

BEFORE THE
SURFACE TRANSPORTATION BOARD

243743

ENTERED
Office of Proceedings
June 12, 2017
Part of
Public Record

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

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

**VERIFIED PETITION FOR BOARD ORDER OF
GRAND ELK RAILROAD, INC.**

EXPEDITED CONSIDERATION REQUESTED

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Dated: June 12, 2017

FILED
June 12, 2017
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
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Pursuant to 49 U.S.C. § 1321(b)(4), Grand Elk Railroad, Inc. ("GDLK") submits this Petition for a Board Order ("PBO") directing the restoration of GDLK operations over a 3.3-mile of railroad line (the "CSXT Line") in Grand Rapids, Michigan, owned by CSX Transportation, Inc. ("CSXT"). For more than 30 years GDLK and its predecessors conducted uninterrupted and uncontested operations over the CSXT Line as an integral part of their rail service in Grand Rapids until abruptly cut off last year by CSXT. The requested order is necessary to avoid further irreparable injury to GDLK and, even more importantly, its customers and the shipping public in general in the greater Grand Rapids metropolitan area. If the Board grants GDLK's simultaneously-filed Emergency Petition for Exemption in Docket No. FD 36127, then GDLK believes that the requested order will be necessary to keep CSXT from – (a) impeding the orderly transfer to GDLK of common carrier rights and obligations on the CSXT Line presently held by Norfolk Southern Railway Company ("NSR"); and/or (b) hindering or preventing GDLK from resuming such operations in keeping with three decades of previous railroad operating and service experience. As demonstrated herein, all of the factors the STB must consider in issuing such an order weigh heavily in favor of GDLK.

BACKGROUND

GDLK simultaneously is filing in sister-docket No. FD 36127 an Emergency Petition for Exemption (the “Emergency Petition”) to authorize GDLK’s acquisition of NSR’s unextinguished common carrier rights and obligations on the CSXT Line. The Emergency Petition contains a detailed description of the parties and the circumstances leading to that petition and this PBO. As such, GDLK incorporates herein by reference the background section of the Emergency Petition.

As is reflected herein, in the simultaneously-filed FD 36127 proceeding, and in an earlier proceeding before the Board – Grand Elk Railroad, Inc. – Acquisition of Incidental Trackage Rights Exemption – Norfolk Southern Railway Company, Docket No. FD 35187 (Sub-No. 1) (“Grand Elk Notice”) – GDLK believed that it had obtained by assignment sufficient rights entitling it to operate over the CSXT Line as part of a railroad line lease transaction entered into with NSR in 2008, and pursuant to which GDLK commenced operations over the CSXT Line in March of 2009. As it turned out, however, GDLK had inadvertently failed at the time of the assignment (which CSXT now contends did not occur and could not have occurred as a matter of contract law) to obtain Board authority to acquire and operate the now-disputed trackage rights. Without those trackage rights, certain NSR-owned line segments north of the CSXT Line leased to GDLK – specifically Kalamazoo Industrial Track, Comstock Industrial Track, and Richmond Street Connecting Track¹ – would be left isolated from the balance of the GDLK system. GDLK sought to remedy its oversight, as is fully chronicled in the record of last year’s Grand Elk Notice proceeding, and the Board ultimately upheld GDLK’s invocation of the

¹ See Grand Elk Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company, Docket No. FD 35187 (STB served November 17, 2008) (“GDLK Lease”) at 1-2 (line segments 3 and 10).

class exemption in a decision served on November 1, 2016 (the “November 1 Decision”).

GDLK also sought to have its exemption take effect retroactively to the commencement of lease operations in 2009, but the Board denied that request.

Concurrently with its efforts in the Grand Elk Notice proceeding, GDLK (along with NSR) sought to resolve their dispute with CSXT in Michigan state court, a step that the Board seemed to ratify in its November 1 Decision. On June 1, 2017, the 17th Circuit Court for Kent County, Michigan (the “Michigan State Court”) issued a decision (the “June 1 State Court Decision” – attached as Exhibit B to the accompanying Emergency Petition) that NSR’s purported assignment of trackage rights interests in the CSXT Line was not enforceable because the underlying agreements have expired, and, thus, the trackage rights agreements are no longer enforceable as a matter of state contract law. A more detailed synopsis of the June 1 State Court Decision is contained in the Emergency Petition.

The practical ramifications of the June 1 State Court Decision are as follows:

- NSR, not GDLK, appears to possess common carrier rights and obligations over the CSXT Line;
- the contracts governing the assignment of NSR’s trackage rights interests in the CSXT Line, and any CSXT right of consent to an assignment (or entitlement to withhold consent in good faith) that was contained in those agreements, have expired;
- NSR’s common carrier rights and obligations survive pursuant to *Texas Mexican*;² but they are no longer tethered to the trackage rights agreements establishing those rights and obligations in the first place because those trackage rights contracts have expired;
- In the absence of an extant contract, there is nothing more for the Michigan State Court to resolve or adjudicate;
- NSR possesses common carrier rights and obligations over the CSXT Line that it does not need and cannot effectively exercise to the benefit of the

² Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946) (“*Texas Mexican*”).

shipping public, whereas, in the hands of GDLK, the trackage rights operations restore a 30-year-old competitive status quo in Grand Rapids; and

- If NSR and GDLK were to agree to it, NSR could resume operation of GDLK's leasehold lines, and, in so doing, NSR could operate over the CSXT Line as part of its re-integrated operations; similarly had there never been a lease transaction with GDLK, a new short line operator likely would be granted permissive Board authority to operate the lines currently leased to GDLK, including the authority to assume NSR's trackage rights interests by incidental assignment.

As indicated above, GDLK commenced operations in March of 2009. From the outset, GDLK ran its own trains over the CSXT Line – a strategic link between GDLK's leased rail lines to the south of the CSXT Line and GDLK's leased lines to the north. See map attached as Exhibit A. For over 7 years, CSXT actively cooperated in GDLK's use of the CSXT Line.

CSXT dispatches the CSXT Line. No trains can operate over the CSXT Line unless or until a CSXT dispatcher authorizes the train to operate over the track. For a roughly 7-year period ending in August of last year, GDLK requested and received authorization from CSXT's dispatchers to operate over the CSXT Line approximately five days per week (Monday through Friday) every week involving some 1,750 discrete train movements. CSXT never withheld authorization to GDLK or complained of GDLK's operations until last year.

CSXT has repeatedly and in writing acknowledged GDLK's trackage rights over the CSXT Line to GDLK and NSR and also to GDLK's customers. For example, a Memorandum of Understanding relating to the joint operation of industrial track serving Padnos (a scrap iron shipper), which CSXT signed, states:

CSXT, Norfolk Southern and GDLK have established trackage right agreements that grant Norfolk Southern and GDLK permission to use [the CSXT Line] to access the Facilities and those trackage rights are to be maintained, preserved and honored before, during, and after the project such that CSXT, Norfolk Southern and GDLK may continue to service to Padnos.

Memorandum of Understanding, attached hereto as Exhibit B.

GDLK provided competitive railroad service and expanded transportation options to the community, and possesses critical transportation infrastructure accessible only via the CSXT Line. Customers that have come to depend upon the use of GDLK infrastructure north of the CSXT Line are Brink Farms, Inc. (“Brink”), Louis Padnos Iron and Metal Co. (“Padnos”), and Sargent Sand Company (“Sargent”), among others. GDLK also interchanges with Marquette Rail, LLC (“Marquette” – by way of a pre-existing intermediate switch)³ and Grand Rapids Eastern Railroad Inc. (“GRE”) via the CSXT Line.

Among GDLK’s key facilities proximate to the CSXT Line is Turner Yard, which is located in northwest Grand Rapids. Turner Yard was constructed in 2014 as a joint venture between GDLK and Brink. GDLK contributed over \$1 million to construct the \$2 million facility, which greatly increased rail transportation options for the community, and ultimately lowered shipping costs in the region. See, e.g., Commerce Derailed, Michigan Business Journal, attached hereto as Exhibit D. Before CSXT barred GDLK from using the CSXT Line, Turner

³ GDLK’s relationship with Marquette is complicated by steps CSXT has undertaken to limit Marquette’s ability to interchange with GDLK or other railroads. Marquette’s lines and GDLK’s lines are roughly three hundred feet apart, separated by an intervening stretch of CSXT track, under an arrangement that GDLK believes would be commonly regarded as a “steel barrier.” CSXT historically has agreed to handle traffic moving between GDLK and Marquette over the intervening stretch of track pursuant to an intermediate switch charge, which, until August of last year, had been \$105/car each direction, and is now \$300/car in each direction. But that is not the entire story. GDLK understands that CSXT imposes a penalty charge under an interchange commitment (or “paper barrier”) with Marquette for traffic that Marquette interchanges with carriers other than CSXT. The arrangement, prior to GDLK’s commencement of operations, was discussed before the Board in Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, Docket No. EP 575 (Public Hearing, Statement of Jeff Baker, Dow Chemical Company) (transcript at 145-47), selected pages attached as Exhibit C. Nevertheless, Marquette and GDLK have found ways to develop traffic between the two of them.

