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July 3, 2017

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board 395 E Street, S.W.
Washington, D. C. 20423

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

Dear Ms. Brown:

Enclosed for efilng are CSX Transportation, Inc.'s Reply to the Verified Emergency Petition for Exemption and Verified Petition for Board Order filed on June 12, 2017 by the Grand Elk Railroad, Inc.

Thank you for your assistance. If you have any questions, Please contact me.

Very Truly Yours,

Louis E. Gitomer

Louis E. Gitomer
Attorney for CSX Transportation, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36127

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

CSX TRANSPORTATION, INC. REPLY

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Dated: July 3, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36127

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

CSX TRANSPORTATION, INC. REPLY

CSX Transportation, Inc. (“CSXT”) respectfully requests that the (1) Verified Emergency Petition for Exemption (the “Exemption Petition”) and (2) Verified Petition for Board Order (the “Order Petition,” both collectively referred to as the “Petitions”¹) filed on June 12, 2017 by the Grand Elk Railroad, Inc. (“GDLK”) be denied by the Surface Transportation Board (the “Board”).

To all intents and purposes, the Petitions are a thinly veiled unjustified Petition to Reopen the Board’s decision in *Grand Elk Railroad, Inc.-Acquisition of Incidental Trackage Rights Exemption-Norfolk Southern Railway Company*, Docket No. 35187 (Sub-No. 1) (served November 1, 2016) (“*FD 35187 (Sub-No. 1)*”). That decision denied GDLK retroactive authority to acquire trackage rights over CSXT by assignment from the Norfolk Southern Railway Company (“NSR”) and prospectively granted such assignment conditioned on the Michigan Court holding that the trackage rights had been assigned under Michigan law, which it did not do. The Honorable Christopher P. Yates granted CSXT’s Summary Judgment Motion and denied the Motion for a Preliminary Injunction filed by GDLK and NSR. *Grand Elk Railroad*,

¹ The Petitions are verified by a highly respected officer of GDLK. The verification is limited to “the facts asserted therein.” CSXT must conclude that the verification only extends to facts concerning GDLK, and not facts concerning CSXT or NSR. NSR is not a party to the Petitions.

Inc.; and Norfolk Southern Railway Company v. CSX Transportation, Inc., Case No. 16-07855-CZB (“*GDLK v. CSXT*”). The Court stated that GDLK and NSR failed to present a legally sufficient complaint because “the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery” and then went on to analyze the same four factor test posited by GDLK in the Order Petition in denying the Preliminary Injunction.

The underlying facts have not changed. There was no material error by the Board and circumstances have not changed. GDLK lost its two-pronged attempt to force its way onto CSXT’s property in the two fora of its choice. It lost its first attempt before this Board, and lost its second attempt before the state court. Now, it is trying a third time. GDLK is wrong in its new argument that when the trackage rights agreements expired by their own terms and were considered unenforceable by the Michigan Court that none of the terms of the trackage rights agreements applied and that notwithstanding NSR can assign only its common carrier obligation without an underlying agreement with the owner of the property to govern the trackage rights operations.

The facts, the two decisions in *FD 35187 (Sub-No. 1)* and *GDLK v. CSXT*, along with well-established precedent that GDLK did not even address, demonstrate that GDLK is not entitled to the relief it seeks in the Petitions.

FACTUAL BACKGROUND

The Board is familiar with the facts of this proceeding, but there are several that bear repeating in light of the Exemption Petition.

CSXT owns about three miles of railroad line running generally north-south through Grand Rapids, MI: (1) (a) at the C&O crossover between Point of Switch at Valuation Station

8021+90 and Point of Switch at Valuation Station 8019+38, near Grandville Avenue, a distance of 202 feet, and (b) between the Point of Switch at Valuation Station 8040+44 and Valuation Station 8072+33, near Butterworth and Fulton Streets, a distance of 3,199 feet (the “3,401 feet”); and (2) approximately 2.45 miles between Valuation Station 8071+35, near Butterworth Street, and Valuation Station 8200+75, north of Ann Street (the “2.45 miles” and collectively with the 3,401 feet, the “Line”).

