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SERVICE DATE – NOVEMBER 20, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35187 (Sub-No. 1)¹

GRAND ELK RAILROAD, INC.—ACQUISITION OF INCIDENTAL TRACKAGE RIGHTS
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

Docket No. FD 36127

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

Docket No. FD 36127 (Sub-No. 1)

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

Digest:² The Board denies Grand Elk Railroad's (GDLK) petition for exemption in Docket No. FD 36127 and its petition for Board order in Docket No. FD 36127 (Sub-No. 1). However, the Board reopens Docket No. FD 35187 (Sub-No. 1), to authorize retroactively GDLK's acquisition of trackage rights in Grand Rapids, Mich., as of January 30, 2009. The Board also directs CSX Transportation, Inc. (CSXT) to allow GDLK to provide service over CSXT's line pending any subsequent determination of GDLK's right to access the line.

Decided: November 17, 2017

By petition filed in Grand Elk Railroad—Acquisition Exemption—Norfolk Southern Railway, Docket No. FD 36127 on June 12, 2017, Grand Elk Railroad, Inc. (GDLK), a Class III rail carrier, seeks an exemption under 49 U.S.C. § 10502 from the requirements of 49 U.S.C. § 10902 to acquire trackage rights currently held by Norfolk Southern Railway Company (NSR) over 3.3 miles of track in Grand Rapids, Mich., owned by CSX Transportation, Inc. (CSXT). By a second petition filed on the same date in Grand Elk Railroad—Petition for Board Order—

¹ These proceedings are not consolidated. A single decision is being issued for administrative purposes.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Norfolk Southern Railway, Docket No. FD 36127 (Sub-No. 1), GDLK seeks, upon approval of the exemption, a Board order directing CSXT to allow GDLK's operations over the 3.3 miles of CSXT rail line (CSXT Line).³ On September 5, 2017, the Board instituted a proceeding in Docket No. FD 36127 and on September 8, 2017, published a notice of the Board's action in the Federal Register (82 Fed. Reg. 42,568).

For the reasons explained below, the Board will deny the petition for exemption in Docket No. FD 36127 and the petition for Board order in Docket No. FD 36127 (Sub-No. 1). However, the Board will reopen Grand Elk Railroad—Acquisition of Incidental Trackage Rights Exemption—Norfolk Southern Railway, Docket No. FD 35187 (Sub-No. 1) to make GDLK's previously granted trackage rights authority over the CSXT Line retroactive to January 30, 2009, and will direct CSXT to allow GDLK to provide service over the CSXT Line pending any subsequent determination of GDLK's right to access the line.

BACKGROUND

The trackage rights at issue here derive from two trackage rights agreements for track located in Grand Rapids, Mich., negotiated by the predecessors of CSXT and NSR in 1980 and 1984. The agreements were negotiated to consolidate duplicative trackage within Grand Rapids to accommodate urban development while still preserving competitive service by the two carriers. (Exemption Pet. 5.) As is relevant here, the agreements gave NSR's predecessor-in-interest trackage rights over what is now the CSXT Line. The trackage rights under these agreements were eventually inherited by NSR (as the grantee) and CSXT (as the grantor). Each agreement contains a provision that neither party may assign its rights under that agreement unless the other party has given its prior written consent to the assignment. The agreements were to expire after 30 years, in 2010 and 2014.

As GDLK explains the situation, in 2008, in an attempt to reverse a significant decline in carloadings on its lines in the Grand Rapids area, NSR proposed leasing its lines to GDLK, a locally-based carrier with an interest in serving the shippers in the area. (GDLK Notice 6, Nov. 3, 2008, Grand Elk R.R.—Lease & Operation Exemption—Norfolk S. Ry., FD 35187.) The objective was to lease 126.2 miles of contiguous track, including the trackage rights over the CSXT Line, which would have advanced the original intent of the 1980s agreements that there be competitive service in the Grand Rapids area. When GDLK sought lease and operating authority from the Board, however, through an apparent oversight, (Exemption Pet. 10), GDLK sought authority for only the 122.9 miles of rail line, but not the 3.3-miles of line that NSR operated over pursuant to trackage rights—the CSXT Line at issue here. See Grand Elk R.R.—Lease & Operation Exemption—Norfolk S. Ry. (GDLK Lease), FD 35187 (STB served Nov. 17,

³ The CSXT Line extends from milepost CH 151.3± at Pleasant Street through milepost CH 151.6/CGE 0.0 to milepost CGE 3.0± north of Ann Street in Grand Rapids, Mich.

