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Meeting under Section 5, STB Reauthorization Act

August 10, 2017

Present: Members Begeman, Elliott, and Miller

Members' Staff: Ryan Lee, Ellen Erichsen, Janie Sheng, Alison Graab

Agency Staff: Craig Keats, Rachel Campbell, Jonathon Binet, Lisa Novins,
Chip Vance

Topic: FD 36127, *Grand Elk Railroad, Inc. – Petition for Acquisition Exemption –
Norfolk Southern Railway Company*

FD 36127 (Sub-No. 1), *Grand Elk Railroad, Inc. – Petition for Board Order – Norfolk
Southern Railway Company*

Summary of the Matters Discussed, Prepared by General Counsel Craig Keats:

At this meeting staff briefed Board Members on a request by Grand Elk Railroad, Inc. (GDLK) for a Board order directing CSX Transportation Inc. (CSXT) to permit GDLK to operate over trackage rights that CSXT granted to Norfolk Southern Railway Company (NSR). The case arises out of another Board proceeding in which the Board authorized GDLK to acquire prospectively NSR's trackage rights over approximately 3.3 miles of CSXT rail line in Grand Rapids, Mich. GDLK had been operating the rights since 2009, but it had not obtained operating authority from the Board, and CSXT purportedly did not explicitly give written authorization for NSR to transfer the rights. CSXT permitted GDLK to continue to use NSR's trackage rights for a period after the trackage rights agreement between CSXT and NSR had expired.

In related court litigation, a court in Michigan found that because the Board's authorization was prospective only, there was no need for it to decide whether CSXT had, in some way, agreed to permit NSR to assign its rights to GDLK. All parties to the case before the Board have agreed that, under Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946) ("Tex-Mex"), CSXT could not oust NSR without STB authorization even after the contract permitting the trackage rights had expired. GDLK in this case argues that, under Tex-Mex, CSXT should not be able to oust it either.

Staff briefed the Members on the following matters:

- The background of the Board's prior prospective-only authorization to GDLK including the relationships among the three carriers.
- The Michigan court's ruling.
- The relationship between the Board's grant of authority and the need for rights under state law to access the rail property.
- The scope of GDLK's operations and how they are affected if it cannot operate over the track involved here.
- What Tex-Mex means and how it has been applied.
- How a carrier to which Tex-Mex applies could be ousted.
- Possible options to resolve the matter.