CSXT’s predecessor granted trackage rights over the two lines in issue, to NSR’s predecessor in February 6, 1980 and January 24, 1984 agreements. NSR’s predecessor granted trackage rights to CSXT’s predecessor (the property referred to by GDLK as the Richmond Street Connection and leased to GDLK by NSR) in the January 24, 1984 agreement. All three trackage rights were exempted by the Interstate Commerce Commission (the “ICC”). CSXT continues to operate over the trackage rights on the Richmond Street Connection and CSXT operates subject to the terms and conditions of the expired January 24, 1984 agreement.

With regard to the assignment of the trackage rights by the user, both agreements provide that “Neither party hereto shall assign or transfer this Agreement or any of its rights hereunder, **without obtaining the prior written consent** of the other party.” This provision is critical. The highlighted language clearly places the burden for obtaining and demonstrating consent to assignment upon the assignor, in this case NSR. NSR was required to obtain “prior written consent” to assign the trackage rights agreement. The burden was not on CSXT, it was on NSR. There was no requirement that CSXT consent to assignment or give a reason for not consenting. NSR has not been able to produce a document where CSXT gave its consent because CSXT did not provide written, or any other, consent for the assignment of either of the agreements. The trackage rights agreements do not require CSXT to explain why it did not consent to the

assignment. And, even though GDLK claims that the trackage rights were an “integral” part of the GDLK lease, GDLK has not produced a document consenting to the assignment. Logic would dictate that for such a supposedly “integral” part of the lease, that Grand Elk would have been diligent in verifying that NSR had obtained consent to the assignments as required by the agreements and kept copies of those documents in its records, but it did not and they do not exist.²

The genesis of GDLK’s issues began in 2007, when NSR sought to rationalize its system through a sale of 299 miles of track and 85.5 miles of trackage, easement and lease rights to the Michigan Central Railway, LLC (“MCR”), a subsidiary of the Watco Companies, Inc. and Watco Transportation Services, Inc. The Board denied the exemption stating “In sum, under the totality of the circumstances presented here, the record shows that NSR would continue to have the power to exert such a significant degree of control over MCR, and the lines it would contribute, to preclude the proposed transaction from coming within the scope of section 10901.”

³ As relevant to this proceeding, MCR also sought to acquire the right “to exercise NSR’s trackage rights over lines of CSX Transportation, Inc. (CSXT) between: mileposts 0.0 – 1.0 M9 in Grand Rapids, MI....” *Id.* at 2, fn. 2.⁴ However, CSXT had not consented to that assignment.

In light of the denial by the Board, NSR and Watco entities restructured the transaction into a lease of 122.9 miles of NSR track and land and incidental trackage rights over 0.43 miles

² Another explanation may be that NSR or GDLK or both realized that CSXT had not consented and was not going to consent to the assignment and decided not to raise the issue at the STB because it would have generated opposition from CSXT. It is customary, as part of the line transaction closing, to “check off” each assigned trackage right contract and any required consent. Both NSR and GDLK’s parent are sophisticated and experienced in this process, and it seems unlikely that the matter was overlooked at closing.

³ *Michigan Central Railway, LLC-Acquisition and Operation Exemption-Lines of Norfolk Southern Railway Company*, STB Finance Docket No. 35063, slip op. at 11 (served December 10, 2007) (“FD 35063”).

⁴ Only a one-mile portion of the trackage rights over the Line that GDLK is claiming were inadvertently omitted in the 2008 Notice of Exemptions were sought in the MCR proceeding. Even in that far-reaching proposed transaction, MCR did not seek incidental trackage rights over the entire Line.

of NSR track into Botsford Yard that was presented to the Board, but not the trackage rights in Grand Rapids.

GDLK filed a Notice of Exemption on November 3, 2008 (the “2008 Notice of Exemption”). The 2008 Notice of Exemption is very specific in identifying the track GDLK sought to operate on pages 3, 4, 5, 7, and 8 and in the first page of the Caption Summary.

Nowhere were incidental trackage rights over CSXT ever mentioned. On pages 4-7 of the 2008 Notice of Exemption, GDLK specifically distinguished the GDLK lease from the MCR acquisition. On page 5, GDLK explicitly states:

The Grand Elk Transaction involved only a portion of the rail lines that were the subject of the much larger and significantly more complex Michigan Central Transaction. The Grand Elk Transaction concerns the lease of 122.9 miles, with incidental trackage rights over a 0.43 mile segment, to a new company, while the Michigan Central Transaction involved the capital contribution of 299 miles of rail lines and 85.5 miles of trackage rights to a joint venture company.