2008); (Exemption Pet. 14.). Around the same time, NSR and GDLK executed the “Grand Rapids Assignment and Assumption Agreement” under which NSR leased to GDLK the 122.9 miles of track and assigned to GDLK all of its trackage rights in the 3.3-mile long CSXT Line. (Exemption Pet. 10-12; Exemption Pet. Ex. D at 1.) See also GDLK Notice 5, Aug. 25, 2016, Grand Elk R.R.—Acquis. of Incidental Trackage Rights Exemption—Norfolk S. Ry., FD 35187 (Sub-No. 1). GDLK explains that it would not have undertaken the lease transaction without acquiring rights over the CSXT Line because the CSXT Line connects key facilities, tracks, and yards to the balance of its system. (Exemption Pet. 10.)

Notwithstanding the omission in its notice of exemption, as part of its operations GDLK operated continuously over the CSXT Line beginning in 2009, and NSR effectively withdrew from the area. Despite its apparent acceptance of (and cooperation with) GDLK’s operations over many years,⁴ CSXT recently took the position that the operations are improper because, it claims, it has no record of having provided written consent for the assignment of trackage rights, as required by the 1980s agreements. (Exemption Pet. 12; CSXT Reply 4, 7, July 3, 2017.) More specifically, in March 2016, CSXT requested from GDLK documentation of GDLK’s right to operate over the CSXT Line. (CSXT Reply 7, July 3, 2017.) When GDLK failed to provide the requested documentation, CSXT asserted that GDLK had received neither authority from the Board to operate over the CSXT Line nor CSXT’s consent to the assignment of trackage rights from NSR, and demanded that GDLK cease and desist operations over its line. (*Id.*) After attempts to reach agreement on a new arrangement failed, beginning on August 10, 2016, CSXT directed its dispatchers to prohibit GDLK trains from entering the CSXT Line. (*Id.*)

In the wake of CSXT’s 2016 actions, GDLK began taking steps to rectify the situation so that it could continue to provide service. On August 25, 2016, GDLK filed a verified notice of exemption to receive Board approval for the acquisition from NSR of trackage rights over the 3.3-mile CSXT Line that had been inadvertently excluded from the GDLK Lease exemption. See Grand Elk R.R.—Acquis. of Incidental Trackage Rights Exemption—Norfolk S. Ry. (GDLK Notice), FD 35187 (Sub-No. 1), slip op. at 1 (STB served Nov. 1, 2016). GDLK concurrently asked the Board to allow the authority to take effect retroactively to January 30, 2009, the effective date of the exemption in the GDLK Lease proceeding. *Id.* Because the Board was not fully aware of GDLK’s intentions at the time, and because the agency generally disfavors retroactive grants of authority, the Board authorized only the prospective assignment of trackage rights. *Id.* at 4.

When the Board decided GDLK Notice, the parties were concurrently litigating the related state contract law questions before a Michigan state court. In their complaint, GDLK and

⁴ Nor does CSXT dispute that NSR intended to permit GDLK to provide the competitive service contemplated by the original agreement over the CSXT Line.

NSR asserted that as a matter of state contract law, NSR's assignment of its trackage rights interests in the CSXT Line to GDLK was legally enforceable. (Exemption Pet. 14.)

As GDLK explains, on June 1, 2017, the Michigan court "ruled that the trackage rights agreements that had governed NSR's trackage rights relationship with CSXT (and, later, GDLK's relationship with CSXT by way of an asserted assignment of NSR's rights) have expired, and, thus, the terms of those agreements are no longer enforceable as a matter of state law." (Exemption Pet. 7-8.) The court recognized that CSXT had acted as if it had accepted NSR's assignment of rights to GDLK,⁵ but concluded that because the contracts had expired, and because there was no retroactive grant of STB authority, there was no need for the court to address whether there had been a valid assignment of rights prior to the expiration of the agreements. (*Id.*)

After the court's decision, GDLK filed the current petition for exemption, in which it argues that the Board can grant authority for NSR's conveyance of the trackage rights to GDLK—despite the court's ruling—under a case commonly known as "Tex Mex."⁶ GDLK states that such a ruling from the Board is warranted in light of CSXT's conduct. GDLK asserts that not only had it been operating in and around Grand Rapids, including over the CSXT Line, since 2009 in cooperation with other railroads, including CSXT, (Exemption Pet. 3), but that during that period, GDLK constructed its Turner Yard, which it states greatly increased rail transportation options for the community and ultimately lowered shipping costs in the region, (Pet. for Board Order 6). Thus, according to GDLK, CSXT's actions effectively barring GDLK from operating over the CSXT Line⁷ have deprived shippers of the competitive service that formed the basis of the original trackage rights agreements in 1980 and 1984, and have also caused the strategically-significant Turner Yard and the Richmond Street Connecting Track (which GDLK leases, maintains and dispatches) to become effectively isolated from the rest of GDLK's system. (Pet. for Board Order at 9, 12.)

