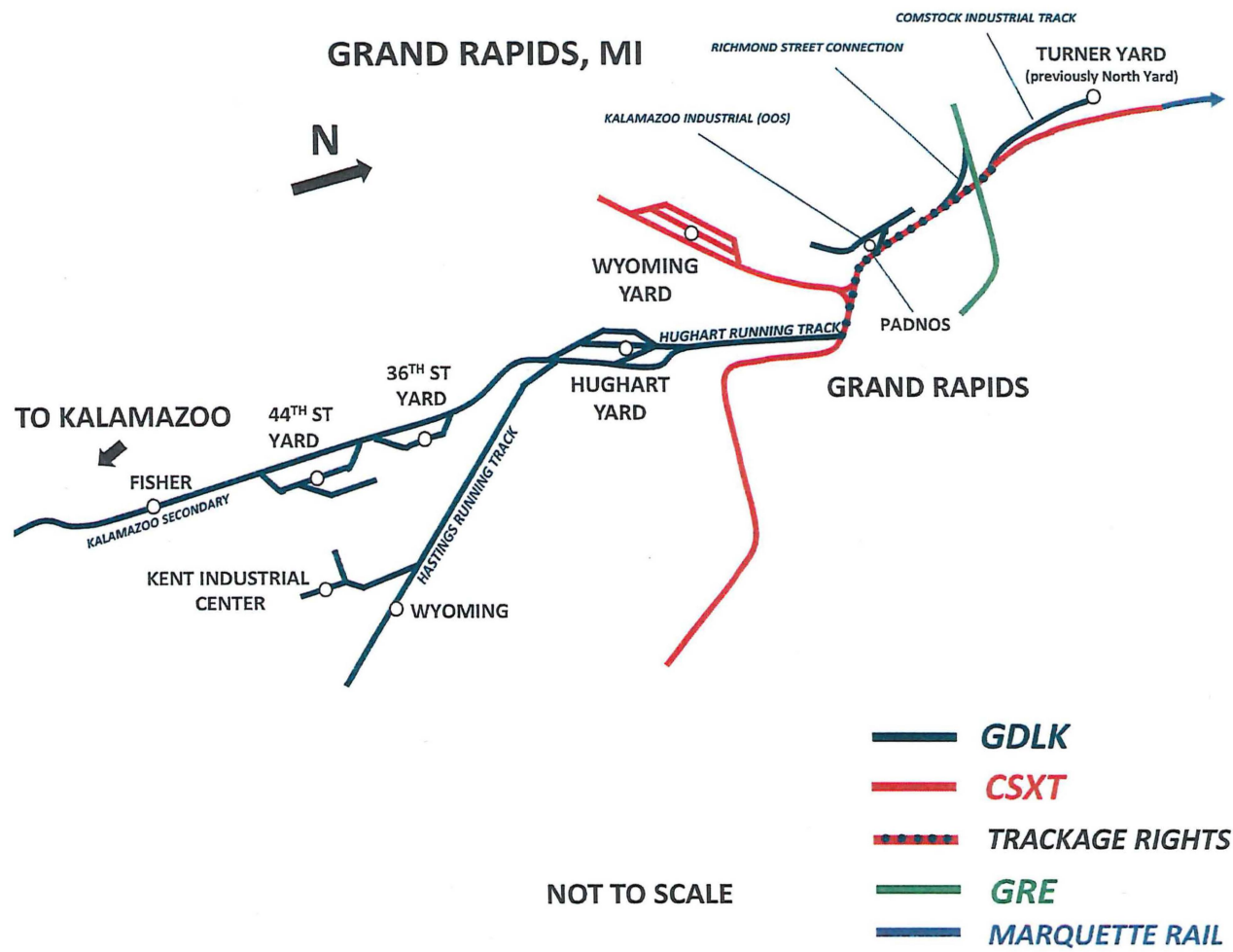
BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127
GRAND ELK RAILROAD, INC.
-- ACQUISITION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY

VERIFIED EMERGENCY PETITION FOR EXEMPTION OF
GRAND ELK RAILROAD, INC.

EXHIBIT A

MAP



BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127
GRAND ELK RAILROAD, INC.
-- ACQUISITION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY

VERIFIED EMERGENCY PETITION FOR EXEMPTION OF
GRAND ELK RAILROAD, INC.

EXHIBIT B

JUNE 1, 2017 STATE COURT DECISION

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

GRAND ELK RAILROAD, INC.; and
NORFOLK SOUTHERN RAILWAY
COMPANY,

Plaintiffs,

Case No. 16-07855-CZB

vs.

HON. CHRISTOPHER P. YATES

CSX TRANSPORTATION, INC.,

Defendant.

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION AND GRANTING SUMMARY DISPOSITION TO DEFENDANT CSX

This case involves a dispute concerning approximately 3.3 miles of railroad track in the City of Grand Rapids. Defendant CSX Transportation, Inc. ("CSX") controls that stretch of track, which Plaintiffs Grand Elk Railroad, Inc. ("Grand Elk") and Norfolk Southern Railway Company ("NSR") have used for many years to transport freight on rail cars pursuant to two trackage-rights agreements signed in 1980 and 1984. Those 30-year agreements expired in 2010 and 2014, though, leaving the two plaintiffs without a right of access to the 3.3-mile stretch of track. In 2016, CSX began asserting its purported authority to exclude Grand Elk from the 3.3-mile stretch of track, which prompted the plaintiffs to file the instant case and also seek relief from the Surface Transportation Board ("STB"). On October 31, 2016, the STB rendered a decision indicating that the plaintiffs' rights depend largely upon state law, so the parties' focus shifted to the instant case. At this early juncture, the Court must deny the plaintiffs' request for a preliminary injunction and award CSX summary disposition under MCR 2.116(C)(8), but afford the plaintiffs an opportunity to amend their complaint.

I. Factual Background

The procedural posture of this case is relatively complicated. Defendant CSX has moved for summary disposition under MCR 2.116(C)(8), which allows the Court to assess the legal sufficiency of the plaintiffs' first amended complaint. Maiden v Rozwood, 461 Mich 109, 119 (1999). Beyond that, the plaintiffs have requested a preliminary injunction, so the Court must determine whether they have presented sufficient evidence to carry their "burden of establishing that a preliminary injunction should be issued[.]" See MCR 3.310(A)(4). The two sides have provided a comprehensive record that reveals very few disagreements about the underlying facts, so the Court can resolve the pending motions largely on common ground.

Two trackage-rights agreements signed on February 6, 1980, and January 24, 1984, form the bases of this dispute.¹ See First Amended Complaint, Exhibits B & C. Each agreement lasted for a 30-year term from its commencement date, see id., Exhibit B (Article 12(a)) & Exhibit C (Section 8(a)), but each one could be renewed for an additional 30-year term by providing notice at least six months before the expiration of the initial 30-year term. See id., Exhibit B (Article 12(b)) & Exhibit C (Section 8(b)). During the original 30-year terms of the trackage-rights agreements, Plaintiff NSR acquired rights and obligations under the agreements, and then assigned those rights and obligations to Plaintiff Grand Elk on March 5, 2009. See id., Exhibit E. Similarly, Defendant CSX acquired rights and obligations under the agreements. As a result, before the original 30-year terms expired, Grand Elk and CSX wound up standing in the shoes of the parties to the trackage-rights agreements, and CSX permitted Grand Elk to operate on the 3.3-mile stretch of track at issue in this case.

¹ The parties to both of the agreements were the Chesapeake and Ohio Railway Company and Consolidated Rail Corporation. See First Amended Complaint, Exhibits B & C. In the fullness of time, both of those contracting parties passed on their rights under the agreements.