At least six times in the 2008 Notice of Exemption, GDLK had an opportunity to specifically include a claim to the incidental trackage rights over the Line, but it did not. Moreover, on page 5, GDLK specifically distinguished 85.5 miles of incidental trackage rights sought by MCR (which only included a portion of the Line) from the 0.43 miles of incidental trackage rights to be acquired from NSR in Kalamazoo, over 40 miles from Grand Rapids. Nor did the Notice to Employees filed with the Board on December 1, 2008 mention incidental trackage rights over CSXT, even though it too contained a detailed description of rail line to be operated.

Over significant opposition, the Board allowed the exemption for the lease to take effect.⁵ Indeed, in the numerous replies to opposition filed by NSR and GDLK, both reiterate the

⁵ *Grand Elk Railroad, L.L.C. – Lease and Operation Exemption–Norfolk Southern Railway Company*, STB Finance Docket No. 35187 (STB served December 22, 2008); *Grand Elk Railroad, L.L.C. – Lease and Operation Exemption–Norfolk Southern Railway Company*, STB Finance Docket No. 35187 (STB served January 29, 2009);

specific track to be leased to GDLK and the limited 0.43 miles of incidental trackage rights involved. There is no mention of incidental trackage rights over CSXT.⁶

NSR requested CSXT to agree to the assignment of trackage rights over the 1.0 mile portion of the Line involved in the CMR proceeding. CSXT withheld its agreement. NSR renewed the request for the GDLK transaction. Again, CSXT did not consent to the assignment to GDLK of either of the two trackage rights agreements that allowed trackage rights operations over the Line.

In March 2016, CSXT requested that GDLK provide CSXT with documentation of GDLK's rights to operate over the Line. Having received no documentation from GDLK, by letter dated June 14, 2016, CSXT notified GDLK that GDLK had not received authority from the Board to operate over CSXT's Line, that CSXT had not consented to the assignment of the trackage rights over the Line, and that GDLK was to cease and desist from operating over CSXT's Line within seven days.⁷ At that time, CSXT marshalled locomotives and personnel in Grand Rapids to provide the service that GDLK had been providing over CSXT's Line. CSXT granted GDLK two extensions based on requests from GDLK and the Board's Rail Customer and Public Assistance Program ("RCPA"). Finally, after unsuccessful mediation sponsored by RCPA, CSXT directed its dispatchers to prohibit GDLK trains from entering the Line as of August 10, 2016.

and *Grand Elk Railroad, L.L.C. – Lease and Operation Exemption–Norfolk Southern Railway Company*, STB Finance Docket No. 35187 (STB served July 13, 2009).

⁶ See GDLK Replies filed December 12, 2008, December 24, 2008, January 16, 2009, January 23, 2009, May 1, 2009, and July 8, 2009; and NS Replies filed December 15, 2008, December 23, 2008, December 29, 2008, and January 23, 2009.

⁷ See Letters in Exhibit 1 to CSX transportation, Inc. (1) Reply to Grand Elk Railroad, Inc. Verified Notice of Exemption; Petition to Partially Revoke Class Exemption; and Petition for Waiver of Requirements of 49 CFR 1150.42€ and (2) Petition for Stay filed on September 16, 2016.

GDLK then began its two-pronged campaign to operate over CSXT's property without CSXT's consent. As relevant here, before the Board GDLK sought to acquire by assignment the trackage rights over the Line from NSR and sought to have those rights made effective retroactively. Before the Court, GDLK and NSR sought a ruling that the trackage rights had been assigned under the contracts if the Board authorized retroactive authority. However before the Court, GDLK and NSR conceded that if GDLK did not receive retroactive authority from the Board, the Court might reason that the contracts had expired and there was no basis for the Court to rule that the trackage rights had been assigned.

The Board acted first in *FD 35187 (Sub-No. 1)*. It allowed the permissive trackage rights exemption to go into effect, subject to a ruling on the parties' State contractual rights, to be resolved by the Court. However, the Board denied the request to make the trackage rights retroactive.