Yard had become the focal point of GDLK's north-end rail operations. Brink alone was shipping approximately 50 railcars per week through Turner Yard prior to the CSXT-initiated disruption.

Despite GDLK's regular exercise of trackage rights, CSXT wrote to GDLK on June 14, 2016, asserting that GDLK did not have the contractual right to operate on the CSXT Line and lacked the requisite regulatory authority from this Board to do so. That letter also directed GDLK to cease and desist from using the CSXT Line. In order to avoid service disruption, GDLK sought and negotiated a provisional agreement with CSXT, under which certain insurance and indemnity issues were addressed (reflecting contract terms and conditions more closely comporting with a Class I- short line trackage rights relationship, and superseding terms more typical of a Class I-Class I agreement as had previously been in place). Under that very short-lived, provisional agreement, CSXT allowed GDLK to continue operations on the CSXT Line pending efforts to resolve the emerging dispute.

However, on August 8, 2016, CSXT advised that it would no longer allow GDLK to operate on the CSXT Line, and, beginning on August 10, 2016, CSXT dispatchers have refused to authorize GDLK trains to operate on the CSXT Line. CSXT has advised that, to bridge the newly-created gap in GDLK's system at Grand Rapids, it would provide an intermediate switch for traffic that previously would have traversed the CSXT Line in GDLK trains exercising trackage rights. Simultaneous with GDLK's expulsion from the CSXT Line, however, CSXT also nearly trebled its intermediate switching charges from \$105/car in each direction to \$300/car in each direction.

CSXT's actions had an immediate, adverse impact on GDLK and its customers. GDLK suddenly was unable directly to serve its customers on the railroad's north end as had been customary. In place of direct GDLK service, CSXT informed GDLK that it would handle

all GDLK traffic over the CSXT Line on GDLK's account via an intermediate switch, the charge for which is now roughly three times the pre-expulsion figure. Not only does the CSXT-imposed gap at the north end of the GDLK system subject customers to increased costs due to the otherwise-avoidable switching charges, but the new arrangement also requires additional inter-carrier handling due to CSXT's intervention in movements.

GDLK believes that CSXT's hostile actions are not so much directed at GDLK as they are at rail competition in Grand Rapids generally, and that CSXT has in mind to marginalize GDLK, so that CSXT can maximize its market power and increase railroad transportation costs in the Grand Rapids metropolitan area. GDLK's customers have expressed concern that shipping costs will continue to rise due to CSXT's anticompetitive ploy. Because of increased costs, GDLK has learned that some of these customers either have departed or may leave the rail market altogether and never return.

ARGUMENT

Pursuant to 49 U.S.C. § 1321(b)(4), the Board may issue an order where necessary to prevent irreparable harm. Public Views on Major Rail Consolidations, Docket No. EP 582 (STB served April 7, 2000) slip op. at 8-9 (the legislative history of Section 721(B)(4), since recodified as Section 1321(b)(4), makes clear that the Board was extended "extremely broad" discretion to issue unilateral injunctive orders to prevent irreparable harm). In considering whether to issue such an order, the Board applies a four-part standard. Specifically, the party seeking an injunctive remedy must demonstrate that: (1) it will likely prevail on the merits of its claim; (2) it will suffer irreparable harm absent the order; (3) other interested parties will not be substantially harmed by the order; and (4) the public interest supports issuance of the order. See, e.g., Colorado Wheat Administrative Committee, Colorado Association of Wheat

Growers, et al. v. V and S Railway, Inc., Docket No. 42140 (STB served May 7, 2015) citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977). Here, all four criteria are met.

CSXT has made it clear to this point that it will not agree to have GDLK re-admitted onto the CSXT Line; despite further overtures initiated by NSR, CSXT has thus far expressed no willingness to negotiate replacement trackage rights terms with GDLK. Perhaps CSXT will relent if the Board grants GDLK's Emergency Petition, which GDLK suspects CSXT will oppose under a characteristic flurry of misdirection, attempts at procedural delay, and recycled calls for an investigation of GDLK and its corporate parent, WATCO Holdings, Inc. If, however, CSXT relents and agrees to honor the Board-authorized assignment of NSR's common carrier rights and obligations, then STB intervention into the current service disruption would be unnecessary, and GDLK gladly would seek to withdraw this PBO. But CSXT's past conduct suggests that such reconciliation is unlikely, and that, absent the requested Board order, CSXT may continue to bar GDLK from the CSXT Line.

A. If GDLK's Emergency Petition is granted, then GDLK will have succeeded on the merits.

In light of the June 1 State Court Decision, GDLK believes that there is no genuine dispute that NSR holds unextinguished common carrier rights and obligations over the CSXT Line, just as CSXT continues to possess common carrier rights and obligations over the Richmond Street Connecting Track (which GDLK leases, maintains and dispatches) over which CSXT operates to interchange traffic with GRE. The original trackage rights agreements have expired on their terms, so, as the Michigan State Court reasoned, even if there might have been a past assignment of NSR's rights, there can be no prospective assignment of NSR's contract

rights based upon contracts that no longer exist and that, for that matter, no longer govern the relationship between CSXT and NSR as a matter of state law.

NSR's "Texas Mexican rights" (i.e., the common carrier rights and obligations that NSR holds by virtue of prior regulatory authority pursuant to the seminal Texas Mexican case) may only be extinguished via a trackage rights discontinuance, which no party has requested here. Ordinarily, the trackage rights "tenant" (or licensee) and "landlord" (or licensor) would negotiate new contract terms and conditions in the ordinary course to replace the terms of the original agreements. But here, NSR cannot practicably exercise its trackage rights. The CSXT Line is far removed from any railroad line over which NSR currently operates, and the rights to operate over the CSXT Line historically have served to effectively (and efficiently) integrate NSR's, and now GDLK's, operations in Grand Rapids. Also, NSR cannot practicably provide rail service over what would be for it an isolated, 3-mile intermediate operation linking GDLK lines to the north and south, which would be roughly 48 railroad miles removed from its own system of railroad lines (and even further from NSR's closest crew base).⁴ Thus, to effectuate the objectives of its lease agreement with GDLK, and in the interest of restoring service and the longstanding competitive balance in the Grand Rapids market, NSR has agreed to assign its "Texas Mexican rights" to GDLK.

Such an assignment is in the legitimate interest of all conceivable stakeholders, and it will restore the pre-August-2016 level of modal competition in the Grand Rapids market. Moreover, with the assignment of NSR's rights consummated by the parties and enforced as necessary by the requested Board order, GDLK may usher negotiations with CSXT toward a

⁴ See Affidavit of Randall W. Hunt (filed in the Michigan State Court proceeding) at page 3, par. 14, attached hereto as Exhibit E.

new and comprehensive trackage rights agreement for the CSXT Line and the Richmond Street Connecting Track, since both operations currently lack extant contracts.

GDLK's request for an order is not a stand-alone proposition. Normally, the invocation of an injunctive remedy is a precursor to some other issue awaiting subsequent Board action, and is commonly sought for purposes of staying a transaction pending further adjudicatory action (hence the need to assess the likelihood of prevailing on the merits of that subsequent action) or for a similar preliminary injunctive purpose. Here, on the other hand, the PBO is an adjunct to GDLK's Emergency Petition, and the requested Board order is either warranted if the Emergency Petition is granted (and CSXT has still shown no signs of relenting), or it is moot if the Board declines to grant the Emergency Petition.

If the Board grants GDLK's simultaneously-filed Emergency Petition, then GDLK submits that it will have succeeded on the merits, and further assessment of this prong of the Holiday Tours test would be unnecessary. Specifically, the Board will have authorized an already-agreed-upon, written assignment of NSR's Texas Mexican rights to GDLK. GDLK and NSR will have every reason immediately thereafter to consummate the Board-authorized transaction to permit GDLK to resume service as had existed for many years prior to CSXT-instigated disruption. All that would stand in the way of GDLK and NSR would be CSXT's expected, continued refusal to – (a) recognize the transaction, and (b) admit GDLK back onto the CSXT Line. Furthermore, if the Board authorizes GDLK's acquisition of NSR's common carrier rights and obligations over the CSXT Line and GDLK and NSR consummate the transaction as planned, then CSXT's refusal to accommodate the Board-approved transaction, in the absence of state law contractual restrictions on such assignment in favor of CSXT, would preclude GDLK from providing Board-authorized common carrier service in place of NSR.