The cooperation between Plaintiff Grand Elk and Defendant CSX was active, not passive. Specifically, CSX dispatchers “consistently granted authority to Grand Elk to operate its trains” over the 3.3-mile stretch of track. See First Amended Complaint, ¶ 21. In 2010 and 2014, the trackage-rights agreements expired by their terms without any notice of renewal from Grand Elk or NSR, but CSX continued to permit Grand Elk to operate over the 3.3-mile stretch of track until June of 2016. See id., ¶ 23. That cooperation ended on June 14, 2016, however, when CSX sent a letter to Grand Elk directing Grand Elk to cease its operations on the contested stretch of track. See id., Exhibit H. Although CSX and Grand Elk reached a temporary resolution of their dispute, on August 10, 2016, CSX dispatchers started refusing “to authorize Grand Elk trains to operate” on the contested stretch of track. See First Amended Complaint, ¶ 26. Grand Elk responded in two ways. First, Grand Elk sought relief from the STB by filing a notice of exemption on August 25, 2016. Second, Grand Elk filed the instant case on August 24, 2016, explaining to the Court that if the assignment of rights by NSR to Grand Elk on March 5, 2009, was valid “and the Surface Transportation Board authorizes retroactively Grand Elk’s exercise of trackage rights over the [contested stretch], then Grand Elk has an ongoing common carrier right and obligation on the [contested stretch], which is not extinguished by the expiration of the 1980, 1984, and 1993 [trackage-rights] Agreements and CSX is prohibited by law from interfering with Grand Elk’s continued trackage rights operations” on the contested 3.3-mile stretch of track. See First Amended Complaint, ¶ 27. Accordingly, Grand Elk defined its right of access to the contested stretch as contingent upon two conditions.

On October 31, 2016, the STB issued a written decision that stated: “With respect to [Grand Elk]’s petition for partial revocation, the Board will deny that petition and thus not permit [Grand Elk]’s exemption to take effect retroactively.” In other words, the STB’s decision knocked one of

the two legs out from under Plaintiff Grand Elk's argument that it retained a right of access over the 3.3-mile contested stretch if "the Surface Transportation Board authorizes retroactively Grand Elk's exercise of trackage rights over the" contested stretch. See First Amended Complaint, ¶ 27. But as the STB explained in its decision, its "authority is permissive and does not constitute a ruling on the parties' contractual rights." Consequently, Grand Elk may still attempt to pick up the pieces of its rejected two-part argument and convince the Court that state law grants it trackage rights that the STB was unwilling to award in response to Grand Elk's petition for partial revocation. Against this backdrop, the Court shall turn to the plaintiffs' motion for a preliminary injunction and Defendant CSX's motion for summary disposition under MCR 2.116(C)(8).

II. Legal Analysis

Because each side has requested relief, the Court must engage in two separate analyses. First, the Court must decide whether Defendant CSX is entitled to summary disposition pursuant to MCR 2.116(C)(8) on the declaratory-judgment claim set forth in Count One of the plaintiffs' first amended complaint. Second, the Court must determine whether the plaintiffs have established the right to a preliminary injunction.

A. Defendant CSX's Motion for Summary Disposition.

The plaintiffs' first amended complaint sets forth one straightforward claim for declaratory relief. That is, Plaintiffs Grand Elk and NSR assert a right of access to the 3.3-mile contested stretch of track under a variety of alternative theories traceable to the 1980 and 1984 agreements governing trackage rights. Defendant CSX has requested summary disposition under MCR 2.116(C)(8) on the plaintiffs' claim for declaratory relief by contending that the plaintiffs failed to take the contractually

prescribed steps necessary to renew their trackage rights for an additional 30-year term that extends beyond the natural expiration dates of the agreements in 2010 and 2014. A motion seeking summary disposition under MCR 2.116(C)(8) “tests the legal sufficiency of the complaint” and obligates the Court to “accept all factual allegations in the complaint as true[.]” See State ex rel Gurganus v CVS Caremark Corp, 496 Mich 45, 62-63 (2014). Beyond that, CSX’s “motion under MCR 2.116(C)(8) may be granted only where the claims alleged are ‘so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.’” Maiden, 461 Mich at 119. Applying these standards, the Court shall address the plaintiffs’ claim for a declaratory judgment concerning its right of access to the contested 3.3-mile stretch of track.

As an initial matter, the Court concludes that the dispute about trackage rights constitutes a proper subject for declaratory relief. Under MCR 2.605(A)(1), in any “case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” “An ‘actual controversy’ under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff’s future conduct in order to preserve legal rights.” UAW v Central Michigan University Trustees, 295 Mich App 486, 495 (2012). Here, consideration of a declaratory judgment strikes the Court as especially appropriate because the dispute about trackage rights cannot be resolved by money damages. Access, not compensation, is the remedy the plaintiffs seek.

Unfortunately for the plaintiffs, however, their request for access to the contested 3.3-mile stretch of track necessarily derives from their contractual relationship with Defendant CSX, and the two agreements that provided the source of trackage rights for 30 years include renewal rights that the plaintiffs failed to exercise under the terms of the two contracts. To be sure, CSX engaged in a

pattern of conduct that reflected an acceptance of Plaintiff Grand Elk's receipt of the assignment of trackage rights from Plaintiff NSR,² but the assigned trackage rights expired under the terms of the 1980 and 1984 agreements in 2010 and 2014. Moreover, although CSX apparently permitted Grand Elk to operate on the contested stretch of track until June of 2016, CSX's actions cannot support the 30-year extension of the two agreements that Grand Elk seeks.³ Forbearance by CSX cannot serve as a substitute for the method of renewal prescribed by the 1980 and 1984 agreements. Indeed, the statute of frauds governing interests in land in Michigan requires a writing to create the sort of 30-year extension (or the right of use in perpetuity) claimed by Grand Elk with respect to its trackage rights in the 3.3-mile stretch of track. See MCL 566.106; see also Kitchen v Kitchen, 465 Mich 654, 660 (2002) ("an interest in land cannot be established on the basis of estoppel"). Consequently, the Court shall grant summary disposition under MCR 2.116(C)(8) to CSX on the claim for declaratory relief set forth in the plaintiffs' first amended complaint.⁴

² Even Defendant CSX's acquiescence in the assignment may be insufficient as a matter of law to give legal effect to the assignment. CSX asserts that Plaintiff Grand Elk failed to obtain the approval of the STB before commencing operations in 2009, and Grand Elk's failure to do so serves as a bar to its operations. The Court need not address that argument at this juncture because of the Court's conclusion that the 1980 and 1984 agreements expired without extension in 2010 and 2014, leaving Grand Elk with no enforceable trackage rights beyond those expiration dates.

³ The Court flatly rejects the plaintiffs' characterization of their trackage rights as a "tenancy" under Michigan law. The 1980 and 1984 agreements speak of trackage rights without ever using the term "tenancy." Moreover, those agreements simply grant the contracting party "the right to operate its locomotives, cars and trains with its own crews over the [defined] trackage sections of Owner's railroad" See First Amended Complaint, Exhibit B (Section 1) & Exhibit C (Section 2). This language creates a license, not a tenancy. That is, "[t]he landlord grants to tenants rights of *exclusive* possession to designated portions of the property, but the landlord retains exclusive possession of the common areas" and gives "to tenants a license to use the common areas of the property." Stanley v Town Square Cooperative, 203 Mich App 143, 147 (1993) (emphasis added).

⁴ Based upon MCR 2.116(I)(5), the Court shall afford the plaintiffs the opportunity to amend their complaint one more time. See Ormsby v Capital Welding, Inc., 471 Mich 45, 52-53 (2004).

B. The Plaintiffs' Motion for a Preliminary Injunction.

In requesting injunctive relief, the plaintiffs must shoulder “the burden of establishing that a preliminary injunction should be issued[.]” See MCR 3.310(A)(4). An injunction “represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity.” Davis v Detroit Financial Review Team, 296 Mich App 568, 613 (2012). Our Court of Appeals “has identified four factors to consider in determining whether to grant a preliminary injunction.” Id. Those four factors are as follows:

(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

Id. The Court must also bear in mind that injunctive relief is only appropriate if there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. Id. at 614.

