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December 3, 2018



VIA FEDEX

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

**Re: KEAN BURENGA AND CHESAPEAKE AND DELAWARE, LLC
– CONTINUANCE IN CONTROL EXEMPTION –
DOVER AND DELAWARE RIVER RAILROAD, LLC
STB Docket No. 36259**

Dear Ms. Brown:

Enclosed for filing are the original and 10 copies of a Petition for Exemption being filed on behalf of Dover and Delaware River Railroad, LLC. Also enclosed are 20 additional copies of the map. A check in the amount of \$11,100.00 representing the filing fee for this Petition is also enclosed.

Please time stamp the extra copy of the Petition provided herewith to indicate receipt of all of the foregoing, and return it to me in the stamped self-addressed envelope provided for your convenience.

FEE RECEIVED
December 4, 2018
SURFACE
TRANSPORTATION BOARD

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FILED
December 4, 2018
SURFACE
TRANSPORTATION BOARD

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Please let me know if there are any questions regarding this filing.

Respectfully,

CLARK HILL PLC



Eric M. Hocky

EMH/dml
Encls.



BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36259

**KEAN BURENGA AND CHESAPEAKE AND DELAWARE, LLC
- CONTINUANCE IN CONTROL EXEMPTION -
DOVER AND DELAWARE RIVER RAILROAD, LLC**

PETITION FOR EXEMPTION

EXPEDITED CONSIDERATION REQUESTED

(contains color images)

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Dated: December 3, 2018

Attorneys for
Kean Burenga and Chesapeake and
Delaware, LLC

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36259

**KEAN BURENGA AND CHESAPEAKE AND DELAWARE, LLC
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PETITION FOR EXEMPTION

EXPEDITED CONSIDERATION REQUESTED

Kean Burenga, an individual and a non-carrier (“Burenga”) and Chesapeake and Delaware, LLC (“CAD”), a non-carrier holding company, hereby petition for an exemption under 49 U.S.C. §10502 and 49 C.F.R. §1121 from the provisions of 49 U.S.C. §§11323-11324 to enable CAD, and Burenga to the extent necessary, to control Dover and Delaware River Railroad, LLC (“DDRR”), together with the other railroad(s) currently controlled by Burenga and CAD. This Petition is related to the notice of exemption being filed by DDRR in STB Docket No. FD 36258 with respect to DDRR’s lease from Norfolk Southern Railway Company (“NSR”) and acquisition of local trackage rights from New Jersey Transit Corporation (“NJT”) and NSR, over a total of 107.9 miles of interconnected tracks in northern New Jersey. Because CAD and Burenga cannot control additional railroads without the prior approval of the Board, they are requesting that the Board grant the exemption requested herein prior to the proposed commencement of operations by DDRR.

In support of their request for exemption, CAD and Burenga represent as follows:

THE PROPOSED TRANSACTION

CAD currently controls through equity ownership one Class III railroad, Dover and Rockaway River Railroad, LLC (“DRRV”). DRRV operates in New Jersey, and is shown on the map attached hereto as Exhibit A.

Burenga has authority, to the extent required, to control three Class III railroads, Belvidere & Delaware River Railway Company, Inc. (“BDRV”), Black River & Western Corp. (“BRW”) and DRRV. *See Kean Burenga – Continuance in Control Exemption – Dover and Rockaway River Railroad, LLC, Belvidere & Delaware River Railway Company, Inc., and Black River & Western Corp.*, STB Docket No. 36125 (served June 16, 2017).¹ All of the railroads operate in New Jersey, and are shown on the map attached hereto as Exhibit A.

DDRR is a non-carrier that is concurrently filing a notice of exemption to lease of rail lines from NSR and acquire interrelated local trackage rights from NJT and NSR. DDRR will become a Class III common carrier by railroad subject to 49 U.S.C. Subtitle IV, Chapter 105 upon the commencement of operations. A map of the lines to be operated by DDRR is attached as Exhibit A. As can be seen on the map, the lines to be operated by DDRR connect with the lines of DRRV.²

DDRR is a wholly-owned subsidiary of CAD. Burenga owns 20% of the equity of CAD (there are four other equity holders), and is one of five directors. Burenga is the President of CAD, and the President of DDRR. He is not the General Manager. He does not have a contract

¹ In the proceeding, Burenga raised the question whether his minority equity interest and management positions in BRW and DRRV constituted “control.” The STB notice noted in footnote 1 that the notice was not a ruling on whether Burenga controls, or needs authority to control, either BRW or DRRV.