B. GDLK and its customers will be harmed irreparably if GDLK cannot resume operations on the CSXT Line.

In assessing claims of irreparable harm, the Board looks to whether the requesting party will suffer unredressable, actual and imminent harm absent an agency-issued injunction. See, e.g., Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, Colorado When Research Foundation, and KCVN, LLC v. V and S Railway, Inc., STB Docket No. 42140 (STB served May 7, 2015). Denying GDLK's request for an order in the face of CSXT's (expected) refusal to cooperate will irreparably harm GDLK, the rail shippers it serves, and Grand Rapids industry generally.

The harms flowing from CSXT's conduct are numerous, substantial, ongoing, and, absent Board action, unredressable. CSXT's unilateral decision to expel GDLK leaves the northern portions of GDLK's system isolated. Among the isolated line segments are Turner Yard and the Richmond Street Connecting Track, both of which are strategically significant, as CSXT well knows. CSXT has contended that GDLK still has indirect access to all of the isolated trackage and to Padnos by way of CSXT-supplied intermediate switching.⁵ While technically true, CSXT's contention that the switching arrangement assures effective access to otherwise stranded railroad assets, customers, and interchange partners is thoroughly misleading and disproven by a comparison of GDLK's pre and post-expulsion traffic data.

As the record reflects, CSXT's intermediate switching comes at a cost of \$300/car in each direction, nearly three times the \$105/car charge that CSXT had assessed pre-expulsion. As CSXT doubtlessly expected, rail service under the intermediate switching arrangement is

⁵ Under CSXT's proposed intermediate switching arrangement, CSXT has offered to transport traffic in GDLK's account pursuant to a per-car fee charged directly to GDLK. Operationally speaking, CSXT's switching offer entails CSXT handling cars between the CSXT/GDLK interchange at Hughart Yard (south of the CSXT Line) on the one hand and Padnos, Turner Yard and the GRE and Marquette interchanges on the other.

economically impracticable and operationally inefficient. GDLK does not in most instances absorb CSXT's switch charge, and so the fee typically is passed through the shipper – \$600 per car for each freight car round trip. Where GDLK has agreed to absorb any portion of the switching charges, GDLK's per-carload income drops by an amount equal to the switching charge CSXT assesses less the modest incremental costs that GDLK would have incurred in – (a) operating over the CSXT Line itself with its own crews and motive power, and (b) paying appropriate and reasonable trackage rights fees to CSXT. Accordingly, where GDLK is and has been absorbing CSXT's switching charges, it is incurring quantifiable financial losses, and where it is not, GDLK's customers (if they continue to ship on GDLK via the CSXT Line) incur the added expenses, all to CSXT's financial benefit. Moreover, the inefficiency of the current intermediate switching arrangement – to the extent that it is being used – is exacerbated by the need for additional inter-railroad administrative effort expended to coordinate and account for the intermediate switch.

The switching charges that CSXT assesses to bridge the newly-created, 3.3-mile gap in GDLK's system have worked precisely as CSXT likely had intended. The increased railroad transportation costs springing from CSXT's tactics have driven all traffic away from the recently-renovated Turner Yard, prompting shippers to incur increased logistics costs in relocating traffic loading and unloading to points on GDLK south of the CSXT (where feasible).

The mainstay of Turner Yard is the transload operation that had been conducted on the premises by Brink. The Brink transload handled substantial carload quantities of both agricultural commodities (soybeans) and sand, which were loaded there for outbound shipment on GDLK. The Brink operations entailed the inbound delivery of empty hopper cars and the reverse movement of loads. Transportation costs for shipments out of Turner Yard suddenly

increased by \$600/car – costs that Sargent Sand Company (the principal sand shipper using Turner Yard and Brink’s transload services there) could not justify. Sargent has relocated its sand shipping to a smaller, more congested GDLK yard track at Mart Street, south of the CSXT Line, where Brink now undertakes sand and soybean transloading in place of Turner Yard.

With its sand loadings averaging 300 per month or more, CSXT’s unabsorbed switching fees would have increased Sargent’s monthly transportation costs by approximately \$180,000. As it is, Sargent estimates that, in avoiding Turner Yard and resorting to the more modest Mart Street facility, it incurs some \$1,200/day in increased logistics costs, a significant cost factor, but comparatively much less costly than incurring the CSXT switching charge. Making matters worse, the Mart Street Yard operation is running at capacity, which is far less than had been available at Turner Yard. Sargent has expressed to GDLK its desire to increase sand loadings, but railroad capacity has precluded it from expanding as it would like to do.

The idling of Turner Yard has had a cascading effect elsewhere on the GDLK system. Another GDLK-served sand shipper, The Nugent Sand Company, Inc. (“Nugent”), which might otherwise have used the Mart Street Yard facility, is now transloading outbound sand on a siding track at Moline, Michigan, farther to the south on GDLK’s lines. Nugent has informed GDLK that resorting to the Moline transload instead of Mart Street increases its sand transportation costs by some \$.30/ton, due mainly to increased use of truck transportation.

Padnos, a shipper whose metals recycling facility is accessible to GDLK only via CSXT Line trackage rights, is not so fortunate. GDLK understands that the CSXT switching charges have forced Padnos to “vote with its feet” by limiting its use of GDLK service. To date, Padnos has tendered only 15 cars to GDLK in 2017, a 75% decrease for the same time period in 2016 (all before GDLK was barred from using the CSXT Line).

Similarly, interchange traffic flows with GRE and Marquette have dropped precipitously since GDLK was forced off of the CSXT Line. Prior to the expulsion, GRE and GDLK effected direct traffic interchange via the GDLK-leased and maintained Richmond Street Connecting Track. See map at Exhibit A.⁶ Under the “replacement” CSXT intermediate switching regime, GDLK has seen its GRE interchange traffic year-to-date 2017 drop by roughly 97% compared to the same time frame in 2016 (from 552 carloads year-to-date in 2016 to 15 carloads year-to-date in 2017).

Finally, GDLK has seen its interline traffic with Marquette, as complicated as that is, drop steeply since being barred from the CSXT Line – from 1,073 carloads year-to-date in 2016 to 663 carloads thus far this year. And, as information that may be of interest to the Board, GDLK and Marquette had been discussing possible arrangements that might reduce the costs of interchanging traffic with one another during the spring and summer of 2016, shortly before GDLK was ejected from the CSXT Line.

Adverse action on the Emergency Petition and this PBO (or delayed consideration of the relief GDLK now seeks) will perpetuate ongoing service disruptions, extend increased transportation costs, and undermine GDLK’s efforts to re-establish its competitive footing in the Grand Rapids market and restore its business goodwill with local customers. Moreover, in the absence of a state law remedy – the June 1 State Court Decision effectively closed the door on

⁶ Ironically, as part of the series of line consolidations in Grand Rapids chronicled at pages 4-6 of GDLK’s Petition for Partial Revocation in Docket No. FD 35187 (Sub-No. 1), CSXT has been granted trackage rights over the Richmond Street Connecting Track to protect its ability also to interchange directly with GRE. Making matters worse, although GDLK currently enjoys no practical benefit from its leasehold interest in the Richmond Street Connecting Track thanks to CSXT, it is nevertheless obligated to maintain the track segment for CSXT’s benefit. As luck would have it, a railroad bridge on the Richmond Street Connecting Track has required significant rehabilitation, which GDLK is undertaking at substantial expense to itself, even though it is unable to use the track. From GDLK’s perspective, honoring its Richmond Street Connecting Track maintenance obligations adds injury to insult.

GDLK/NSR contract claims – GDLK’s and its customers’ only redress for the losses they are experiencing (and have experienced) would be before the Board. But it is not at all clear that the agency, or any court, has the authority to award damages in favor of GDLK or its customers as things now stand, at least not without issuance of the requested Board order.

CSXT’s decision to continue to bar GDLK from the CSXT Line deprives the Grand Rapids market of a historical modicum of competition, reducing GDLK’s ability to preserve pre-August 2016 traffic flows and to compete for and secure additional freight traffic. The current situation, if the Board were to allow it to stand, would deprive GDLK of business goodwill. For a short line railroad like GDLK, the development and preservation of business goodwill is critical, as sometimes-elusive traffic opportunities can and will quickly slip away where an existing or prospective customer is concerned about the cost and feasibility of GDLK service on the railroad’s north end. And because GDLK’s business goodwill is both valuable and difficult to quantify, it is precisely for that reason that courts in similar situations have granted an injunctive remedy such as that requested here.