1. Likelihood of Success on the Merits

The most obvious flaw in the plaintiffs' request for injunctive relief is their failure to plead a viable claim. As the Court has already explained in awarding summary disposition to Defendant CSX pursuant to MCR 2.116(C)(8), the first amended complaint filed by the plaintiffs fails to offer any theory that can support a ruling in the plaintiffs' favor. Even assuming, *arguendo*, that Plaintiff Grand Elk acquired trackage rights from Plaintiff NSR by assignment in 2009, those rights expired in 2010 and 2014, leaving the plaintiffs with no basis for asserting a contractual right to the 3.3-mile stretch of track at issue in this case. Accordingly, the Court concludes that the plaintiffs have failed to demonstrate a likelihood of success on the merits of their claim.

2. Irreparable Harm

Under settled Michigan law, “a party need[s] to make a particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction.” Michigan Coalition of State Employee Unions v Civil Service Comm’n, 465 Mich 212, 225 (2001). “The mere apprehension of future injury or damage cannot be the basis for injunctive relief.” Pontiac Fire Fighters Union Local 376 v City of Pontiac, 482 Mich 1, 9 (2008). If Defendant CSX had the ability to completely exclude the plaintiffs from the contested 3.3-mile stretch of track, the plaintiffs might well be able to convince the Court that they face the prospect of irreparable harm to their operations absent some form of injunctive relief. Common-carrier obligations, however, ensure access to railroad lines such as the stretch of track at issue here.⁵ See 49 USC 10742. Indeed, the STB even regulates switching charges that CSX can collect for track access. Thus, the Court concludes that the plaintiffs have not demonstrated that irreparable harm will befall them in the absence of injunctive relief.

C. Balance of Harms to the Opposing Parties.

In assessing the relative harm to the opposing parties in the presence or absence of injunctive relief, see Davis, 296 Mich App at 613, the Court acknowledges that Defendant CSX would be hard-pressed to establish any likelihood of substantial harm if the Court were to provide the plaintiffs with injunctive relief. CSX simply would have to grant the plaintiffs largely unfettered access to the 3.3-mile stretch of track. But the same can be said of the plaintiffs in the absence of injunctive relief. Indeed, our integrated national rail system has been designed to minimize the cost and disruption to

⁵ As one federal court has noted: “Railroads are required by law to provide ‘through routes’ for competitors’ cars over their proprietary tracks in the interest of promoting an integrated national freight system.” Engelhard Corp v Springfield Terminal Railway Co, 193 F Supp 2d 385, 386 n1 (D Mass 2002).

rail carriers, regardless of where ownership of desirable track segments rests. As a result, the Court concludes that the balance of harms does not favor either side in this case. Rail traffic will continue largely unabated regardless of any injunctive order from the Court.

D. Potential Harm to the Public Interest.

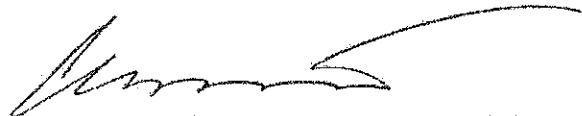
The only potential harm to the public interest arising from the award or denial of injunctive relief in this case takes the form of higher prices for rail transportation. But as the Court has already explained, the STB effectively regulates prices for track access, thereby ensuring fair and stable rates for the transportation of goods by rail. In such a regulated industry, the Court cannot find that some sort of injunctive order is necessary to prevent harm to the public.

III. Conclusion

For all of the reasons stated in this opinion, the Court shall grant summary disposition under MCR 2.116(C)(8) to Defendant CSX on the claim for declaratory relief advanced in the plaintiffs' first amended complaint. Pursuant to MCR 2.116(I)(5), the Court shall afford the plaintiffs 21 days' leave to file a second amended complaint recasting their claim in an effort to present a viable theory. Unsurprisingly, the Court shall deny the plaintiffs' motion for a preliminary injunction because they have neither established any likelihood of success on the merits nor demonstrated any likelihood of irreparable harm in the absence of injunctive relief.

IT IS SO ORDERED.

Dated: June 1, 2017



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127
GRAND ELK RAILROAD, INC.
-- ACQUISITION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY

VERIFIED EMERGENCY PETITION FOR EXEMPTION OF
GRAND ELK RAILROAD, INC.

EXHIBIT C

HEARING TRANSCRIPT – SELECTED PAGES

STATE OF MICHIGAN

17TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF KENT

GRAND ELK RAILROAD, INC.,
and NORFOLK SOUTHERN
RAILWAY COMPANY,

Plaintiffs,

v

File No. 16-07855-CZB

CSX TRANSPORTATION, INC.,

Defendant.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, AND
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE CHRISTOPHER P. YATES, CIRCUIT COURT JUDGE

Grand Rapids, Michigan - Friday, January 13, 2017

APPEARANCES:

On Behalf of Plaintiffs: MR. JAMES D. HELENHOUSE (pro hac vice)
MR. ROBERT A. WIMBISH (pro hac vice)
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 920
Chicago, Illinois 60606
312-252-1500

On Behalf of Defendant: MR. DAVID W. CENTNER (P43071)
MR. GREGORY L. LONGWORTH (P49249)
Clark Hill PLC
200 Ottawa Avenue NW, Suite 500
Grand Rapids, Michigan 49503
616-608-1100

APPEARANCES CONTINUED:

On Behalf of Defendant:

MR. LOUIS E. GITOMER (pro hac vice)
Law Office of Louis E. Gitomer, LLC
600 Baltimore Avenue, Suite 301
Towson, Maryland 21204
410-269-2260

Recorded and
Transcribed By:

Molly P. Norton, CER 8741
Certified Court Recorder
616-632-5025

1 it's a mismatch here in the sense that the regulatory
2 authority's now been granted to Grand Elk, but the right as a
3 matter of contract belongs only to Norfolk Southern, and
4 because neither one of them has both pieces, neither one of
5 them can operate?

6 MR. CENTNER: No. Certainly Norfolk Southern can
7 operate and must operate if asked on a reasonable request.

8 THE COURT: Okay.

9 MR. CENTNER: Because they have a continuing common-
10 carrier obligation that federal law imposes upon them because
11 they were authorized by the ICC, now the S.T.B. --

12 THE COURT: All right. Sure.

13 MR. CENTNER: -- at the very beginning.

14 THE COURT: All right. So, in other words, even
15 though the contract's duration is 30 years, they have the
16 right and duty in perpetuity to operate on the line if,
17 essentially, they choose to do so?

18 MR. CENTNER: That's correct, up until there is a
19 discontinuance.

20 THE COURT: Sure. And there's been a discontinuance
21 for Norfolk Southern, I presume?

22 MR. CENTNER: No.

23 THE COURT: No? Okay.

24 MR. CENTNER: There is no official request that it
25 be discontinued.

1 Supreme Court says.

2 THE COURT: Right. Absolutely. Right.

3 MR. CENTNER: And that's something that NS cannot
4 simply transfer to another railroad. That arises out of the
5 authority -- the regulatory authority granted to a common
6 carrier.

7 THE COURT: Right. Because we can all agree at one
8 point Norfolk Southern had both pieces. It had the legal
9 assignment, and it had the authorization from the Surface
10 Transportation Board. So for all purposes analytically under
11 this framework you've laid out, they were good and legal, and
12 it sounds to me the way you're describing it is they're good
13 and legal in perpetuity.

14 MR. CENTNER: Absolutely. And -- and the -- NS, if
15 there are issues regarding terms of payment, amounts, things
16 like that, they go back to the S.T.B. to figure it out, which
17 may adopt the old charges from the contract while it was in
18 place, or they may increase it for cost of living, whatever,
19 you know?

20 THE COURT: Sure.

21 MR. CENTNER: The other thing that I want to hit on
22 is the relief sought in the complaint -- in the first amended
23 complaint is declaratory. There is a little thing about
24 damages, but primarily they're asking for declaratory judgment
25 about before the approval date and after the approval date.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127
GRAND ELK RAILROAD, INC.
-- ACQUISITION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY

VERIFIED EMERGENCY PETITION FOR EXEMPTION OF
GRAND ELK RAILROAD, INC.