⁵ "CSX[T] engaged in a pattern of conduct that reflected an acceptance of [GDLK's] receipt of the assignment of trackage rights." (*Id.* at Ex. B, State Court Decision at 5-6 (footnote omitted); see also Exemption Pet. Ex. B, State Court Decision at 2 ("During the original 30-year terms of the trackage-rights agreements, [NSR] acquired rights and obligations under the agreements, and then assigned those rights and obligations to [GDLK] on March 5, 2009.")).

⁶ Thompson v. Texas Mexican Railway (Tex Mex), 328 U.S. 134 (1946).

⁷ GDLK explains that CSXT has offered to supply intermediate switching service for GDLK traffic that traverses CSXT Line, but that this is operationally inefficient. (Exemption Pet. 12-13; Pet. for Board Order 12-13.) CSXT also apparently raised the cost of switching in the Grand Rapids area from \$105/car in each direction to \$300/car in each direction, which GDLK claims is economically impracticable. (Pet. for Board Order 12-13.)

GDLK claims that CSXT's actions not only harm GDLK's business but also reduce competition in the Grand Rapids area to the detriment of the shipping public. (Exemption Pet. 3; Pet. for Board Order 16.) Several shippers also submitted comments expressing concern and frustration with the situation. For example, Padnos, a recycling operation with a location in Grand Rapids, reports that it has a dual service arrangement that allowed its facility to receive direct service from GDLK on one line (via the CSXT Line) and CSXT on another. (Pet. for Board Order Ex. B.) Padnos states that, because it has been deprived of GDLK's service and because of inefficient service arrangements by CSXT, it has shifted much of its rail traffic to truck. (Padnos Reply 1-2.) Nugent Sand Company, Inc. and King Milling Co. both submitted comments expressing concern about the increased transportation costs they have experienced as a result of CSXT's actions with respect to GDLK, and the Michigan Agri-Business Association states that several of its members have lost opportunities, seen costs skyrocket, and face an uncertain future regarding rail service to their facilities. (Nugent Sand Co. Reply 1; King Milling Co. Reply 1; Michigan Agri-Business Ass'n Reply 1.) Sargent Sand Company and Brink Farms, Inc. comment that access to Turner Yard is essential to their business. They state that the switching charges CSXT has imposed are "inflated" and "exorbitant," and make shipping from Turner Yard financially untenable. (Sargent Sand Co. Reply 1-2; Brink Farms Inc. Reply 1-2.)

In its reply to GDLK's petitions, CSXT argues that GDLK's application of Tex Mex is incorrect and that the Board cannot compel one carrier to grant trackage rights to another carrier in circumstances like this. (CSXT Reply 9-12, July 3, 2017.) CSXT also contends that its actions are not harming shippers, as it has offered to provide reasonable railroad service, but rather that it is GDLK and NSR that are hurting shippers by refusing to allow them to be served by CSXT or at least bring their cars to the Line for service by CSXT.⁸ (CSXT Reply 15, July 3, 2017.)

DISCUSSION AND CONCLUSION

GDLK asks the Board for authorization to acquire by assignment what it identifies as NSR's "unextinguished rights and obligations" pursuant to which it states NSR is "entitled and required to provide common carrier service over" the CSXT Line. (Exemption Pet. 2.) Relying

⁸ CSXT does not contest that it increased the switching fee to \$300, but argues that GDLK itself has not disclosed the rates that it would charge and notes that any shippers that believe the CSXT rates are too high can seek relief at the Board. (CSXT Reply 16, July 3, 2017.) CSXT also notes that the shippers have the right to demand that NSR fulfill its common carrier obligation and serve them pursuant to the trackage rights. (*Id.* at 15-16.) While NSR is authorized to provide service over the CSXT Line, NSR no longer has operations within 48 rail miles of Grand Rapids, (Pet. Ex. H at ¶ 14), and therefore is not currently a viable competitive option.

on Tex Mex, GDLK asserts that the Board should direct the transfer of NSR's "Tex Mex rights" that it claims exist as a matter of federal law. (Exemption Pet. 18.) CSXT counters that any transfer of trackage rights from NSR requires its written consent, despite expiration of the 1980s agreements.