² The lines to be operated by DDRR, and the lines operated by BDRV both connect with NSR at Phillipsburg although they will not have the ability to directly connect with one another.

for his services as President. As such, Burenga does not believe that he “controls” DDDR, directly or indirectly. However, Burenga joins in this petition in the event that the Board were to determine that his holdings and positions give Burenga control of DDDR.

Because CAD and Burenga control other common carriers, they need authority from the Board under 49 U.S.C. §11323(a)(5) to continue in control of DDDR when DDDR becomes a carrier. The continuance in control does not involve a Class I carrier (only Class III carriers are involved). If not for the fact that the lines to be operated by DDDR connects with another Class III carrier already controlled by CAD and Burenga, this transaction would be an exempt transaction under 49 C.F.R. §1180.2(d)(2). Since the transaction is not eligible for the class exemption notice procedures, CAD and Burenga are filing this Petition for Exemption.

ADDITIONAL INFORMATION

CAD and Burenga provide the following additional information about the transaction to enable the Board to process this Petition³:

1180.6(a)(1)

(i) The proposed transaction as described above involves the continuance in control of DDDR, a non-carrier, when DDDR becomes the operator of the Rail Lines. Because CAD already owns one railroad, its continuance of control of DDDR when DDDR becomes a carrier would require authorization under 49 U.S.C. §11323(a)(5) or an exemption therefrom. Similarly, because Burenga is the owner of and in control of at least one other carrier, if it were determined that he is in control of DDDR, his continuance in control of DDDR would also require authorization or an exemption.

³ This Additional Information is the information that would have been required under 49 C.F.R. §1180.4(g), if the transaction were eligible for the class exemption.

The full name and address of the petitioners are: (a) Kean Burenga, 20 Toad Lane, Ringoes, NJ 08551; and (b) Chesapeake and Delaware, LLC, 24006 Old Meadow Road, Seaford, DE, 19973.

The name, address and telephone number of petitioners' counsel who should receive correspondence is: Eric M. Hocky, Esquire, Clark Hill PLC, One Commerce Square, 2005 Market Street, Suite 1000, Philadelphia, PA 19103; (215) 640-8500.

(ii) As indicated in the request for expedited consideration set forth below, CAD and Burenga would like to have authority to control DDDR as soon as possible so that DDDR can commence operations. DDDR's exemption to operate will be effective in 30 days; however, it will not commence operations until CAD and Burenga have received the exemption requested herein.

(iii) The purpose of the transaction is to allow CAD, a non-carrier owner of a connecting railroad, and Burenga, an individual and a non-carrier that controls one or more other carriers, to continue in control of DDDR when DDDR begins to operate as a carrier. The continuance in control will allow DDDR to take advantage of CAD and Burenga's administrative, financial, marketing and operational experience in the local area, thus promoting the ability of DDDR to provide safe and efficient service to their shippers.

1180.6(a)(5)

DDRR will operate solely in the State of New Jersey. The railroad that CAD currently controls (DRRV), and the railroads that Burenga currently controls or may be deemed to control (BDRV, BRW and DRRV), also operate in New Jersey. As noted previously, the lines to be operated by DDDR connect with the lines of DRRV.

1180.6(a)(6)

A map showing the Rail Lines to be operated by DDDR is attached as Exhibit A. The map also shows the lines operated by the other railroads controlled by CAD and Burenga. Twenty additional copies of the map are also being submitted.

1180.6(a)(7)(ii)

There are no documents covering the common control of DDDR and DRRV by CAD, nor any covering the common control of DDDR with BDVR, BRW, or DRRV by Burenga.