EXHIBIT D

2017 GRAND RAPIDS ASSIGNMENT AND
ASSUMPTION AGREEMENT

2017 GRAND RAPIDS ASSIGNMENT AND ASSUMPTION AGREEMENT

This 2017 GRAND RAPIDS ASSIGNMENT AND ASSUMPTION AGREEMENT (this "2017 Agreement") is dated as of the 8th day of June, 2017, by and between Norfolk Southern Railway Company, a Virginia corporation ("Assignor"), and Grand Elk Railroad, Inc., a Delaware corporation ("Assignee"). All capitalized terms used but not otherwise defined in this Agreement shall have the meaning ascribed to such terms in the Lease Agreement between Assignee and Assignor, dated December 29, 2008 (the "Lease Agreement").

RECITALS:

WHEREAS, Assignor and Assignee previously entered into that Grand Rapids Assignment and Assumption Agreement dated March 5, 2009 (the "Original Assignment Agreement"); and

WHEREAS, the Original Assignment Agreement assigned from Assignor to Assignee: (a) that certain trackage rights agreement, dated January 24, 1984, by and between The Chesapeake & Ohio Railway Company ("C&O") and Consolidated Rail Corporation ("Conrail"), as it had been from time to time amended and assigned, and the underlying right of movements in and about Grand Rapids, MI (the "1984 Agreement"); (b) that certain trackage rights agreement, dated February 6, 1980, by and between the C&O and Conrail, as it had been from time to time amended and assigned, and the underlying right of movements in and about Grand Rapids, MI (the "1980 Agreement"); (c) that certain interlocking agreement, dated June 1, 1994, by and between CSX, Transportation, Inc. ("CSXT") and Conrail, as it had been from time to time amended and assigned, and the underlying right of movements in and about Grand Rapids, MI (the "1994 Agreement"); (d) that certain trackage rights agreement, dated July 6, 1993, by and between the C&O and Conrail, as it had been from time to time amended and assigned, and the underlying right of movements in and about Grand Rapids, MI (the "1993 Agreement"); (e) that certain trackage rights agreement, dated December 23, 1964, by and between the C&O, the Pennndel Company and the Pennsylvania Railroad Company, as it had been from time to time amended and assigned, and the operation of the Godfrey Mill Spur in Grand Rapids, MI (the "1964 Agreement"); and (f) that certain interchange agreement, dated December 18, 1989, by and between CSXT and Conrail, as it had been from time to time amended and assigned, and the interchange of traffic at Grand Rapids, MI (the "1989 Agreement"); and

WHEREAS, Assignee accepted such assignment and utilized its rights under such agreements without objection from any party beginning in March of 2009 and lasting into 2016; and

WHEREAS, in the interim, the 1984 Agreement, the 1980 Agreement, and the 1993 Agreement which governed access to and use of certain CSXT-owned trackage in Grand Rapids (the "Operating Agreements") expired pursuant to their respective terms; and

WHEREAS, in 2016, seven years after the assignment of such agreements, CSXT objected for the first time to the assignment of the Operating Agreements, claiming that CSXT had no record of providing written consent to such assignment; and

WHEREAS, CSXT has continued to refuse to acknowledge or honor assignment of the Operating Agreements despite documentation proving that CSXT was informed and aware of such assignment from 2009 onward, and documentation showing CSXT agreed to cease payments and billing under the 1984 Agreement with the Assignor as of the date of the commencement of Assignee's operations in 2009;

WHEREAS, due to expiration of the Operating Agreements, CSXT has contested the effectiveness of Assignor's assignment to Assignee of Assignor's rights for movements in and about Grand Rapids under the Original Assignment Agreement; and

WHEREAS, if such prior assignment did lapse with the expiration of the Operating Agreements, Assignor nevertheless retains the right and obligation as a duly licensed common carrier to operate over CSXT trackage previously covered by those agreements (collectively, the "Grand Rapids Trackage") unless and until such right of operation is discontinued by formal order of the Surface Transportation Board; and

WHEREAS, the contractual requirement to seek consent from CSXT for assignment of the Operating Agreements terminated along with such agreements;

WHEREAS, to the extent (if any) such prior assignment has lapsed, Assignor is willing to assign its current rights and obligations with respect to the Grand Rapids Trackage to Assignee in the interest of restoring fully-integrated service over the lines that Assignee leases from Assignor and operates pursuant to the Lease Agreement; and

WHEREAS, Assignee desires to accept such assignment.

NOW, THEREFORE, for and in consideration of the premises, the mutual covenants and agreements contained herein and in the Lease Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

Section 1. Assignment. Assignor hereby contributes, assigns, sets over and transfers to Assignee, any and all of its rights and obligations to operate over the Grand Rapids Trackage in accordance with any federal authority that Assignor may currently possess.

Section 2. Assumption. Assignee hereby accepts the assignment of all of Assignor's right, title and interest to operate as a common carrier over the Grand Rapids Trackage in place of Assignor.

Section 3. Effect of the Assignment and Assumption. To the extent not previously assigned to Assignee under the Original Assignment Agreement, all rights and responsibilities with respect to the Grand Rapids Trackage accruing prior to the effectiveness of this 2017

Agreement shall be the rights and responsibilities of Assignor. All rights and responsibilities with respect to the Grand Rapids Trackage accruing after the effectiveness of this 2017 Agreement shall be the rights and responsibilities of Assignee.

Section 4. The Lease Agreement. Nothing herein shall be deemed to amend, modify, alter, expand or diminish the terms and conditions of the Lease Agreement, including, without limitation, the covenants, representations, warranties and indemnification obligations contained therein. If the rights assigned by Assignor to Assignee hereunder remain in effect as of the termination or expiration of the Lease Agreement, they shall be automatically assigned by Assignee back to Assignor upon such termination or expiration.

Section 5. Further Assurances. Assignor shall, from time to time upon the reasonable request of Assignee, execute and deliver all such further documents and instruments, and take all such further acts as shall be necessary or desirable to give full effect to the intent and meaning of this 2017 Agreement.

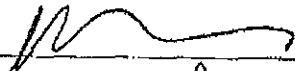
Section 6. Governing Law. The laws of the state of Delaware shall govern the validity of this Agreement, the construction of its terms and the interpretation of the rights and duties arising hereunder, without regard to the laws that might otherwise govern under the applicable principles of conflicts of law thereof.

Section 7. Counterparts. This 2017 Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

Section 8. Successors and Assigns. This 2017 Agreement shall be binding upon and inure solely to the benefit of each party hereto and their respective successors and permitted assigns, and nothing in this Agreement, express or implied, is intended to or shall confer upon any other Person any rights, interests, benefits or remedies of any nature whatsoever under or by reason of this Agreement.

IN WITNESS WHEREOF, the parties have executed this 2017 Agreement as of the date first above written.

NORFOLK SOUTHERN RAILWAY COMPANY

By: 
Title: Vice President

GRAND ELK RAILROAD, INC.

By: 
Title: EVT

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127
GRAND ELK RAILROAD, INC.
-- ACQUISITION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY

VERIFIED EMERGENCY PETITION FOR EXEMPTION OF
GRAND ELK RAILROAD, INC.

EXHIBIT E

AFFIDAVIT OF RANDALL W. HUNT
FROM STATE COURT PROCEEDING

STATE OF MICHIGAN
IN THE KENT COUNTY CIRCUIT COURT

GRAND ELK RAILROAD, INC. and
NORFOLK SOUTHERN RAILWAY
COMPANY

Plaintiffs,

Case No. 2016-07855-CZB
Hon. Christopher P. Yates

-vs-

CSX TRANSPORTATION, INC.,

Defendant.

AFFIDAVIT OF RANDALL W. HUNT

Randall W. Hunt, being duly sworn, deposes and says:

1. I am over the age of twenty-one, and I have personal knowledge of the facts stated in this Affidavit and, if sworn as a witness, I can competently testify to the facts stated in this affidavit.

2. I am currently employed by Norfolk Southern as Director -- Joint Facilities. I have been employed by Norfolk Southern since 2004 and have occupied my present position since 2014. My business address is 1200 Peachtree St NE, Atlanta, GA 30309.