It is well-established that a Board license is permissive, and that a carrier cannot begin operations until it also has a contract or property right to provide the service. See Ohio River Partners LLC—Acquis. & Operation Exemption—Hannibal Development, LLC, FD 35984, slip op. at 3 (STB served April 1, 2016). Thus, for example, a party may obtain Board authority to operate over a line via the Board's approval of a trackage rights transaction, but can only legally begin operations if it receives permission from the owner of the line—generally through a contract—to conduct operations. Further, a party with contractual rights to operate over another carrier's track may also have the right to assign those rights, depending on the terms of the contract.

Under Tex Mex, a carrier that has operated under color of both a federal license and a contract may not be forced to terminate its operations—even if the contract has expired—without an agency finding that such termination is in the public interest. See Tex Mex, 328 U.S. at 136-37, 144-45, 147. Here, GDLK asserts that, even if the underlying agreements have expired, NSR nonetheless continues to possess a right to operate under Tex Mex and, as such, these "Tex Mex rights" can be conveyed to GDLK. However, GDLK cites no authority for the proposition that Tex Mex creates a "right" that can be transferred from one carrier to another. Because GDLK has not shown that there is a basis for transferring what it calls NSR's Tex Mex rights, the Board will deny GDLK's petition in Docket No. FD 36127 to acquire NSR's Tex Mex rights.

But that is not the end of the matter. GDLK previously sought to restore its ability to provide service over the CSXT Line, so that it could provide service over the entire 126.2 miles that were the subject of the original arrangement, by seeking retroactive Board operating authority and a state court determination that it possessed the contractual right to operate over the Line. However, because the Board granted only prospective authority, it appears that the court saw no need to rule on whether there had been an assignment of the contract rights (prior to expiration of the agreements) as to "trackage rights that the STB was unwilling to award." (Exemption Pet. Ex. B, State Court Decision at 3.) Having now reviewed the court's decision, and the parties' most recent pleadings, the Board has a clearer understanding of the parties' arguments and why the court did not reach the question of whether GDLK had a contractual right to operate over the CSXT Line before the 1980s trackage rights agreements expired. The unintended consequence of the Board's denial of retroactivity has been to deny GDLK access to the CSXT Line. This in turn has enabled CSXT to frustrate GDLK's ability to serve over the 126.2 miles that NSR sought to assign it, without regard to the public interest and the parties' conduct.

Here, based on CSXT's actions, the Board is indeed concerned about the public interest. Despite CSXT's assertion that it is not responsible for the service issues alleged by shippers in this case, CSXT's actions appear to have degraded service by introducing another carrier and adding costs for a short distance, and clearly seem to have disconnected important GDLK facilities from the rest of its network. CSXT's behavior also appears to conflict with the intent of the original agreements, which were negotiated to consolidate duplicative trackage while preserving competition. If GDLK had a right to operate over the CSXT Line prior to the expiration of the 1980s agreements, either by written consent or based on CSXT's pattern of conduct, fairness dictates that GDLK should be permitted to continue to operate on the line unless and until the Board authorizes abandonment or discontinuance.

Therefore, in light of all of the changed circumstances here—including the court's decision and the fact that CSXT's behavior appears to be contradictory to the intent of the 1980s agreements—the Board will reopen the GDLK Notice proceeding⁹ and make the trackage rights exemption previously granted in that docket retroactive to January 30, 2009, the effective date of the GDLK Lease proceeding. See Grand Elk R.R.—Lease & Operation Exemption—Norfolk S. Ry., FD 35187, slip op at 2 n.2 (STB served Dec. 22, 2008).¹⁰

The Board believes that granting retroactive authority will permit GDLK and NSR to amend their complaint or file a new complaint in state court, whichever is procedurally appropriate, and ask the court to determine whether GDLK had a valid right to operate over the CSXT Line prior to expiration of the agreements. The state court originally provided GDLK with 21 days to amend its complaint to present an alternative, viable legal theory, but has since stayed that deadline until at least November 29, 2017. (GDLK Suppl. 1-2, Nov. 14, 2017.) The Board believes that with this grant of retroactive Board authority, GDLK may now present a viable alternative legal theory to the court. In particular, the Board hopes this grant of retroactivity will give the court the opportunity to address whether, prior to the expiration of the underlying agreements, GDLK possessed a right to operate over the CSXT Line, either by written consent or by CSXT's longtime consistent pattern of conduct.¹¹ If the court answers this

⁹ The Board may, on its own motion or on petition by an interested party, reopen a proceeding based on material error, new evidence, or substantially changed circumstances. 49 U.S.C. § 1322(c).