In *GDLK v. CSXT*, at 5-6, the Court looked at the two factors that GDLK argued were needed for it to prevail – retroactive authority from the STB and a valid assignment. Without retroactivity, the Court concluded that

Unfortunately for the plaintiffs, however, their request for access to the contested 3.3-mile stretch of track necessarily derives from their contractual relationship with Defendant CSX, and the two agreements that provided the source of trackage rights for 30 years include renewal rights that the plaintiffs failed to exercise under the terms of the two contracts. To be sure, CSX engaged in a pattern of conduct that reflected an acceptance of Plaintiff Grand Elk's receipt of the assignment of trackage rights from Plaintiff NSR, but the assigned trackage rights expired under the terms of the 1980 and 1984 agreements in 2010 and 2014. Moreover, although CSX apparently permitted Grand Elk to operate on the contested stretch of track until June of 2016, CSX's actions cannot support the 30-year extension of the two agreements that Grand Elk seeks. Forbearance by CSX cannot serve as a substitute for the method of renewal prescribed by the 1980 and 1984 agreements. Indeed, the statute of frauds governing interests in land in Michigan requires a writing to create the sort of 30-year extension (or the right of use in perpetuity) claimed by Grand Elk with respect to its trackage rights in the 3.3-mile stretch of track. See MCL 566.106; see also Kitchen v Kitchen, 465

Mich 654, 660 (2002) ("an interest in land cannot be established on the basis of estoppel").

Consequently, the Court shall grant summary disposition under MCR 2.116(C)(8) to CSX on the claim for declaratory relief set forth in the plaintiffs' first amended complaint. (footnotes omitted) (emphasis added).

GDLK and NSR also sought a Motion for a Preliminary Injunction enjoining CSXT from blocking Grand Elk's operations on the Grand Rapids Track," which the Court denied. In denying the Motion, the Court relied on the same four part test that the Board typically uses in rulings under 49 U.S.C. 1321(b)(4) and found arguments by GDLK and NSR to be lacking.

Now, GDLK comes to the Board with a "new" theory that would allow it to seize CSXT's property and operate over that property without an agreement.⁸

THE EXEMPTION PETITION MISTATES THE LAW AND MUST BE DENIED

The trackage rights agreements continue to govern the use of CSXT property.

GDLK makes another two pronged argument. First, GDLK argues that NSR retains a common carrier obligation even though the agreements have expired as explained in *Thompson v. Texas-Mexican R. Co.*, 328 U.S. 134 (1946) ("*Tex-Mex*"). Second, GDLK argues that because the Court recognized that the agreements had expired and the court could not enforce those agreements, the terms of the agreements no longer apply and NSR can assign its common carrier obligation to GDLK without obtaining consent from CSXT as required by the trackage rights agreements.

GDLK's premise is wrong. Even though the contracts expired by their own terms, the trackage rights are still subject to the terms of the contracts.

⁸ It must be noted that GDLK could well have presented this theory to the Board at the time it filed its proceedings since no facts underlying the theory have changed (e.g., the agreements had expired by their own terms prior to GDLK initiating the original proceeding before the Board).

In *Atchison, T. & S. F. Ry. Co. – Operating Agreement*, 331 I.C.C. 367 (1967) (“*Santa Fe*”), the issue of an expired trackage rights agreement and continued use of the line was in issue. In 1912, the Southern Pacific Company (“SP”) and The Atchison, Topeka and Santa Fe Railway Company (“Santa Fe”) entered an agreement granting Santa Fe the right to operate over an SP line of railroad in California. By its terms, the agreement expired on December 31, 1961. Santa Fe sought temporary authority from the Board to continue to operate over the line. One issue addressed by the ICC was the terms that governed Santa Fe’s continued operations. The ICC concluded that “The Commission’s jurisdiction over the transaction is continuous and **the terms and conditions may not be revised or the rights terminated** without the Commission’s prior approval. *Thompson v. Texas-Mexican R. Co.*, *supra*, pages 146-148.” *Santa Fe* at 382. GDLK, a third party to the trackage rights agreements, is seeking to revise the terms and conditions of those agreements to which it is not a party without presenting any contract to the Board or with Board approval. And, of course, the most fundamental of any term of an agreement is the identity of the parties.

However, GDLK cannot present a trackage rights agreement to the Board because CSXT has not agreed to grant GDLK trackage rights and there is no agreement. Trackage rights have not been allowed to go into effect until there is an executed agreement. *Seaboard Airline R. Co.-Trackage Rights*, 331 I.C.C. 361,363 (1967) (“*Santa Fe*”).