3. As part of my present duties as Director -- Joint Facilities, I oversee the administration of contractual relationships with other railroads, including CSX Transportation, Inc. ("CSXT") and Grand Elk Railroad, Inc. ("Grand Elk Railroad"). I am Norfolk Southern's counterpart to CSXT's Director of Joint Facilities and Agreements James Allan, who I understand has submitted an affidavit in this proceeding.

4. Mr. Allan's affidavit discusses in part the Trackage Rights Agreement entered into as of January 24, 1984, between Chesapeake and Ohio Railway Company ("C&O"),

CSXT's predecessor-in-interest, and Consolidated Rail Corporation ("Conrail"), Norfolk Southern's predecessor-in-interest, (the "1984 Agreement"), which contains grants of trackage rights both from CSXT to Norfolk Southern and from Norfolk Southern to CSXT.

5. Norfolk Southern assigned the 1984 Agreement, among other agreements, by written contract to Grand Elk Railroad in 2009 as part of a transaction by which Norfolk Southern leased over 100 miles of track in Michigan and Indiana to Grand Elk.

6. Mr. Allan asserts that CSXT has searched its records and failed to find any record of payment from Grand Elk to CSXT for its operation over CSXT lines.

7. Despite CSXT's claims that the 1984 Agreement was not assigned and remained between CSXT and Norfolk Southern, Norfolk Southern has searched its own records and failed to find any record of payment from CSXT to Norfolk Southern after the assignment in 2009 for CSXT's operation over the Norfolk Southern owned/Grand Elk Railroad leased line as provided for in the 1984 Agreement.

8. Further, on my instruction, members of my Joint Facilities Department searched for records of communications between Norfolk Southern and CSXT concerning the trackage rights agreements assigned to Grand Elk Railroad and related billing.

9. I understand that Vyto K. Dailide, a retired member of Norfolk Southern's Joint Facilities Department, is submitting an affidavit concerning conversations he had with John Booth at CSXT about the assignment and a letter Norfolk Southern sent to CSXT in early 2009.

10. Attached as Exhibit A to this Affidavit is an email record found by my staff from Mr. Dailide dated Friday, March 13, 2009, to, among others, CSXT Joint Facilities employees Sheila Gennette, Randy Webb, and John Booth (all of whom reported at the time to CSXT's then-Director of Joint Facilities). In it, Mr. Dailide confirms Grand Elk Railroad's assumption of

operations from Norfolk Southern on March 8, 2009. Mr. Dailide also informs CSXT that Norfolk Southern is pulling the billing for the assigned agreements in Grand Rapids from the Norfolk Southern – CSXT Annual Simplified Bill (the “ASB”), and that CSXT should do the same. Mr. Dailide references that John Booth has copies of the assigned agreements.

11. Subsequent email records found by my staff, attached as Exhibit B to this Affidavit, confirm that Norfolk Southern and CSXT ultimately settled the prorated billing of those assigned agreements, ceasing billing after the transfer to Grand Elk Railroad.

12. Mr. Allan’s affidavit also asserts that CSXT has never objected to NSR’s operations over the CSXT line and currently is willing to allow Norfolk Southern to operate over the CSXT line, subject to Norfolk Southern entering an agreement with CSXT.

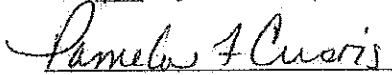
13. As previously mentioned, Norfolk Southern has assigned by written contract its right to operate over the CSXT line to Grand Elk Railroad.

14. Notwithstanding the contractual assignment, CSXT’s proposal that Norfolk Southern could operate over the CSXT line is infeasible and illusory. As a result of the 2009 lease to Grand Elk Railroad, Norfolk Southern does not have any operations within 48 rail miles of Grand Rapids, Michigan. Norfolk Southern’s closest crew base is even further away in Battle Creek, Michigan. In order to operate over the CSXT line, Norfolk Southern would need to taxi a crew from Battle Creek (or another location) to Grand Rapids and back each time traffic needed to move over the 3 mile CSXT line from one Grand Elk Railroad leased line to another and permanently strand at least one locomotive on Grand Elk Railroad or CSXT trackage in Grand Rapids. Such an arrangement is infeasible economically and operationally, a fact understood by CSXT. The infeasibility of such operations is precisely the reason that the trackage rights necessarily were assigned to Grand Elk Railroad as part of the larger lease transaction in 2009.

FURTHER, AFFIANT SAYETH NOT.


Randall W. Hunt

Subscribed and sworn to before me,
this 12 day of January, 2017.



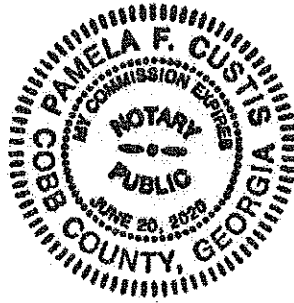


EXHIBIT A

Subject:

FW: GRAND ELK RR GRAND RAPIDS, MI.

From: Dailide, Vyto K

Sent: Friday, March 13, 2009 2:29 PM

To: 'Gennette, Sheila' <Sheila_Gennette@csx.com>

Cc: 'Webb, Randy' <Randy_Webb@csx.com>; 'Booth, John III' <John_Booth@csx.com>; Robbins, Keith <Allan.Robbins@exchange.nscorp.com>; Abron, Lawrence E. <Lawrence.Abron@exchange.nscorp.com>; Thompson, Latoya <Latoya.Thompson@exchange.nscorp.com>; Rackliffe, Jeffrey C. <Jeffrey.Rackliffe@exchange.nscorp.com>; Davidson, Douglas K <Douglas.Davidson@exchange.nscorp.com>; Floyd, Melissa W <Melissa.Floyd@exchange.nscorp.com>; Padgett, Alice M. <Alice.Padgett@exchange.nscorp.com>; Edwards, Peggy . <Peggy.Edwards@exchange.nscorp.com>

Subject: GRAND ELK RR GRAND RAPIDS, MI.

SHEILA,

PER OUR CONVERSATION THE GRAND ELK RR. TOOK OVER AT 1201AM ON 3-8-09.

NS HAS PULLED THE GRAND RAPIDS AGREEMENTS FROM THE ASB AND WILL INCLUDE IN THE NEXT NET SETTLEMENT THE PRORATED CHARGES FOR THE PERIOD FROM 1-1-09 TO 3-7-09.

CSXT SHOULD DO THE SAME WITH THEIRS.

JOHN BOOTH HAS A COPY OF THE AGREEMENTS THAT WERE ASSIGNED TO THE GRAND ELK RR.

VYTO

EXHIBIT B

Subject:

FW: NS7162+7163/CSXT2328 + 2327 GRAND RAPIDS, MI. (2009 ASB)

From: Dailide, Vyto K

Sent: Monday, July 06, 2009 7:11 AM

To: Deas, Alexandria <Alexandria_Deas@csx.com>

Cc: 'Webb, Randy' <Randy_Webb@csx.com>; Gennette, Sheila <Sheila_Gennette@csx.com>; Warner, Stephen G. <Stephen.Warner@exchange.nscorp.com>; Rackliffe, Jeffrey C. <Jeffrey.Rackliffe@exchange.nscorp.com>; Abron, Lawrence E. <Lawrence.Abron@exchange.nscorp.com>; Robbins, Keith <Allan.Robbins@exchange.nscorp.com>; Thompson, Latoya <Latoya.Thompson@exchange.nscorp.com>; McLean, Tami H. <Tami.McLean@exchange.nscorp.com>; Davidson, Douglas K <Douglas.Davidson@exchange.nscorp.com>; Padgett, Alice M. <Alice.Padgett@exchange.nscorp.com>; Schoeneman, Robert L. <Robert.Schoeneman@exchange.nscorp.com>

Subject: NS7162+7163/CSXT2328 + 2327 GRAND RAPIDS, MI. (2009 ASB)

ALEXANDRIA,

CSXT WAS INFORMED IN 2008 THAT THE GRAND RAPIDS, MI. AGREEMENTS WERE ASSIGNED TO THE GRAND ELK RR.