Interchange Commitments

Petitioners do not believe that the Board's interchange disclosure requirements are intended to apply to equity control transactions such as this one in which no new interchange commitment is being imposed as part of the control transaction. *See generally* 49 C.F.R. §1180.4(g)(4) "Transactions *imposing* interchange commitments." *See also Information Required in Notices and Petitions Containing Interchange Commitments*, STB Docket No. EP714 (served September 5, 2013), slip op. at 1 ("disclosure requirements for notices and petitions for exemption where *the underlying lease or line sale* includes an interchange commitment"), p.9 ("regulations adopted here will affect all railroads filing notices and petitions for exemption for *sales and leases* that contain interchange commitments") (emphasis added).

This Petition for Exemption covers only the continuance in control of DDDR and is not a direct purchase or lease of a rail line. No interchange commitment is being imposed in connection with the continuance in control of DDDR.⁴

⁴ DDDR's lease with NSR includes an interchange commitment, and its notice of exemption complies with the Board's interchange commitment disclosure requirements.

COMMON CONTROL SHOULD BE EXEMPTED

Common control of a rail carrier by a person who is not a rail carrier but that controls a number of railroads is subject to the prior approval and authorization of the Board under 49 U.S.C. §11323(a)(5). Thus, unless the exemption requested herein is granted, the proposed control of DDDR by CAD and by Burenga would require that they file an application under 49 C.F.R. §1180. Since the transaction does not involve the merger of two Class I railroads, however, the Board would be required to approve the application unless it were to find both:

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

See 49 U.S.C. §11324(d).

The Board is directed by 49 U.S.C. §10502 to grant an exemption from regulation if it finds that (1) regulation is not necessary to carry out the rail transportation policy ("RTP") of 49 U.S.C. §10101, and (2) either the transaction is limited in scope or regulation is not needed to protect shippers from the abuse of market power. The Interstate Commerce Commission held:

In determining whether regulation of a transaction proposed for exemption under §10505 [now 10502] is necessary to carry out the RTP, our analysis generally focuses on the criteria relating to the underlying statute from which exemption is sought. We need not extend our analysis beyond what we would address in an application proceeding itself. See Finance Docket No. 31493, Blackstone Cap. Partners -- Cont. Exempt. -- CNW Corp., Et Al. (not printed), served July 5, 1989, at 2. Section 10505 provides a shortcut analysis to see if regulation -- in this case under §11344(d)[now 11324(d)] -- is necessary. If §11344(d) does not require review of particular issues, neither does the §10505 process.

Indiana R. Co. – Acq. & Oper. – Illinois Central R. Co., 6 ICC 2d 1004, 1006 (1990), *aff'd sub nom.*, *Village of Palestine v. ICC*, 936 F. 2d 1335 (D.C. Cir 1991).

As noted above, the inquiry under Section 11324(d) focuses on the lessening of competition and anticompetitive effects. Here, no such effects will be likely.

Further, grant of the requested exemption would also be fully consistent with the standards of 49 U.S.C. §10502. Detailed scrutiny of a full application is not required to carry out the transportation policy of 49 U.S.C. §10101. The grant of an exemption to CAD and Burenga will minimize the need for Federal regulatory control (49 U.S.C. §10101(2)), foster sound economic conditions in transportation (49 U.S.C. §10101(5)), encourage efficient management of railroads (49 U.S.C. §10101(9)), and provide for expeditious handling and resolution of all proceeding (49 U.S.C. §10101(15)). Moreover, the grant of the exemption will not adversely affect any of the other 15 items which have been made a part of rail transportation policy by 49 U.S.C. §10101.

Additionally, the transaction is clearly limited in scope. The lines to be leased by DDDR are only 107.9 miles long and are all in a small region of one state. DDDR will have less than \$5,000,000 in revenues. While DDDR will connect directly with DRRV, it also has less than \$5,000,000 in revenues and operates in the same region, and the access of shippers will not be reduced. DDDR will merely substitute for NSR in handling of traffic over the leased and trackage rights lines, and between DRRV and NSR. Although the exemption analysis does not require further inquiry, it is also clear in this proceeding that the transaction will not result in any abuse of market power. As noted above, no competitive harm will result (shippers will not lose access to any connecting Class I carriers) and there is no threat of abuse of shippers. By

allowing CAD and Burenga to assume control of DDDR, together with the other local carriers in their respective control, the carriers will be able to better coordinate service moving to and from NSR. Further, DDDR will benefit from the experience and local marketing contacts of the other railroads in the family to develop additional local business in the region.