GDLK offers no contrary precedent because there is none. Indeed, under GDLK’s argument, once a trackage rights agreement expires the user is not bound by any of its terms. Trackage rights agreements contain provisions governing day-to-day operations by the user of the owner’s property, such as dispatching control, limits on use (such as CSXT’s limited use of the Richmond Street Connection to only reach Westside Yard), the owner’s exclusive control of

the track, maintenance requirements, management and operations (including engineer training and user's crew discipline for rule violations), car hire, clearing wrecks, liability, abandonment and discontinuance, and assignment. Trackage rights can limit the number of trains operating, whether they can provide local service or only overhead service, and whether there are commodity or other limitations. Over the life of the railroad industry, these types of provisions have been essential to the efficient, economical and safe operations of railroads. GDLK is asking the Board to allow it to ignore all of these important requirements and instead just allow GDLK to operate, taking all control from CSXT.

GDLK already contends that the restrictions on assignment in the trackage rights agreements are unenforceable. If the STB accepts GDLK's argument that it can summarily ignore or treat as unenforceable assignment restrictions, what is next: safety requirements, liability allocations, operating rules, dispatch authority, compensation provisions, etc.?

GDLK may come back to the Board and ask the Board to set the terms and conditions of operations. But, the Board only sets the terms and conditions of operations either where the parties agree to the trackage rights but cannot agree on the terms and conditions (*Santa Fe*) or where the Board has imposed trackage rights as a condition to a consolidation.⁹ Here, CSXT does not agree to the trackage rights. Here, there is no consolidation requiring conditioning.

GDLK may come back to the Board and ask it to compel CSXT to grant trackage rights (which is essentially the purpose of the Petitions). It is well settled that the Board cannot compel a carrier to grant trackage rights. *Magner-O'Hara Scenic Ry. v. ICC*, 692 F.2d 441 (6th Cir. 1982); *City of Hialeah, Fla. V. Florida East Coast Ry. Co.*, 317 I.C.C. 34, 36 (1962); *Baltimore & Ohio R. Co. Operation*, 261 I.C.C. 535, 544 (1945).

⁹ *St. Louis Southwestern Railway Company-Trackage Rights*, 1 I.C.C.2d 776 (1984).

GDLK's argument falls under the weight of precedent. Trackage rights agreements continue to govern the operation under those agreements even after they expire until the parties negotiate new terms. Therefore, GDLK errs in alleging that NSR can assign the trackage rights outside the four corners of the agreements. The parties, but not outsiders like GDLK, can ask the Board to set terms and conditions for expired trackage rights if the parties cannot agree. CSXT does not have a contract with GDLK governing trackage rights and does not agree to negotiate one. Finally, in circumstances like this one, the Board does not have authority to compel one carrier to grant trackage rights to another carrier.

The trackage rights agreements continue to govern the use of CSXT property and the common carrier right to operate over CSXT's property cannot be assigned without complying with the assignment provisions that require NSR to obtain written consent from CSXT.

The trail use reactivation analogy offered by GDLK has no support.

The Trails Act is intended to preserve railroad rights-of-way that might otherwise be abandoned for future reactivation of rail service, while allowing the right-of-way to be used in the interim as a trail. *See Preseault v. ICC*, 494 U.S. 1, 5 (1990); *Birt v. STB*, 90 F.3d 580, 582-83 (D.C. Cir. 1996). The statute expressly provides that "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). Congress also provided that the interim trail sponsor is to assume responsibility for liability in connection with the trail use, including managing and paying any taxes that are due on the right-of-way. *See Idaho N. & Pac. R.R.—Aban.& Discontinuance Exemption—in Wash. & Adams Ctys., Idaho (Idaho Northern)*, 3 S.T.B. 50, 59 (1998). Thus, § 1247(d) allows the right-of-way to remain intact and available for future railroad use (i.e., "railbanked"), while relieving the railroad of liability and financial responsibility for the right-of-way during the period of interim trail use. *See Rail Abans.—Use of Rights-of-Way as Trails*, 5 I.C.C.2d 370, 370-71 (1989).