GRAND ELK RR TOOK OVER OM 3-8-09.

PLEASE PRORATE AND REDUCE THE 2009 CHARGES FOR THE PERIOD OF 66 DAYS.

VYTO

NS CONTACT IS VYTO

Subject: FW: NS Exceptions to CSX Rec 2009 ASB
Attachments: NS Exceptions to CSX 2009 ASB.xls

From: Deas, Alexandria [mailto:Alexandria_Deas@csx.com]
Sent: Thursday, July 23, 2009 3:57 PM
To: Dailide, Vyto K <Vyto.Dailide@exchange.nscorp.com>
Cc: Webb, Randy <Randy_Webb@csx.com>; Gennette, Sheila <Sheila_Gennette@csx.com>; Warner, Stephen G. <Stephen.Warner@exchange.nscorp.com>; Rackliffe, Jefferey (Internet) <Jefferey_Rackliffe_INET@csx.com>; Abron, Lawrence E. <Lawrence.Abron@exchange.nscorp.com>; Robbins, Keith <Allan.Robbins@exchange.nscorp.com>; Thompson, Latoya (Internet) <Laytoya_Thompson_INET@csx.com>; McLean, Tami H. <Tami.McLean@exchange.nscorp.com>; Davidson, Douglas K <Douglas.Davidson@exchange.nscorp.com>; Hicks, Alice P <Alice.Hicks@exchange.nscorp.com>; Schoeneman, Robert L. <Robert.Schoeneman@exchange.nscorp.com>; Broll, Linda <Linda_Broll@csx.com>
Subject: NS Exceptions to CSX Rec 2009 ASB

Hi Vyto,

I have taken the time to compile your exceptions to the CSX 2009 Receivable ASB as I understand them. These are the exceptions CSX is prepared to discuss during our meeting next week.

Thank you for your time and consideration,

Alexandria L. Deas | CSX Property Services – Specialist Joint Facility Billing | 904.633.4566 (RNX) | 904.306.5120(FAX)



Please consider the environment before printing this e-mail.

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JF AGMT NO	NS NO	CSXT JF NO	CITY	ST	DESCRIPTION	Comments
NS253	190	JF0156	ATHENS	GA	M/O JOINT TRACKS	REMOVED FROM EARLIER ASB
NS253	190	JF0156	ATHENS	GA	INTEREST ON VALUATION	Pending review to reduce or remove billing
NS384	1575	JF0155	CORDELE	GA	TRACKAGE	REMOVED FROM EARLIER ASB
NS290	1026	JF0816	DALTON	GA	MTCE. OF CROSSING SIGNALS	NS claims this is billing under Simplified Interlocking billing; See Vyto email 7-6-09
NS653X	7108	JF2324	Brighton Park	IL	CROSSING DIAMOND	REMOVED FROM EARLIER ASB
NS902	466	JF2359	PRINCETON	IN	RENT CARGILL TRACKS	NS states crossover has been removed
NS668	7163	JF2327	Grand Rapids MI	MI	Track Butterworth Street - Anne St	NS states their rights were assigned to Grand Elk RR on 3-8-09
NS669	7162	JF2328	Grand Rapids MI	MI	Rent Pleasant St. to Butterworth St.	NS states their rights were assigned to Grand Elk RR on 3-8-09
NS220	1369	JF0293	EAST DURHAM	NC	RENT	NS claims track has been gone since 2003; settled last year**Trackage Rights**
NS228	1365	JF1207	RALEIGH	NC	MTCE. OF INTERLOCKING PLANT	NS claims this is billing under Simplified Interlocking billing
NS241	1360	JF1111	WILSON	NC	MTCE. OF INTERLOCKING PLANT	NS claims this is billing under Simplified Interlocking billing
#N/A	1136	OT 1M120910	CHARLESTON	SC	TRACKS TO REACH TIDEWATER CONN #145	NS states track and connections are gone
#N/A	1136	OT 1M124200	CHARLESTON	SC	RENT326.5' SEQ TRKS ASHLEY RVR BR	NS states track and connections are gone
#N/A	1129	RN 1M124190	CHARLESTON	SC	CROSSING SERVING FORD	NS states crossover was removed 6 years ago
NS401	1591	JF1435	NEWBURY	SC	USE OF TRACKAGE	REMOVED FROM EARLIER ASB
	523	OT1C11690	FRISCO	TN	RENT XYZ TRACKS	REMOVED FROM EARLIER ASB
#N/A	63	n/a	HYDE	TN	DISPATCHING TRAINS	NS began dispatching in 2004
NS394	1599	JF0544	JACKSON. TN	TN	TRACKAGE	Track is overgrown **Trackage Rights**
NS250	3516	JF8482	PEMBERTON	WV	TRACKS	This charge accounted for in increase (JF8483) per Chris Page. Should remove from ASB.
NS250	3518	JF8483	PEMBERTON	WV	INTEREST RENTAL	NS will not consider until \$12 charge (NS3516/CSXT8482) explained.

Subject: FW: NS-CSXT facility locations 09-02-09.xls
Attachments: NS-CSXT facility locations 09-02-09.xls

From: Dailide, Vyto K
Sent: Wednesday, September 23, 2009 3:37 PM
To: 'Deas, Alexandria' <Alexandria_Deas@csx.com>
Cc: 'Gennette, Sheila' <Sheila_Gennette@csx.com>; Webb, Randy <Randy_Webb@csx.com>; Davidson, Douglas K <Douglas.Davidson@exchange.nscorp.com>; Hicks, Alice P <Alice.Hicks@exchange.nscorp.com>; Floyd, Melissa W <Melissa.Floyd@exchange.nscorp.com>; Rackliffe, Jeffrey C. <Jeffrey.Rackliffe@exchange.nscorp.com>; Abron, Lawrence E. <Lawrence.Abron@exchange.nscorp.com>; Robbins, Keith <Allan.Robbins@exchange.nscorp.com>; Thompson, Latoya <Latoya.Thompson@exchange.nscorp.com>; McLean, Tami H. <Tami.McLean@exchange.nscorp.com>
Subject: FW: NS-CSXT facility locations 09-02-09.xls

ALEXANDRIA,

ATTACHED IS A RECAP OF THE VARIOUS CHANGES THAT HAVE TAKEN PLACE OVER THE YEARS AND NS/CSXT HAVE DISCUSSED IN THE LAST 2 MONTHS.

MANY OF THE LINE ITEMS ARE FOR NS INTERNAL RECORDS (MISC. BILLING) ONLY (INDICATES BLANK CREDITS).

THIS UPDATES THE CSXT PREVIOUS PARTIAL SUBMISSIONS.

THIS IS A PRELIMINARY FINAL AND WILL BE FOLLOWED BY A LIST OF FACILITIES FOR WHICH NS DOES NOT HAVE AGREEMENTS FOR.