¹⁰ Because of the retroactive authority being granted in Docket No. FD 35187 (Sub-No. 1), and the petition for exemption being denied in Docket No. FD 32127, the Board order requested in Docket No. FD 36127 (Sub-No. 1) is unnecessary, and that petition will be denied as moot.

¹¹ The court earlier stated that CSXT's conduct "reflected an acceptance of [GDLK's] receipt of the assignment of trackage rights from [NSR]." (Exemption Pet. Ex. B, State Court Decision at 5-6.) Indeed, "[t]he cooperation between [GDLK] and [CSXT] was active, not passive. Specifically, CSX[T] dispatchers 'consistently granted authority to [GDLK] to operate (continued . . .)

question in the affirmative, then GDLK would have held both federal regulatory authority to operate and a state law interest in trackage rights over the CSXT Line prior to the expiration of the 1980s agreements. Based on Tex Mex and Board precedent, it would then be indisputable that abandonment or discontinuance authority would be required before GDLK operations could be terminated despite the intervening expiration of the underlying agreements. In other words, GDLK would still have enforceable trackage rights over the CSXT Line.

In the meantime, the Board will direct CSXT to allow GDLK to resume service over the CSXT Line. GDLK has demonstrated that for seven years CSXT actively cooperated and permitted GDLK to operate over the CSXT Line, so that it could properly serve the entire 126.2 miles over which NSR gave rights to GDLK. (Exemption Pet. 12, 16, 21, 22, 24.) For example, an undated Private Memorandum of Understanding (MOU) between Padnos, CSXT, GDLK, and NSR acknowledges the existence of an agreement permitting GDLK to use CSXT tracks to access Padnos' facilities:

WHEREAS, CSXT, [NSR] and [GDLK] have established trackage right agreements that grant [NSR] and [GDLK] permission to use CSXT tracks to access the [existing railroad rights-of-way] Facilities and those trackage rights are to be maintained, preserved and honored before, during, and after the project such that CSXT, [NSR] and [GDLK] may continue to offer service to Padnos . . .

(Pet. for Board Order Ex. B.) The MOU, relating to the impact of crossing realignment on rail operations, sets forth the parties' "mutual understanding of present conditions and establish[es] their intent to mutually preserve and extend each parties' existing rights before, during, and after the planned track realignment project" and recognizes the existence of an agreement between GDLK and CSXT to use CSXT tracks to access the Padnos facility. (Id.)

These acknowledgements are clearly in line with the goal of preserving competitive service embodied in the 1980s agreements, a goal that CSXT's more recent actions have undermined. Notwithstanding CSXT's prior apparent consent to GDLK's use of the Line, CSXT has now isolated a portion of GDLK's system, cutting off GDLK from important facilities on its network, and in so doing has reduced rail-to-rail competition and adversely affected rail service to shippers in the area. Because GDLK has been providing service over the CSXT Line under color of license and right, and to effectuate the goal of the pro-competitive 1980s agreements, the

(. . . continued)

its trains' over the [CSXT Line]." (Exemption Pet. Ex. B, State Court Decision at 3.) The court also noted that "before the original 30-year terms expired, Grand Elk and CSX[T] wound up standing in the shoes of the parties to the trackage-rights agreements, and CSX[T] permitted Grand Elk to operate on the 3.3-mile stretch of track at issue in this case." (Exemption Pet. Ex. B, State Court Decision at 2.)

Board directs CSXT to permit GDLK to resume operations, unless and until the state court rules that the parties' course of conduct and the MOU did not amount to a right to operate. GDLK may, no later than December 4, 2017, resume operations under the same conditions as existed prior to CSXT's August 10, 2016 prohibition on GDLK trains entering the CSXT Line.

Should the state court find that GDLK did not have a state law right to operate over the CSXT Line prior to expiration of the agreements, the parties should be prepared to submit additional briefs on whether GDLK should be permitted to provide service over the CSXT Line based on theories of terminal access. Additional information will be provided as necessary following any future state court decision relating to the pre-expiration contractual rights. GDLK is ordered to submit to the Board any future state court decisions on this matter.

It is ordered:

1. The proceeding in Docket No. FD 35187 (Sub-No. 1) is reopened and GDLK's petition to partially revoke the class exemption is granted, retroactive to the effective date (January 30, 2009) of the previously-granted exemption in Docket No. FD 35187.
2. The Board denies the petition for exemption in Docket No. FD 36127.
3. The Board denies the petition for Board order in Docket No. FD 36127 (Sub-No. 1) as moot.
4. CSXT is directed to allow GDLK to resume service over the CSXT Line beginning no later than December 4, 2017.
5. GDLK is directed to file promptly any future state court decisions bearing on this matter.
6. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.