Specifically, courts applying similar injunctive standards have granted relief in the face of a real and imminent threat of loss of customers, business goodwill, and/or business viability. See Gateway E. Ry. Co. v. Terminal R. Ass’n of St. Louis, 35 F.3d 1134, 1140 (7th Cir. 1994) (“Gateway Eastern” – a line owner’s refusal on asserted contract grounds to allow a rail carrier trackage rights access over a line is disruptive to the tenant railroad’s service and threatens loss of business goodwill); and see also Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992) (“competitive injuries and loss of goodwill are difficult to quantify,” but nevertheless warrant an injunction); AK Steel Corp. v. Colton, 2001 WL 1636957, at *5 (E.D. Mich. 2001) (“competitive injury and loss of goodwill . . . are difficult to quantify, [but they

justify] issuance of a preliminary injunction”); Chem-Trend, Inc v McCarthy, 780 F.Supp. 458, 462 (E.D. Mich. 1991); Zurn Constructors, Inc. v. B.F. Goodrich Co., 685 F.Supp. 1172, 1181 (D. Kan. 1988) (“Numerous cases support the conclusion that loss of customers, loss of goodwill, and threats to a business’ viability can constitute irreparable harm”).⁷

Moreover, although an economic injury may be insufficient to qualify as irreparable harm where there is an available remedy at law for damages sustained by the injunction seeker, substantial and unredressable economic losses are irreparable and warrant injunctive relief. See Odebrecht Constr., Inc. v. Secretary, Fla. Dep’t of Transp., 715 F.3d 1268, 1289 (11th Cir. 2012) (finding irreparable injury because plaintiff “has no monetary recourse against a state agency”); Chamber of Commerce v. Edmondson, 594 F.3d 742, 771 (10th Cir. 2010) ; Iowa Utils. Bd. v. FCC, 109 F.3d 418, 426 (8th Cir. 1996) (“The threat of unrecoverable economic loss [is] irreparable harm.”); Resolution Trust Corp. v. Elamn, 949 F.2d 624, 629 (2d Cir. 1991); Boxworth v. Blinder, Robinson & Co., 903 F.2d 186, 205-07 (3d Cir. 1990); Texas Children’s Hosp. v. Burwell, 76 F. Supp. 3d 224 (D.D.C. Dec. 29, 2014).

But as matters now stand, it appears that CSXT is immune from damages from either GDLK or its customers. Ordinarily, if CSXT precluded GDLK from exercising its legal rights and obligations as acquired from NSR, then GDLK could pursue damages under state contract law theories. But the June 1 State Court Decision makes clear that there is no longer

⁷ See also Tri-State Generation, 805 F.2d 351, 356 (10th Cir.1986); Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co., 749 F.2d 124, 125–26 (2d Cir.1984); Otero Savings & Loan Ass’n v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir.1981); Federal Leasing, Inc. v. Underwriters at Lloyd’s, 650 F.2d 495, 500 (4th Cir.1981); Valdez v. Applegate, 616 F.2d 570, 572 (10th Cir.1980); John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., 588 F.2d 24, 28–29 (2d Cir.1978); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir.1970); Associated Producers Co. v. City of Independence, 648 F.Supp. 1255, 1258 (W.D.Mo.1986); Stanley-Fizer Associates, Inc. v. Sport-Billy Productions Rolf Deyhle, 608 F.Supp. 1033, 1035 (S.D.N.Y.1985); Great Salt Lake Minerals & Chemicals Corp. v. Marsh, 596 F.Supp. 548, 557 (D.Utah 1984).

any contract under which either NSR or GDLK could seek damages for CSXT non-performance. Only the Board may interpret and enforce NSR's and GDLK's respective rights on the CSXT Line as circumstances now exist, pending the negotiation of new trackage rights terms. But GDLK is unaware of any authority vested in the STB to award damages or order reparations under present circumstances. Consequently, bereft of any other forum to address its harms aside from this agency, GDLK submits that any and all harms it would suffer by CSXT's continued refusal to allow GDLK to operate over the CSXT Line are irreparable by definition, unless the Board issues the requested order, which, if issued, would allow for enforcement and other remedies under 49 U.S.C. § 11704.

C. Restoring GDLK's operations over the CSXT Line is in the public interest.

The public will benefit from a Board-sanctioned restoration of the competitive status quo ante dating back to the 1980s. Due to CSXT's tactics, some of GDLK's customers have discontinued the use of railroad transportation, while others have reduced shipping via GDLK due to the CSXT-imposed railroad service disruption and increased railroad transportation costs occasioned thereby. Those continuing to ship traffic via the CSXT Line have incurred substantially increased transportation costs in so doing.

The restoration of GDLK service will: (a) allow railroad transportation costs to return to a semblance of pre-August 2016 levels for all but Marquette traffic (which presumably would remain subject to CSXT's punitive switching charge); (b) reduce inter-carrier traffic handling; (c) avoid operational inefficiency; (d) expand railroad service options; (e) maximize the use of local railroad infrastructure (such as the now-shuttered Turner Yard); and (f) restore competition in the Grand Rapids market. By eliminating an otherwise avoidable cost increase motivated by CSXT's anticompetitive animus, the community at large indeed will benefit.

Similarly, it is clearly contrary to the public interest to permit CSXT to obstruct GDLK's operations, as evidenced by the broad local support for restoration of GDLK's operations as was reflected in the outpouring of support for GDLK in the Grand Elk Notice, FD 35187 (Sub-No. 1) proceeding.

D. CSXT will not be substantially harmed by issuance of the requested order.

The Board must also evaluate whether CSXT will suffer "irreparable" harm compared to the harm suffered by GDLK. Cf. Gateway Eastern, 35 F.3d at 1140-141. CSXT will suffer no substantial injury from issuance of the requested order. GDLK operated safely over the CSXT Line and with the full consent and cooperation of CSXT for roughly 7 years. And not only did CSXT not suffer harm during GDLK's past operations over the CSXT Line (or during the period of NSR's operations before that), it cannot credibly claim that the restoration of GDLK operations will harm it now.

It is difficult to conceive of any harm that would befall CSXT if it is ordered to allow GDLK to resume operations over the CSXT line. Such an order would restore the operational and competitive status quo that CSXT's and NSR's predecessors negotiated for in the 1980s in the course of consolidating track infrastructure to facilitate urban development projects of that time. If CSXT perceived that it would suffer significant harm from GDLK's operations over the CSXT Line, then surely it would have taken steps to address such harm at the outset of GDLK's operations in 2009. The only "harm" that CSXT might experience is that issuance of the order would undercut CSXT's Grand Rapids market power grab. But this agency should not sanction CSXT's anticompetitive conduct by extending GDLK's expulsion, which is a windfall to CSXT.

Arguably, an arrangement that did not adequately address the commercial aspects of standard trackage rights operations and that did not fairly apportion costs and liability could

be seen as harming CSXT. GDLK understands that, as a short line carrier, its relationship with CSXT would differ from the Class I-to-Class I relationship between NSR (and before that Consolidated Rail Corporation) and CSXT. GDLK recognizes, for example, that CSXT may require different liability and insurance terms than had existed under the NSR trackage rights regime. GDLK is willing and able to address those issues with CSXT. It already has.

Shortly before CSXT directed its dispatchers to refuse to allow GDLK trains to operate over the CSXT Line, GDLK and CSXT had reached an accord on a provisional arrangement under which CSXT would allow GDLK to continue to operate notwithstanding the dispute over GDLK's contract rights and regulatory authority. That provisional agreement covered all items of concern to CSXT as expressed at that time, and reflected the sort of terms that GDLK believes are common to Class I-short line trackage rights agreements, except that the provisional agreement did not resolve the compensation due to CSXT. GDLK is willing to abide by the terms of that mutual provisional agreement if GDLK is restored to the CSXT Line pending the negotiation of new contract terms. Accordingly, there is no plausible argument that CSXT will suffer substantial harm as a consequence of a Board order.

Even assuming for the sake of argument that CSXT could articulate some plausible, irreparable harm⁸ that it would experience as a result of the requested Board order — and neither GDLK nor the Michigan State Court could conceive of any — such harm would be

⁸ GDLK anticipates that operations will resume without a final agreement in place to cover the compensation due to CSXT (just as the parties will need to resolve the compensation due to GDLK in connection with CSXT's use of GDLK's Richmond Street Connecting Track). Such an outlier will not be the source of any irreparable harm to CSXT, because, if it proves necessary, the Board may prescribe such compensation terms retroactive to the date GDLK service was restored. Cf. Gateway Eastern, 35 F.3d at 1140 (no irreparable harm to the non-moving party trackage rights host where monetary damages would compensate it for any losses it might incur).

minor. And that harm, such as it might be, would be vastly outweighed by the irreparable harm to GDLK and the public interest resulting from denying GDLK's request for an order.