VYTO

From: McLean, Tami H.
Sent: Wednesday, September 23, 2009 8:08 AM
To: Dailide, Vyto K
Subject: NS-CSXT facility locations 09-02-09.xls

NS VS CSXT 2009
ASB EXCEPTIONS

NS JF#	CSXT JF#	LOCATION	2006	2007	2008	2009	TOTAL	COMMENTS
190	156	Athens, GA						CSXT removed 2005 (\$11,948)
1026	816	Dalton, GA	4262	4376.88	4565.08	4708.43	(\$17,912.38)	Duplicate - ISB - 2003
1026	817	Dalton, GA	1393	1430.34	1491.84	1538.88	5853.88	Incorrect Facility-removed (2003)
1575	155	Cordale, GA						CSXT removed 2005 (\$796)
1589	544	Jackson, TN	9642	9902.12	10327.91	10652.21	(\$40,834.28)	Shortlined 2003 (Western Tenn RR)
4703	7123	Chicago Ridge, IL	2891	2969.29	3096.87		(\$8,957.28)	No basis for billing- 1990 (\$3,184)
7182	2328	Grand Rapids, MI				350.88	(\$350.88)	1-09 + 2-09 (\$3,158)
7183	2327	Grand Rapids, MI				255.76	(\$255.76)	1-09 + 2-09 (\$2302)
83	RM 203021	Hyde, TN	1728	1728	1728	1728	(\$6,912.00)	Dispatching (NS started-2004)
466	2359	Princeton, IN	1800	1800	1800		(\$5,400.00)	CSXT removed (2005) (\$1,800)
523	OTIC 011690	Frisco, TN						CSXT removed - 2005 (\$1,711)
1129	RNIM 124180	Charleston, SC	120	120	120		(\$350.00)	CSXT removed - 2003 (\$120)
1136	OTIM 120910	Charleston, SC	34	34	34		(\$102.00)	CSXT removed - 2003 (\$34)
1136	OTIM 124200	Charleston, SC	111	111	111		(\$332.00)	CSXT removed - 2003 (\$111)
1369	293	East Durham, NC	1501	1501	1501	1501	(\$6,004.00)	CSXT removed - 2003
1691	1435	New Berry, SC						CSXT removed - 2005 (\$10,000)
3516	8482	Pemberton, WVA						CSXT removed part of NS 3618/CSXT 8483 (\$12)
172	OTIM 096600	Cordale, GA				59	(\$59.00)	CSXT shortlined 2004
179	107	Johnson City, TN				232	(\$232.00)	Shortlined Tennessee - 2003
7167	2326	North Lansing, MI				2313	(\$2,313.00)	CSXT Lease 1998
7108	2324	Brighton Park, IL						Removed 1998 (\$1,650)
1360	1111	Wilson, NC	7344	7542.72	7867.06	8114.08	(\$39,367.87)	Duplicate bill ISB-2003
1385	1207	Raleigh, NC	2923	3002.38	3131.48	3229.81	(\$12,365.87)	Duplicate bill ISB - 2003
1359	1102	Fayetteville, NC						CSXT removed from ASB to Actual 9/1/09 (\$2,262)
1359	1100	Fayetteville, NC						CSXT removed from ASB to Actual 9/1/09 (\$3,370)
1359	1215	Fayetteville, NC						CSXT removed from ASB to Actual 9/1/09 (\$2,070)
791	262	Attalia, AL	5889	5842.05	6093.88		(\$17,825.83)	AL-TN RR 2003 (\$8,285)
1095	2731	Coosa Pines, AL			1054.08	1087.18	\$2,141.26	CSXT Math Error
TOTAL							(\$142,500.29)	

Subject:

FW: CSXT VS. NS 2009 ASB Exceptions

From: Deas, Alexandria [mailto:Alexandria_Deas@csx.com]

Sent: Tuesday, November 03, 2009 11:20 AM

To: Bonner, Candice

Cc: Webb, Randy; Gennette, Sheila; Hicks, Alice P; Davidson, Douglas K

Subject: FW: CSXT VS. NS 2009 ASB Exceptions

Importance: High

Thank you very much for providing this information Candice. It is very helpful.

CSX will credit NS \$185 for Grand Rapids, MI.

CSX will credit NS \$45,766 for Savannah, GA.

CSX will not pay \$130,972 for Youngstown, OH -- CSX takes exception as communicated in previous emails, resolution may be agreed upon at later date. Sheila Gennette is primary contact.

CSX will not pay \$11,669 for Jacksonville, FL -- CSX takes exception as communicated in previous emails, resolution may be agreed upon at later date. Alex Deas is primary contact.

Alexandria L. Deas

From: Bonner, Candice [<mailto:candice.bonner@nscorp.com>]

Sent: Tuesday, November 03, 2009 10:55 AM

To: Deas, Alexandria

Cc: Webb, Randy; Gennette, Sheila; Hicks, Alice P; Davidson, Douglas K

Subject: FW: CSXT VS. NS 2009 ASB Exceptions

Importance: High

Alex,

Based on the original NS invoice #1907006226, in the amount of \$826,659, your exception spreadsheet has the following errors:

1. JF6121/JB9848 -- Grand Rapids MI: CSX was only charged \$288 on the original invoice. Pro-rated amount is \$209. Credit due CSX \$79, not \$264
2. JF191/JB5017 -- Savannah GA: Credit for \$45,766 was already included on the original invoice. Only additional credit of \$13,737 due CSX, not the entire \$59,503
3. JF1000/JB5618 -- Jacksonville FL: Per Vyto, he did not receive a response back on the email below and CSX does owe NS for Jacksonville FL. Due NS \$11,669.
4. JF6298/JB5424 -- Youngstown OH: Per Vyto, he did not receive a response back on the email below and CSX does owe NS for Youngstown OH. Due NS \$130,972.

Based on the above, I have attached a revised spreadsheet showing the balance of \$188,592 due to NS.

I have also attached a copy of your exception spreadsheet and the original invoice for your reference.

Thanks

Candice Bonner
Chief Joint Facility Accountant
Norfolk Southern Corporation
Miscellaneous Billing, Box 34
110 Franklin Road SE
Roanoke, VA 24042-0034
540.981.4126
candice.bonner@nscorp.com

From: Dailide, Vyto K [<mailto:Vyto.Dailide@exchange.nscorp.com>]
Sent: Friday, October 16, 2009 3:12 PM
To: 'Deas, Alexandria'
Cc: Webb, Randy; Robbins, Keith; Rackliffe, Jefferey (Internet); Abron, Lawrence E.; Thompson, Latoya (Internet); McLean, Tami H.; Davidson, Douglas K; Hicks, Alice P; Bonner, Candice; Gennette, Sheila; Warner, Stephen G.
Subject: RE: CSXT VS. NS 2009 ASB

ALEXANDRIA,

YOUR MATH MAKES NO SENSE.

CHARLOTTESVILLE, VA, HANNA, IN., ORANGE, VA., SAVANNAH, GA., SELMA, AL., AND TOLEDO, OHIO ARE CORRECT AND CREDITS WERE GIVEN TO CSXT ON THE 9-22-09 REVISED 2009 ASB.

GRAND RAPIDS MAKES NO SENSE, BUT MISC. BILLING CAN FIGURE THIS ONE OUT. CSXT OWES NS FOR THESE 2 AGREEMENTS FROM 1-1-09 TO 3-08-09.

JACKSONVILLE, FL. AS PER OUR MEETING SEVERAL MONTHS AGO (FOR WHICH CSXT STILL HAS NOT PRODUCED A DOCUMENT FOR). EITHER PARTY CAN REVERT BACK TO ACTUAL AGREEMENT TERMS, BUT YOU CANNOT GO RETRO BACK. CSXT OWES FOR 2009 AND NS AGREES THAT WE WILL BILL ACTUAL STARTING 1-1-2010.

YOUNGSTOWN, OHIO WAS EXPLAINED ON NUMEROUS OCCASIONS TO CSXT BY BOTH MYSELF AND KEITH ROBBINS. CSXT FAILED TO RESPOND. DO YOU HAVE A DIFFERENT AGHREEMENT?
CSXT PER TERMS OF THE AGREEMENT PAYS 3 ITEMS:

#1 TRACKAGE BETWEEN YOUNGSTOWN AND SHENANGO.

#2 MINIMUM TRACKAGE RIGHTS ARE DUE.

#3 MAINTENANCE WHICH WAS FLAT RATED

UNLIKE OTHER TRACKAGE AGREEMENTS THAT ONLY INCLUDED MAINTENANCE AND WERE CONVERTED TO TRACKAGE, THIS AGREEMENT ALREADY INCLUDED CLAUSES FOR BOTH ITEMS.

CSXT OWES NS \$130,972 FOR YOUNGSTOWN, \$11,669 FOR JACKSONVILLE, AND WHATEVER THE MATH IS FOR GRAND RAPIDS.