Granting of the petition would be consistent with grant of exemptions in other proceedings where the continuance in control transaction involved control of a Class III carrier that connected with other Class III carriers in the family of the petitioner. *See Genesee & Wyoming Inc. – Acquisition of Control Exemption – Atlantic Western Transportation, Inc. and Heart of Georgia Railroad, Inc.*, STB Docket No. FD 36105 (served April 18, 2017); *Rail America, Inc., et al – Control Exemption – Marquette Rail, LLC*, STB Docket No. 35592 (served April 13, 2012); and *Twin Cities & Western Railroad Company, et al – Continuance in Control Exemption – Sisseton Milbank Railroad Company*, STB Docket No.. FD 35642 (served July 18, 2012).

EMPLOYEE PROTECTION

Petitioners recognize that under 49 U.S.C. §10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Because this transaction will involve the control of Class III carriers only, this transaction may not be subject to labor protection. *See* 49 U.S.C. §11326(c).

ENVIRONMENTAL AND HISTORIC REPORTS

The proposed transaction involves only the continuance in control of a non-carrier when it becomes a carrier, and will not affect the level of operations on the Rail Lines to be operated by DDDR, or the rail lines operated by any other railroads controlled by CAD or Burenga. As

such, the proposed transaction should be exempt from the Board's environmental reporting requirements pursuant to 49 C.F.R. §1105.6(c)(2)(ii). Further, the proposed transaction is exempt from the historic preservation reporting requirements since the proposed transaction will not substantially change the level of operations over, or maintenance of, the Rail Lines be operated by DDDR, or the rail lines operated by any other railroads controlled by CAD or Burenga. *See* 49 C.F.R. §1105.8(b)(3).

EXPEDITED CONSIDERATION

Burenga and CAD request expedited consideration of this Petition so that the related lease and trackage rights exemption sought by DDDR in STB Docket No. FD 36258 can become effective as soon as possible. NJT will be implementing PTC on the Trackage Rights Lines in 2019, and DDDR wants to begin operations as soon as possible so that it can have the maximum amount of time to coordinate implementation of the PTC installation.

The DDDR exemption will be effective thirty days from the filing of its notice, i.e., on or about January 3, 2019. Continuance in control class exemptions take effect on the same schedule as lease exemptions - thirty days after filing. Although the continuance in control in this proceeding does not qualify for the exemption because of the connection between DDDR and the Class III carrier DRRV already in their control, as discussed above, Burenga and CAD believe that they are entitled to the exemption on the same basis as that underlying the class exemption. Granting this Petition on an expedited basis is consistent with the goals of the RTP, 49 U.S.C. §10101, (2) to minimize the need for regulatory control, (7) to reduce regulatory barriers to entry, (8) to operate transportation facilities and equipment without detriment to public health and safety, and (15) to provide for expeditious handling of proceedings.

CONCLUSION

For the foregoing reasons, CAD and Burenga, to the extent necessary, request that the Board, under 49 U.S.C. §10502, exempt from regulation under 49 U.S.C. §§11323-11324 their proposed continuance in control of DDDR when it becomes a carrier, together with the control of the other carriers already controlled by them, and that the exemption be granted on an expedited basis.

Respectfully submitted,



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Dated: December 3, 2018

Attorneys for
Kean Burenga and Chesapeake and
Delaware, LLC

VERIFICATION

I, Kean Burenga, individually and as President of Chesapeake and Delaware, LLC, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on December 3, 2018.

Kean Burenga

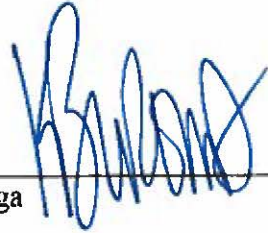


EXHIBIT A

MAP

220642734.3

Chesapeake & Delaware LLC