EXPEDITED CONSIDERATION

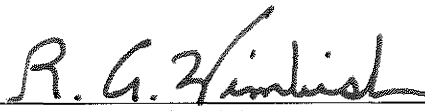
As with its simultaneously-filed Emergency Petition, and for the same reasons set forth in that sister filing (incorporated herein by reference), GDLK respectfully requests expedited Board consideration of, and favorable action upon, its request for a Board order. Should the Board grant the Emergency Petition, GDLK urges the Board to grant this PBO at the same time to facilitate a swift and orderly restoration of GDLK trackage rights operations over the CSXT Line.

CONCLUSION

For the foregoing reasons, the Board should grant this Petition and issue an Order directing CSXT to – (1) allow GDLK to resume operations over the CSXT Line; and (2) desist from any actions that would hinder GDLK operations over that railroad line. Otherwise, sustaining CSXT's obstructionism will continue to cause irreparable harm to GDLK, affected rail shippers, the local community, and the public interest, all as has been demonstrated herein.

GDLK respectfully requests that, in the interests of preventing against further irreparable harm, the Board issue the requested Order simultaneously with its grant of the Emergency Petition or as soon thereafter as possible to permit GDLK to effectuate its acquisition and exercise of NSR's rights and obligations over the CSXT Line.

Respectfully submitted,

By: 

Robert A. Wimbish

Thomas J. Litwiler

Peter C. McLeod

Fletcher & Sippel LLC

29 North Wacker Drive

Suite 920

Chicago, Illinois 60606-2832

(312) 252-1500

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

Dated: June 12, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

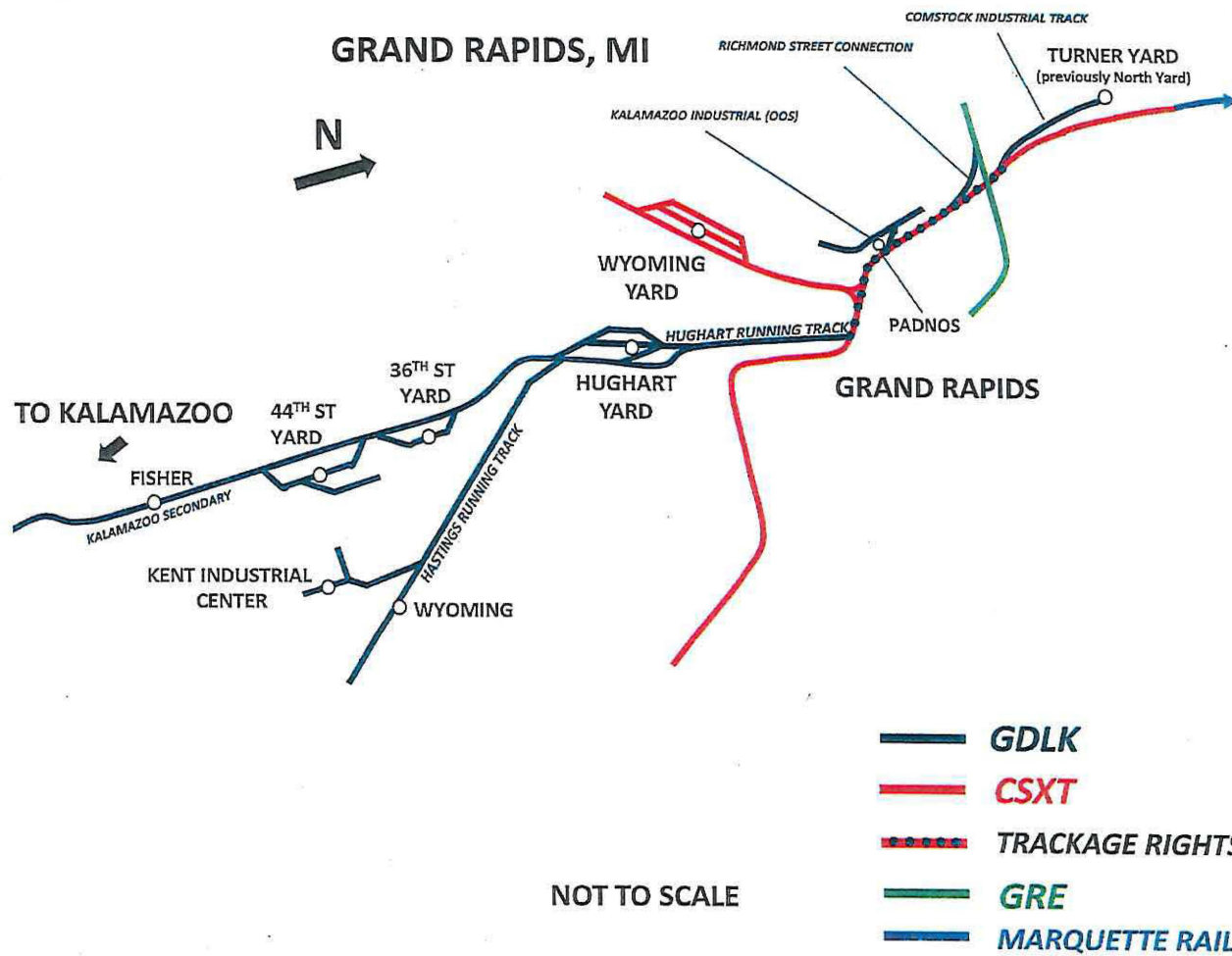
DOCKET NO. FD 36127 (SUB-NO. 1)

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

VERIFIED PETITION FOR BOARD ORDER OF
GRAND ELK RAILROAD, INC.

EXHIBIT A

MAP



BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

VERIFIED PETITION FOR BOARD ORDER OF
GRAND ELK RAILROAD, INC.

EXHIBIT B

MEMORANDUM OF UNDERSTANDING

PRIVATE MEMORANDUM OF UNDERSTANDING

IMPACT OF CROSSING ELIMINATION INITIATIVE ON EXISTING & FUTURE RAIL OPERATIONS OF CSX TRANSPORTATION, NORFOLK SOUTHERN, GRAND ELK, AND PADNOS

In recognition of public safety benefits to be realized by eliminating the hazards of highway-railroad grade crossings through execution of projects which re-align railroad tracks in such a manner that certain grade crossings may be permanently removed, and with respect for the impact of such projects on current and future operations of the railroads and rail customers involved, the above-named parties do hereby set forth their mutual understanding of present conditions and establish their intent to mutually preserve and extend each parties existing rights before, during, and after the planned track realignment project.

RECITALS

WHEREAS, the Michigan Department of Transportation (MDOT), in compliance with federal guidelines for such work, has established a program to develop and provide funding for projects that eliminate highway-railroad grade crossings by realigning track to remove crossings while preserving and enhancing existing rail operations and rail customer access; and,

WHEREAS, MDOT has identified funding to support a project (the Project) to realign the existing Norfolk Southern/Grand Elk industrial spur into the Padnos scrap metal facility in downtown Grand Rapids, MI, as detailed in the site plan drawing (the Plan) provided on Exhibit A of this Memorandum; and,

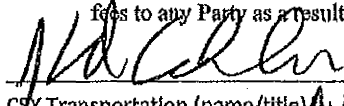
WHEREAS, as shown on the Plan, CSX Transportation (CSXT), Norfolk Southern, Grand Elk, and Padnos (the Parties) presently have various and independent underlying property interests and operating rights within the existing railroad rights-of-way (the Facilities) between Emporer and Fulton Street in the City of Grand Rapids, including multiple highway-railroad grade crossings of Emporer, Butterworth, Watson, and Fulton Street, as shown on the Plan; and,

WHEREAS, CSXT, Norfolk Southern and Grand Elk have established trackage right agreements that grant Norfolk Southern and Grand Elk permission to use CSXT tracks to access the Facilities and those trackage rights are to be maintained, preserved and honored before, during, and after the project such that CSXT, Norfolk Southern and Grand Elk may continue to offer service to Padnos; and,

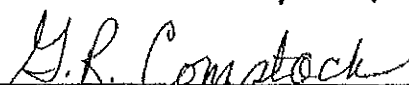
WHEREAS, the Parties have all reviewed, commented and collaborated on development of the Plan in such a manner that all relevant present and future operational and property issues have been discussed and resolved to the satisfaction of the Parties,

NOW, THEREFORE, the undersigned Parties hereby recognize that the Project, in accordance with the general outline of the Plan, will be undertaken upon the Facilities in order of and compliance with the following conditions:

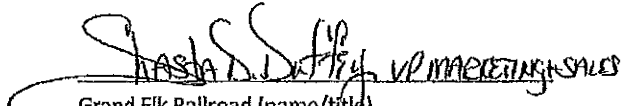
1. This non-binding Memorandum of Understanding is for public safety project development purposes only, and it does not supersede or replace any other agreement(s) by or between any of the Parties.
2. MDOT provides funding and authorization for Grand Elk to proceed with its portion of the Project for realignment of the Norfolk Southern industrial spur tracks that lead to Padnos.
3. MDOT provides funding and authorization for CSXT to proceed with its portion of the Project for circuitry adjustments and track improvements along its main line and its industrial spur track that leads to Padnos.
4. CSXT coordinates with the Federal Railroad Administration related to the portion of the Project involving removal of Control Point Watson and accompanying circuitry adjustments.
5. Grand Elk works with Norfolk Southern to assure equitable disposition of any track materials not used in the Project for realignment purposes.
6. Upon completion of the Project, current operating rights are extended unto the new alignment such that CSXT, Norfolk Southern and Grand Elk preserve their respective abilities to provide competitive service to Padnos with no new or additional fees to any Party as a result of the Project.