VYTO

From: Deas, Alexandria [mailto:Alexandria_Deas@csx.com]
Sent: Friday, October 16, 2009 2:36 PM
To: Dailide, Vyto K
Cc: Webb, Randy; Robbins, Keith; Rackliffe, Jefferey (Internet); Abron, Lawrence E.; Thompson, Latoya (Internet); McLean, Tami H.; Davidson, Douglas K; Hicks, Alice P; Bonner, Candice; Gennette, Sheila
Subject: RE: CSXT VS. NS 2009 ASB

Please see attached spreadsheet detailing CSX exceptions. The remainder will be paid on this month's Net Settlement.

INVOICE AMOUNT			\$ 826,659
REDUCTION			\$ 314,319
TOTAL PAYMENT			\$ 512,340

Alexandria L. Deas

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Subject: FW: Remaining balances for 2009 ASB
Attachments: Book19.xls

From: Gennette, Sheila [mailto:Sheila_Gennette@csx.com]
Sent: Thursday, March 18, 2010 4:52 PM
To: Davidson, Douglas K <Douglas.Davidson@exchange.nscorp.com>; Padgett, Alice M. <Alice.Padgett@exchange.nscorp.com>; Abron, Lawrence E. <Lawrence.Abron@exchange.nscorp.com>; Thompson, Latoya (Internet) <Laytoya_Thompson_INET@csx.com>; Robbins, Keith <Allan.Robbins@exchange.nscorp.com>
Cc: Webb, Randy <Randy_Webb@csx.com>; Potter, Philip <Philip_Potter@csx.com>
Subject: Remaining balances for 2009 ASB

I believe the attached addresses the remaining balances for the ASB for both of us. Our receivable balance will be reduced to the \$14K shown on the attached. I apologize if the existing large balance created some confusion.

I think Vyto handled most of the issues on the attached and Alex handled our review. Let me know if I am missing any information concerning these issues as I had to interpret Alex's notes concerning the positions for both of us.

Thanks

Sheila

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CSX ASB

NS JF#	CSXT JF#	LOCATION	2006	2007	2008	2009	TOTAL	NS COMMENTS	CSX COMMENTS
7162	2328	Grand Rapids, MI				350.88	\$ 350.88	1-09 + 2-09 (\$3,158)	NS owes Prorated amount Showr
7163	2327	Grand Rapids, MI				255.76	\$ 255.76	1-09 + 2-09 (\$2302)	NS owes Prorated amount Showr
466	2359	Princeton, IN	1800	1800	1800		\$ 5,400.00	CSXT removed (2005) (\$1,800)	Payment is to retain future access to Cargill
1369	293	East Durham, NC	1501	1501	1501	1501	\$ 6,004.00	CSXT removed - 2003	Interest Rental Payment
7167	2329	North Lansing, MI				2313	\$ 2,313.00	CSXT Lease 1996	NS Regularly uses tracks per RM Tom Bown
							\$ 14,323.64	Balance shown on aging report will be reduced to reflect this total	

NS ASB

NS JF#	CSXT JF#	LOCATION	2006	2007	2008	2009	TOTAL	NS COMMENTS	CSX COMMENTS
6298	JB5424	YOUNGSTOWN, OH	\$ 32,743	\$ 32,743	\$ 32,743	\$ 32,743	\$ 130,972		NS receiving compensation on current Youngstown to Ashtabula trackage rights agreement which exceeds minimum payment
							\$ 130,972.00		

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127
GRAND ELK RAILROAD, INC.
-- ACQUISITION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY

VERIFIED EMERGENCY PETITION FOR EXEMPTION OF
GRAND ELK RAILROAD, INC.

EXHIBIT F

CONRAIL- 1 AND CONRAIL-2
FEDERAL REGISTER NOTICES

49 FR 5002-01, 1984 WL 127773(F.R.)
NOTICES
INTERSTATE COMMERCE COMMISSION
[Finance Docket No. 30385]

Consolidated Rail Corp.; Trackage Rights Exemption Over Chesapeake and Ohio Railway Co.; Exemption

Thursday, February 9, 1984

***5002 January 30, 1984.**

Consolidated Rail Corporation (Conrail) has filed a notice of exemption under 49 CFR 1180.4(g) to permit relocation of a line of railroad. The relocation will be accomplished by Conrail: (1) Acquiring trackage rights over a line of the Chesapeake and Ohio Railway Company (Chessie) in the city of Grand Rapids, MI, and (2) abandoning its own line connecting the same points as the Chessie line. This abandonment will be the subject of a separate proceedings. The trackage rights agreement grants Conrail the right to operate its freight trains, cars, and engines, in either direction over the following Chessie lines in Grand Rapids: (1) Beginning at the C&O crossover in Grand Rapids, between Point of Switch at Valuation Station 8021+90 and the Point of Switch at Valuation Station 8019+38, near Grandville Avenue, a distance of 202 feet, and (2) between the Point of Switch at Valuation Station 8040+44 and Valuation Station 8072+33, near Butterworth and Fulton Streets, a distance of 3,199 feet.

This joint project is a relocation of a line of railroad in cooperation with an effect by Grand Rapids to revitalize its central business district. It does not disrupt service to shippers and is an exempt transaction pursuant to 49 CFR 1180.2(d)(5).

As a condition to use of this exemption, any employees affected by the trackage rights agreement shall be protected pursuant to Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified by Medocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980).

By the Commission, Richard Lewis, Acting Director, Office of Proceedings.

James H. Bayne,

Acting Secretary.

[FR Doc. 84-3511 Filed 2-8-84; 8:45 am]

BILLING CODE 7035-01-M

End of Document

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49 FR 18053-01, 1984 WL 141545(F.R.)
NOTICES
INTERSTATE COMMERCE COMMISSION
[Finance Docket No. 30449]

Rail Carriers; Consolidated Rail Corporation; Trackage Rights
Exemption; Over Chesapeake and Ohio Railway Company; Exemption

Thursday, April 26, 1984

***18053 April 19, 1984.**

Consolidated Rail Corporation (Conrail) has filed a notice of exemption under 49 CFR 1180.4(g) to permit relocation of a line of railroad. The relocation will be accomplished by Conrail: (1) Acquiring trackage rights over a line of the Chesapeake and Ohio Railway Company (Chessie) in the city of Grand Rapids, MI, and (2) abandoning its own line connecting the same points as the Chessie line. The abandonment will be the subject of a separate proceeding. The trackage rights agreement grants Conrail the right to operate in either direction over the following Chessie lines in Grand Rapids: beginning at Chessie's Valuation Station 8071+35+, near Butterworth Street, to Valuation Station 8200+75+, north of Ann Street, a distance of approximately 2.45 miles, including use of certain connections.

This joint project is a relocation of a line of railroad in cooperation with the city of Grand Rapids to revitalize its central business district. It does not disrupt service to shippers and is an exempt transaction pursuant to 49 CFR 1180.2(d)(5).

As a condition to use of this exemption, any employees affected by the trackage rights agreement shall be protected pursuant to Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc.—Lease and Operate, 360 ICC 653 (1980).

By the Commission.

James H. Bayne,

Acting Secretary.

[FR Doc. 84-11227 Filed 4-25-84; 8:45 am]

BILLING CODE 7035-01-M

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36127
GRAND ELK RAILROAD, INC.
-- ACQUISITION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY

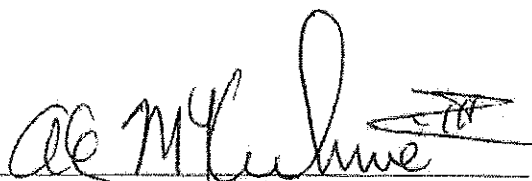
VERIFIED EMERGENCY PETITION FOR EXEMPTION OF
GRAND ELK RAILROAD, INC.

VERIFICATION

VERIFICATION

State of Kansas)
) ss:
County of Crawford)

Arthur E. McKechnie III, being duly sworn, deposes and says that he is Chief Commercial Officer of Grand Elk Railroad, Inc., that he has read the foregoing Emergency Petition for Exemption, and knows the facts asserted therein, and that the same are true as stated.


Arthur E. McKechnie III

SUBSCRIBED AND SWORN TO
before me this 9th day
of June, 2017.


Notary Public

My Commission expires: 5-19-2021