Sunflower Rails-Trails Conservancy, Inc.—Petition for Declaratory Order—Sale of Railbanked Right-of-Way, Docket No. FD 36034, slip op. at 3 (served February 23, 2017) ("*Sunflower*"). Sunflower goes on to explain that "the Board's chief concern once a trail condition has been

imposed is that the statutory railbanking conditions not be compromised and that nothing occur that would preclude a railroad's right to reassert control over the right-of-way at some future time to revive active service." *Id.* at 4. The Line is not inactive. CSXT operates it today and has continuously for decades. NSR has the right to operate over the Line.¹⁰ This is not a rail line that has been authorized for abandonment, the traffic has not stopped moving, CSXT still operates over the Line, and the Line does not need reactivation. It is a rail line available to service from two Class I railroads, CSXT and NSR. Unlike trail use, the assignment of trackage rights is not mandated by statute. Indeed, the interpretation of 49 U.S.C. 11323 and its predecessor statutes as explained above clearly requires consent by one railroad for another railroad to use its line, as is the situation here.

GDLK attempts to equate the reactivation of rail service over a line that has no service, with the Line that has active service from CSXT and available service from NSR if NSR elects to provide service.

Moreover, GDLK and NSR are the cause of any shipper on the lines leased by GDLK north of Grand Rapids electing not to use or relocate rail service. CSXT has offered to serve the shippers at the Kalamazoo Industrial Track, Comstock Industrial Track (including Turner Yard), and Richmond Connecting track if NSR and GDLK will allow CSXT access to those tracks or allowing the shippers to bring their cars to the Line. Without explanation, NSR and GDLK have rejected this legal offer, while GDLK merely seeks to continue the unlawful operations (GDLK never received STB authority to operate over the Line between 2009 and 2016) that it has benefitted from over the years.

¹⁰ Pursuant to Section 3(c)(i) of the Lease Agreement dated December 29, 2008 between NSR and GDLK, NSR can terminate the lease for no reason on 90 days' notice. NSR could then resume a connected operation to the Line. In the alternative, NSR and GDLK could renegotiate the lease or make some other agreement to allow NSR to easily

The assignment of trackage rights is not analogous to the reactivation of a rail line that has been authorized for abandonment and reactivated for rail use

THE ORDER PETITION DOES NOT MEET THE REQUIREMENTS FOR INJUNCTIVE RELIEF

Grand Elk contends that it is entitled to injunctive relief under 49 U.S.C.

1321(b)(4). The four part formula is set forth by GDLK is the same one adopted by the Board.

Under 49 U.S.C. § 1321(b)(4),¹¹ the Board may issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. A party seeking a preliminary injunction must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will suffer irreparable harm in the absence of a preliminary injunction, (3) other interested parties will not be substantially harmed by a preliminary injunction, and (4) the public interest supports the granting of the preliminary injunction. *See, e.g., Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc. (Holiday Tours)*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *N. Coast R.R. Auth. & Nw. Pac. R.R. v. Sonoma-Marin Area Rail Transit Dist.*, NOR 42148, slip op. at 3 (STB served Oct. 21, 2016); *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42129, slip op. at 4 (STB served May 4, 2012). A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction. *Am. Chemistry Council*, NOR 42129, slip op. at 4. The requesting party must also show that there is “more than a mere possibility” of success on the merits of its case. *Nken v Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted).

Richard Best Transfer, Inc. v. Union Pacific Railroad Company, Docket No. NOR 42149, slip op. at 4 (served December 22, 2016).

The similar injunction that GDLK sought from the Michigan Court under the same criteria was denied. CSXT urges the Board to adopt the well-founded reasoning of the Court.

reach and serve the Line. As CSXT has said before, CSXT does not object to NSR operating on the Line pursuant to the terms of the expired agreement as provided by *Tex-Mex*.

GDLK is not likely to succeed on the merits. GDLK contends that if the Exemption Petition is granted, it will have succeeded on the merits. As explained above, CSXT contends that GDLK will not succeed on the merits. The relief GDLK seeks is contrary to the past precedent of the Board, the 6th Circuit Court of Appeals and the United States Supreme Court. GDLK has not even attempted to address the precedent that requires the relief it seeks to be denied. GDLK has not shown that there is more than a “mere possibility” of the relief sought in the Exemption Petition will be granted. As the Michigan Court succinctly stated in finding that GDLK was unlikely to succeed on the merits before the Court, “The most obvious flaw in the plaintiffs’ request for injunctive relief is their failure to plead a viable claim.” *GDLK v. CSXT*, at 7.

GDLK has not demonstrated irreparable harm.

GDLK is not a naïve and innocent party here. GDLK comes to the Board with unclean hands. GDLK operated over CSXT’s property from 2009 to 2016 without authority from the Board, which is required for lawful operations over another railroad’s track. 49 U.S.C. 11901. Nor did GDLK have contractual rights to operate over CSXT’s property. Such behavior should not be rewarded.