CSX Transportation (name/title)

Sup Engineering


Norfolk Southern Railway Company (name/title)

General Manager


Grand Elk Railroad (name/title)

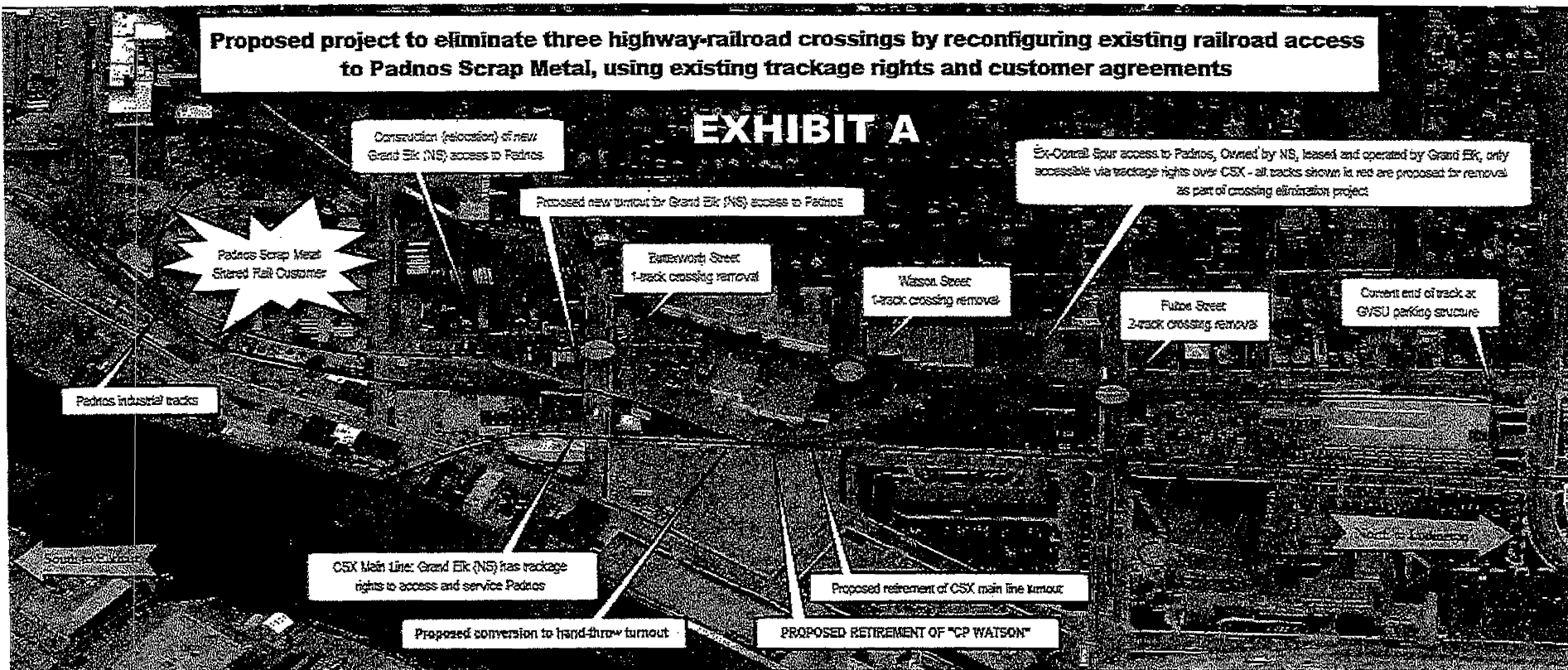

Padnos (name/title)

Padnos Logistics Manager

Copy 5 - MDOT

Proposed project to eliminate three highway-railroad crossings by reconfiguring existing railroad access to Padnos Scrap Metal, using existing trackage rights and customer agreements

EXHIBIT A



BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

VERIFIED PETITION FOR BOARD ORDER OF
GRAND ELK RAILROAD, INC.

EXHIBIT C

STATEMENT OF JEFF BAKER

UNITED STATES OF AMERICA

+ + + + +

SURFACE TRANSPORTATION BOARD

PUBLIC HEARING

REVIEW OF RAIL ACCESS AND COMPETITION ISSUES --
RENEWED PETITION OF THE
WESTERN COAL TRAFFIC LEAGUE

EX PARTE 575

+ + + + +

THURSDAY, JULY 27, 2006

+ + + + +

The Public Hearing convened in Hearing Suite 760, 1925 K Street, N.W., Washington, D.C. 20423-0001, pursuant to notice at 10:00 a.m., Chairman Douglas Buttrey presiding.

SURFACE TRANSPORTATION MEMBERS PRESENT:

DOUGLAS BUTTREY Chairman
FRANCIS MULVEY Vice Chairman

PANELISTS:

	PANEL I
DAVID LAFFERE	WESTERN COAL TRAFFIC LEAGUE
ANDREW B. KOLESAR III	WESTERN COAL TRAFFIC LEAGUE
MICHAEL E. GRISSE	ALLIANCE FOR RAIL COMPETITION
THOMAS E. SCHICK	AMERICAN Chemistry COUNCIL
MICHAEL F. McBRIDE	EDISON ELECTRIC INSTITUTE
ANDREW P. GOLDSTEIN	NATIONAL GRAIN AND FEED ASS'N

	PANEL II
LOUIS P. WARCHOT	ASSOCIATION OF AMERICAN RAILROADS
KEITH T. BORMAN	AMERICAN SHORT LINE AND R.R.

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JOHN T. GRAY	RAILROAD INDUSTRY WORKING GROUP UNION PACIFIC RAILROAD COMPANY

SANDRA BROWN	PANEL III AMEREN ENERGY FUELS AND SERVICES CO.
STEVE SHARP	ARKANSAS ELECTRIC COOPERATIVE CORP.
JEFF BAKER	DOW CHEMICAL CO.
MIKE MUNRO	DOW CHEMICAL CO.
JEFFREY G. HERNDON	ENTERGY SERVICES AND ENTERGY ARKANSAS, INC.

ROGER BELL	PANEL IV COLUMBUS & GREENVILLE R. COMPANY
CHARLES N. MARSHALL	GENESEE & WYOMING, INC., AND FARMRAIL SYSTEM, INC.
ROBERT DINGMAN	OIL CREEK & TITUSVILLE LINES, INC.
WAYNE A. MICHEL	READING BLUE MOUNTAIN & NORTHERN R. CO.
Ed McKeachie	WATCO COMPANIES, INC.
LARRY PARSONS	WHEELING & LAKE ERIE RAILWAY COMPANY

1 issue. The Board has authority to take action on
2 paper barriers and it should do so.

3 Second, I am not aware of any rule, as
4 defined by the Administrative Procedure Act that
5 authorizes paper barriers. Thus, retroactive rule
6 making arguments do not apply. Even assuming that
7 those rules did apply, the Board can take reasonable
8 retroactive action. Implementation of the relief
9 requested in this proceeding would not propose damages
10 for past action, and seeks only relief with respect to
11 future rights of the parties, in other words would be
12 reasonable.

13 Thank you for allowing Ameren to share its
14 views today. And I am happy to answer any questions.

15 CHAIRMAN BUTTREY: Thank you very much.

16 MR. BAKER: My name is -- good afternoon,
17 my name is Jeff Baker and I have Global Purchasing
18 responsibility for Dow Chemical Rail Assets and
19 Freight. My purpose today is to provide you insight
20 into Dow Chemical's paper barrier situation and
21 related commercial issues pertaining to Dow's facility
22 in Ludington, Michigan.

1 To my right is Mike Munro. He's a member
2 of Dow's legal department and he will address legal
3 issues as it relates to paper barriers. Dow is a
4 diversified chemical company that offers a broad range
5 of chemicals, plastics, agricultural products to
6 customers in more than 175 countries. Dow has
7 approximately \$20 billion in annual sales in North
8 America. And we initiate, in North America, 130,000
9 rail shipments each year using a fleet of 20,000 rail
10 cars.

11 Dow's sole manufacturing facility for
12 calcium chloride is located in Ludington, Michigan and
13 it is served by a short line railroad called the
14 Marquette Railroad. Calcium chloride is sold globally
15 as deicing chemicals for walkways, oil and drilling
16 fluids, and in dust control. These markets are
17 extremely price competitive with numerous product
18 substitutes. Rail freight reflects 30 to 50 percent
19 of the total delivered calcium chloride product cost
20 and is a major factor in determining a products global
21 competitiveness.

22 The Marquette Railroad purchased an

1 estimated 100 miles of rail line from Dow's Ludington
2 Facility to just north of Grand Rapids, Michigan from
3 the CSXT Railroad. Dow asked to be considered as a
4 purchaser of this rail line, the line running from
5 Ludington to north of Grand Rapids; however, CSXT
6 would not allow Dow to participate in this bidding
7 process. Marquette has indicated to Dow that a paper
8 barrier and a steel barrier was imposed by CSXT as a
9 part of this sale agreement. Dow, by our estimate,
10 that the CSXT paper barrier more than doubles the
11 Marquette portion of the railway from our Ludington
12 Facilities if Dow traffic wanted to connect to the NS
13 in Grand Rapids. So we have the ability to connect
14 from Ludington into the NS in Grand Rapids.

15 In addition, CSXT created a steel barrier
16 which prevents Marquette from making a direct
17 interchange with the NS or Norfolk Southern, without
18 first connecting to the CSXT line. This steel barrier
19 allows CSXT to add additional rates along with paper
20 barrier costs, you know, the paper barrier costs, to
21 prevent a cost effective connection to the NS.

22 The CSXT paper barrier and the steel

1 barriers make it anti-competitive for Marquette to
2 connect to the Norfolk Southern in Grand Rapids. CSXT
3 has used this lack of competition to increase their
4 rates, and I'll stress significantly increase our
5 rates, which has been compounded through unjustified
6 and unreasonable fuel surcharges.

7 There is no economic justification to
8 support the significant CSXT rate increases, other
9 than the absence of effective rail competition. You
10 know, we actually believe CSXT has improved the cost
11 position by selling the Ludington line to Marquette
12 Railroad. And Dow wants viable railroads. What does
13 not want is to be subject to a monopoly situation, you
14 know, created through artificial means such as paper
15 and steel barriers to limit effective rail
16 competition.

17 And I'll stress, we've worked, you know,
18 we have attempted to work with the CSXT management to
19 help them understand that we compete in a global
20 calcium chloride market with primary competition from
21 Europe and China. You know, imports are a significant
22 threat to our calcium chloride franchise, and no one,

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

VERIFIED PETITION FOR BOARD ORDER OF
GRAND ELK RAILROAD, INC.

EXHIBIT D

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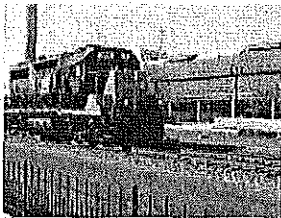
Sunday, 30 October 2016 15:55

Commerce derailed: Fight over 3.3 miles of railroad track hampers business in West Michigan

Written by John Wiegand

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The Grand Elk Railroad, whose trains are pictured here, has petitioned the federal Surface Transportation Board for a ruling in a case involving CSX and a disputed 3.3-mile section of track in Grand Rapids. As a result of the dispute, Grand Elk has not been able to service its customers north of Grand Rapids.

Courtesy Photo

GRAND RAPIDS — When **Brink Farms Inc.** began construction on a rail yard off Turner Avenue in northwest Grand Rapids in 2014, the Hamilton-based bulk transportation firm hoped to alleviate capacity constraints and better serve customers shipping cargo south through the city.

The company began operating in summer 2015 at the site, where it loaded and unloaded agricultural commodities and other products onto train cars or tractor trailers. The new location allowed Brink Farms to bypass the notoriously congested S-curve along U.S. 131 through downtown Grand Rapids, gaining operational efficiencies for the company and keeping prices competitive for its customers.

However, the benefits of the rail yard proved to be short-lived. In August of this year, a little over a year into operating its new facility, Brink Farms received a cease-and-desist letter from track owner **CSX Transportation Inc.** restricting the company from using the infrastructure to ship or receive goods.

"We're caught in the middle of corporate politics," President Brian Brink told MiBiz. "It's a bad deal."

CSX owns the contested track — a 3.3-mile section stretching between Ann Street NW and Pleasant Street SW in Grand Rapids — but has shared use of the rail line with other carriers under a 2009 agreement with the predecessor to Kalamazoo-based **Grand Elk Railroad Inc.**

A subsidiary of Kansas-based **Watco Companies LLC**, Grand Elk Railroad operates as a short-line carrier, which focuses on servicing companies such as Brink Farms over short distances of track.

The cease-and-desist letter CSX sent to Brink stemmed from its decision to revoke a shared track usage agreement with Grand Elk Railroad, while also calling into question whether the agreement was ever valid in the first place.

"It's corporate CSX," Brink said. "We've never had any issues with local operations or anything like that."

In response to the cease and desist order, Grand Elk Railroad petitioned for a ruling from the bipartisan Surface Transportation Board (STB), according to documents filed with the federal entity. It remains unclear when the body will issue a decision on the matter.

Breaking News

Central Interconnect enters next phase of ownership with sale

GRCC secures \$6 million federal grant for health care worker training

North Central Co-op to invest \$10.1M in Newaygo County facility

Snyder names new director for state's talent development efforts

MSU Foundation launches new \$5 million venture capital fund

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November 2016						
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6	7	8	9	10	11	12
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27	28	29	30	1	2	3



"We filed with the STB to reinstate the trackage rights, which we believe we still have," said Tom Hayes, assistant general counsel for Watco Companies. "Our primary motivation for doing all of this is really for the customers we've developed over the last eight years."

In an emailed statement noting that the company does not comment on ongoing litigation, a spokesperson for CSX told MiBiz that "we continue to work through the STB and court process to resolve the matter."

BUSINESS IMPACTS

For West Michigan businesses that contract with Grand Elk Railroad, the impasse has caused myriad issues, ranging from long delays in freight car shipments to additional transportation costs.

The dispute resulted in Brink Farms ceasing to use its northern Kent County facility, in which it had invested \$2 million in conjunction with the **Michigan Department of Transportation (MDOT)** and other stakeholders, Brink said.

"It was really a great location, but then we got a cease-and-desist letter from CSX saying that we had no rights to operate on that track," Brink said.

For its part, CSX has offered to service Brink Farms' northern hub at an additional cost of approximately \$1,000 per railcar, making it too cost prohibitive for the company's customers, Brink said. Brink Farms can service 50 railcars in any given week.

Holland-based **Louis Padnos Iron and Metal Co.** also faced challenges as a result of the track dispute. The company has been forced to switch from rail to truck shipments at its 601 Letellier SW location, according to a letter sent to the Surface Transportation Board by Scott Wolters, senior logistics manager at Padnos.

In addition to Brink Farms, Padnos and MDOT, local firms including **The Right Place Inc.**, **King Milling Co.**, **Universal Well Services Inc.**, **Michigan Agri-Business Association** and **DRT LLC** have sent letters to the federal body urging it to take action on the matter. They were supported with letters from the offices of U.S. Rep. Fred Upton, R-St. Joseph, U.S. Rep. Bill Huizenga, R-Holland, and State Sen. Tonya Schultmaker, R-Lawton.

"There's been a substantial cost increase in the movement of freight deliveries inbound and outbound that companies haven't budgeted for," Rick Chapla, vice president of strategic initiatives at The Right Place, told MiBiz, noting the organization is not "taking sides" in the dispute. "The customer is ultimately going to pay for it."

For Jim Doyle, senior vice president of Lowell-based King Milling, the fight over track rights underscores the near monopoly that exists for railroad operators. In this case, one of only two options for railcars over this particular stretch of track was eliminated, resulting in increased costs.