GDLK cannot be said to have suffered irreparable harm because of a situation it created through its own unlawful operations. And the shippers on the Kalamazoo Industrial Track, Comstock Industrial Track (including Turner Yard), and Richmond Connecting Track are not being harmed by CSXT, which has offered to provide reasonable railroad service, but by GDLK and NSR by refusing to allow these shippers to be served by CSXT or at least bring their cars to the Line for service by CSXT. Moreover, the shippers have the right to demand that NSR fulfill its common carrier obligation and serve them pursuant to the trackage rights. That NSR might

incur some inconvenience is not CSXT's doing, but is a direct result of NSR not fulfilling its obligations under the trackage rights agreements of "obtaining the prior written consent of" CSXT, but then going ahead with the transaction with GDLK.¹² In addition, as the Court noted, if the shippers believe that the rates of CSXT are too high, they have redress available before the Board.

Interestingly, GDLK only mentions CSXT's intermediate switch rate of \$300 per car. GDLK does not mention its rates or those of NSR. Moreover, GDLK does not mention the intermediate or reciprocal switch charges that it would impose on traffic to and from Kalamazoo Industrial Track, Comstock Industrial Track (including Turner Yard), and Richmond Connecting track. How can GDLK claim irreparable when it does not provide the other rates that shippers incur and only the CSXT rate that GDLK and NSR have refused to absorb?

CSXT will be significantly harmed by a Preliminary Injunction. Allowing a railroad that failed to comply with the law, entered and used another railroad's property without a contract, and now contends that it can use CSXT's property without being bound by any terms to a contract will harm CSXT. CSXT will be subject to liability claims for GDLK's activities, be unable to control GDLK's operations on CSXT's property and suffer interference with CSXT operations because GDLK does not believe it is bound by operating requirements, including obeying orders from dispatchers, to name but a few of the problems caused by a railroad operating on another railroad without a contract. This is not to imply that CSXT would agree to GDLK's operations if GDLK agreed to be bound by the obligations in the expired agreement between NSR and CSXT. On the contrary, this highlights the issue, the CSXT/NSR terms

¹² Many common carrier obligations, particularly for major railroads, can prove to be expensive or "inconvenient" but are nonetheless fulfilled by the carrier. The argument that it is too "inconvenient" for NSR to operate is really nothing more than saying that the commercial value of operation isn't worth the expense to NSR.

included CSXT's written consent to any assignment. GDLK cannot ignore that term nor pick and choose what terms would serve its convenience.

Denial of the injunctive relief will not harm the public interest. Today, the public has access to two competitive Class I railroads. That one of the railroads may be unwilling to meet its common carrier obligation has not been caused by CSXT.

The Court determined that the only potential harm to the public interest was higher prices for transportation. As the Board well knows, it can order railroads to provide reasonable transportation at reasonable rates, resolving that issue.

In addition, GDLK admits that several of the customers that it served from the Line have opted for alternative transportation options cutting out GDLK. What GDLK has not said is that if it were to reduce its rates, then the shippers may continue to be willing to use GDLK service beginning at the south end of the Line. Instead, GDLK seeks to place that burden on CSXT, even though GDLK has no one to blame for being in this situation but itself for its lack of due diligence.

This entire matter is really not about customer service or interline connectivity – it's all about GDLK's effort to improve its profit margin.

GDLK has not adequately supported its request for a preliminary injunction. Because GDLK has failed to satisfy the requirements that it demonstrate irreparable harm in the absence of a preliminary injunction and that it is likely to succeed on the merits of its complaint, CSXT respectfully requests that the Order Petition be denied.

CONCLUSION

For the reasons explained above, CSXT requests that the Petitions be denied by the Board. The Exemption Petition (1) does not justify the transfer of a common carrier obligation

that ignores a critical limitation on the right to transfer the underlying agreement and without the additional obligations of an expired agreement intended to govern the operations, (2) is contrary to well settled precedent requiring agreement of the owner before another railroad can use its property via trackage rights to provide common carrier service, and (3) is completely different than operations reactivated where the interim use of the line is for trail use. The Order Petition fails to meet the criteria for a preliminary injunction, no harm to the public has occurred and the only alleged harm is to GDLK, which has been the result of GDLK's own actions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day electronically served a copy of this Reply on

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