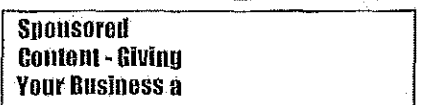
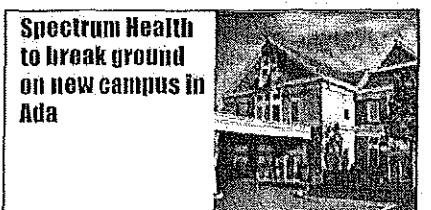
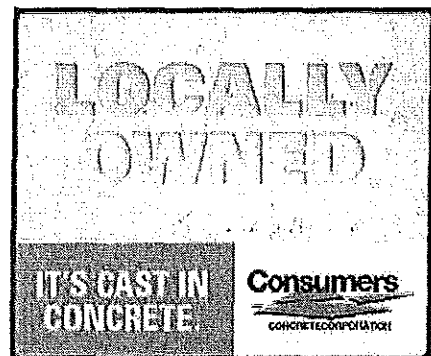
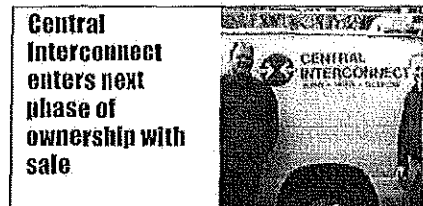
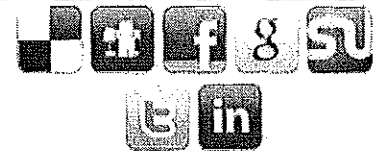
"It's basically that you've gone from a competitive situation that keeps rates in check and now it's a monopoly," Doyle said, noting that King Milling has still been able to move product. "In time, we know that leads to deteriorating services and rising cost."

A HISTORY OF COOPERATION

While the disagreement at hand stems from 2009, the joint track usage agreement between CSX and Grand Elk Railroad dates back to the early 1980s, according to a letter filed by MDOT.

At the time, the Chesapeake & Ohio Railway Co. (C&O) and Consolidated Rail Corp. (Conrail) operated adjacent rail lines running through Grand Rapids' west side. In a bid to reduce the number of tracks in the city and to allow construction of an extension to Seward Avenue, local officials struck a deal with C&O and Conrail to eliminate one of the tracks and consolidate service on the remaining line.

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11/18/2016

Commerce derailed: Fight over 3.3 miles of railroad track hampers business in West Michigan

Conrail agreed to abandon the majority of its track in exchange for joint access rights on the C&O line to service its customers and access its remaining track on either end of the consolidated line and other rail lines.

In later years, CSX would acquire the track through Grand Rapids from C&O, at the same time **Norfolk Southern Corp.** purchased the assets of Conrail, including the shared usage agreement for the section of track in question.

In 2009, Norfolk Southern leased those track rights to Grand Elk Railroad, which worked on the company's behalf since that time.

However, CSX maintains that agreement expired in 2014 and that it requested documentation from Grand Elk Railroad proving the short-rail company had the right to operate over the rail line. CSX alleges it did not receive proof of the track rights before issuing the cease-and-desist orders, according to federal filings.

CSX also alleges that the 2009 lease of track rights by Norfolk Southern to Grand Elk Railroad was not completed properly, rendering the agreement null.

Still, Grand Elk Railroad and other stakeholders, including MDOT, note that the two parties had collaborated on large projects through 2015 and have had a history of daily interaction.

"The Grand Elk has been operating at this site and into the northern Grand Rapids area for years. On a daily basis CSX has authorized the Grand Elk on the Joint Track. It is not acceptable due to the business we are generating, that CSX can just turn off the faucet so to speak," Brink wrote in a letter to the Surface Transportation Board.

For its part, Grand Elk Railroad has asked the Surface Transportation Board to ratify the 2009 agreement and allow it to continue sharing the rail line.

WEIGHING DOWN ECONOMIC DEVELOPMENT

As the parties wait for the Surface Transportation Board to issue a ruling, the track usage dispute will continue to restrict the flow of business in West Michigan and hamper economic development, sources said.

Moreover, the dispute could tarnish economic developers' efforts to promote railroads as an efficient logistical resource in the region, according to Chapla of The Right Place.

"This is why we continue to talk about the importance of rail," Chapla said. "We have to have that option, but we need competitive prices and the reliability has to be there so that when a railroad says it's going to deliver in a certain amount of time, they do."

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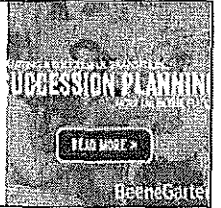
Tagged under #Brink Farms Inc #CSX Transportation Inc #Brian Brink #Grand Elk Railroad Inc #Watco Companies LLC #Michigan Department of Transportation #Louis Padnos Iron and Metal Co #The Right Place Inc #King Milling Co #Universal Well Services Inc #Michigan Agribusiness Association #DRT LLC #Norfolk Southern Corp

John Wiegand

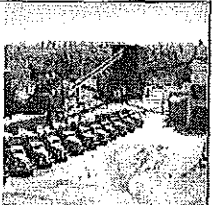
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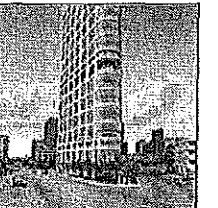
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Consumers
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Staff writer

jwiegand@mibiz.com

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

VERIFIED PETITION FOR BOARD ORDER OF
GRAND ELK RAILROAD, INC.

EXHIBIT E

HUNT AFFIDAVIT

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.

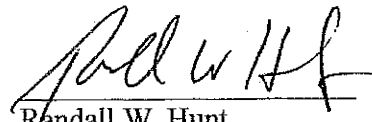
11. Subsequent email records found by my staff, attached as Exhibit B to this Affidavit, confirm that Norfolk Southern and CSXT ultimately settled the prorated billing of those assigned agreements, ceasing billing after the transfer to Grand Elk Railroad.

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.

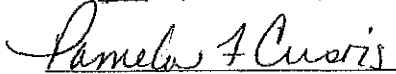
13. As previously mentioned, Norfolk Southern has assigned by written contract its right to operate over the CSXT line to Grand Elk Railroad.

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.



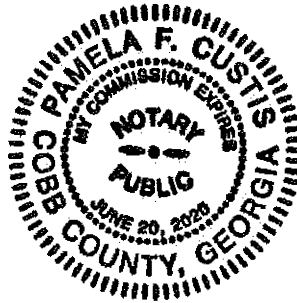


EXHIBIT A

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 IFORMED 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)



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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	NEWBURRY	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	155	Alhens, GA						CSXT removed 2005 (\$11,948)
1026	816	Dalton, GA	4262	4376.88	4565.09	4708.43	(\$17,912.39)	Duplicate - ISB - 2003
1026	817	Dalton, GA	1393	1430.34	1491.84	1538.68	5853.86	Incorrect Facility-removed (2003)
1575	155	Cordele, GA						CSXT removed 2005 (\$706)
1599	544	Jackson, TN	9642	9902.12	10327.91	10652.21	(\$40,524.25)	Shortlined 2003 (Western Tenn RR)
4703	7123	Chicago Ridge, IL	2891	2968.29	3096.97		(\$8,957.25)	No basis for billing- 1998 (\$3,194)
7162	2328	Grand Rapids, MI				350.88	(\$350.88)	1-09 + 2-09 (\$3,158)
7163	2327	Grand Rapids, MI				255.76	(\$255.76)	1-09 + 2-09 (\$2302)
83	RN 203021	Hyde, TN	1728	1728	1728	1728	(\$6,942.00)	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 124190	Charleston, SC	120	120	120		(\$360.00)	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		(\$333.00)	CSXT removed - 2003 (\$111)
1389	293	East Durham, NC	1501	1501	1501	1501	(\$8,004.00)	CSXT removed - 2003
1591	1435	New Berny, SC						CSXT removed - 2005 (\$10,000)
3516	8482	Pemberton, WVA						CSXT removed part of NS 3516/CSXT 8483 (\$12)
172	OTIM 096600	Cordele, GA				59	(\$59.00)	CSXT shortlined 2004
179	107	Johnson City, TN				232	(\$232.00)	Shortlined Tennessee - 2003
7167	2329	North Lansing, MI				2313	(\$2,313.00)	CSXT Lease 1998
7108	2324	Brighton Park, IL						Removed 1999 (\$1,650)
1360	1111	Wilson, NC	7344	7542.72	7867.06	8114.09	(\$30,857.87)	Duplicate bill ISB-2003
1365	1207	Raleigh, NC	2923	3002.38	3131.48	3229.81	(\$12,285.67)	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)
701	262	Attalla, AL	5689	5842.65	6093.88		(\$17,625.53)	AL-TN RR 2003 (\$8,285)
1095	2731	Coosa Pines, AL			1054.08	1087.18	\$2,141.28	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 AGREEMENT?
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 (SUB-NO. 1)

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

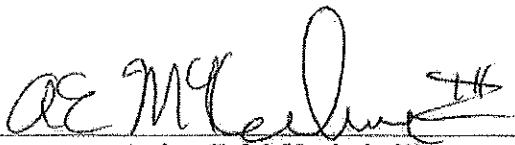
VERIFIED PETITION FOR BOARD ORDER OF
GRAND ELK RAILROAD, INC.

VERIFICATION

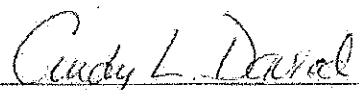
VERIFICATION

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 Petition for a Board Order 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

