BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NOS. 35518, 35519, 35520, and 35521
230616, 230620, 230618, and 230619

THE NEW BRUNSWICK RAILWAY COMPANY
– CONTINUANCE IN CONTROL EXEMPTION –
MAINE NORTHERN RAILWAY COMPANY

MAINE NORTHERN RAILWAY COMPANY
– TRACKAGE RIGHTS EXEMPTION –
MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.

MAINE NORTHERN RAILWAY COMPANY
– MODIFIED RAIL CERTIFICATE –
IN AROOSTOOK AND PENOBSCOT COUNTIES, ME

PETITION FOR CORRECTION

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PETITION FOR CORRECTION

The New Brunswick Railway Company ("NBRC"), the Maine Northern Railway Company ("MNRC"), and the Eastern Maine Railway Company ("EMR") hereby petition the Surface Transportation Board ("Board" or "STB"), pursuant to 49 CFR § 1117.1, to accept this correction regarding the factual background described in STB Docket Nos. 35518, 35519, 35520, and 35521. As set forth below, inadvertence and miscommunication resulted in the relevant transaction occurring in a different manner than was previously explained to the Board. NBRC, MNRC, and EMR respectfully request that the Board accept this correction and provide nunc pro tunc approval and/or exemption of the covered transactions.

I. Background

The four dockets related to this Petition enabled MNRC to begin rail service on State-owned rail lines in Northern Maine that had recently been approved for abandonment in Montreal, Maine & Atlantic Railway, Ltd. – Discontinuance of Service and Abandonment – In Aroostook and Penobscot Counties, Maine, STB Docket No. AB-1043 (Sub-No. 1) (served Dec. 27, 2010). The rail lines were purchased by the State of Maine prior to consummation of the abandonment pursuant to the class exemption at 49 CFR § 1150.22 as explained by the State in a filing made on December 9, 2010 in the abandonment docket. The Montreal, Maine & Atlantic Railway ("MMA") conveyed the lines to the State on January 14, 2011, but MMA continued to provide temporary operations on the lines pursuant to a Modified Certificate. See generally Montreal, Maine & Atlantic Railway, Ltd. – Modified Rail Certificate – in Aroostook and Penobscot Counties, ME, STB Docket No. 35463 (served Jan. 26, 2011). As described in the December 9th filing, certain trackage rights were also planned.

To prepare for MNRC operations on the State-owned rail lines, NBRC (a non-carrier) filed a Petition for Exemption in Docket No. 35520 on May 20, 2011 to enable NBRC to continue in control of MNRC and EMR upon MNRC becoming a rail carrier. MNRC would become a Class III rail carrier upon filing its Notice for Modified Certificate of Public Convenience and Necessity under 49 CFR § 1150.23. NBRC already controlled EMR, another Class III carrier, meaning that MNRC becoming a rail carrier would implicate 49 USC §§ 11323 – 11325. Overhead trackage rights that MNRC would obtain in Docket No. 35519 would enable interchange with EMR at Millinocket, Maine. Therefore, NBRC used the Petition for Exemption process for the continuance in control. See 49 CFR § 1180.2(d)(2).

Also on May 20, 2011, MNRC filed two Notices of Exemption in Docket Nos. 35518 and 35519 for overhead trackage rights that were granted by MMA to MNRC. In their filings made on May 20th, NBRC and MNRC requested expedited consideration so that rail operations could begin June 15th. In a decision served on June 3, 2011, the Board granted the Petition for Exemption in Docket No. 35520, and the Board also stated that the exemptions in Docket Nos. 35518, 35519, and 35520 would be effective June 15, 2011.

On June 6, 2011, MNRC filed its Notice for a Modified Certificate of Public Convenience and Necessity, stating that it would begin rail operations on June 15th. Operations began on that date and MNRC is currently serving the shippers of Northern Maine on the State-owned rail lines pursuant to the Modified Certificate.

II. A Factual Correction is Needed

During a recent routine internal review, NBRC realized that the corporate transaction creating MNRC differed from the description provided in the Petition for Exemption in Docket No. 35520, in the Notices of Exemption in Docket Nos. 35518 and 35519, and in the Notice for a Modified Certificate in Docket No. 35521. In particular, NBRC and MNRC had previously stated that NBRC would wholly own MNRC, just like NBRC wholly owns EMR. At the time, this was the good faith intent of NBRC. However, the actual current corporate structure involves NBRC wholly owning EMR, which itself wholly owns MNRC. The difference from what was described earlier to the Board resulted from internal miscommunication and inadvertence regarding the structural plan.

As originally described, the corporate structure of MNRC's ownership was covered under 49 USC § 11323(a)(5). However, as actually structured, it appears that both 49 USC §§ 11323(a)(3) and 11323(a)(5) apply.

III. Argument

A. All other relevant facts remain the same

Other than the corporate structure described in Section II, all other relevant facts of the transactions in Docket Nos. 35518, 35519, 35520, and 35521 remain the same. MNRC still operates pursuant to a Modified Certificate on rail lines and connected branch lines owned by the State of Maine between Millinocket and Madawaska, MNRC still has overhead trackage rights on MMA between Madawaska and St. Leonard, NB and between Millinocket and Brownville Junction. Additionally, MMA still has overhead trackage rights on MNRC between Madawaska and Millinocket. See STB Docket No. 35505, Maine, Montreal & Atlantic Railway, Ltd. – Trackage Rights Exemption – Maine Northern Railway Company.

The Trackage Rights Agreements previously submitted to the Board in Docket Nos. 35505, 35518, and 35519 are unchanged, as is the Lease between the State of Maine and MNRC in Docket No. 35521.

There is no prejudice to any party as a result of the inaccurate corporate structure description, because the relevant parties, NBRC, MNRC, and EMR, were fully disclosed in the original filings in Docket Nos. 35518, 35519, 35520, and 35521. Similarly, the purpose of the transactions was fully disclosed and remains unchanged. It is simply the specific corporate structure that is different. Nevertheless, out of an abundance of caution, NBRC, MNRC, and EMR are serving this Petition for Correction on all parties of record in Docket No. AB-1043 (Sub-No. 1).

B. The same exemptions still apply

Despite the different corporate structure, the Petition for Exemption previously granted in Docket No. 35520 remains warranted under 49 USC § 10502. The justifications and arguments

set forth by NBRC in the Petition for Exemption filed on May 20 are unchanged. Exemption from the prior approval requirements of 49 USC §§ 11323-11325 is consistent with 49 USC § 10502 because exemption ensures shippers in Northern Maine have rail service from MNRC, thereby avoiding a potential lapse in rail service. The national rail transportation policy ("RTP") is similarly advanced by the exemption, which allows uninterrupted rail service on a rail line that had just recently been approved for abandonment. Detailed scrutiny is not necessary to carry out the RTP. Furthermore, the exemption reduces regulatory barriers to entry and ensures that a sound transportation system continues to meet the needs of the shipping public.

Regulation of the transaction is also not necessary to protect shippers from an abuse of market power because the transaction ensures the continuation of rail service on a line that had been approved for abandonment. Control of MNRC by EMR does not lessen competition in Northern Maine because the two railroads connect only via overhead trackage rights on an end-to-end basis. Indeed, operations by MNRC will ensure transportation options are available to shippers in Northern Maine by preserving rail service where it might not otherwise exist. The transaction also remains limited in scope.

The control transaction remains exempt from environmental reporting requirements under 49 CFR § 1105.6(c)(2)(i) because it will not result in any significant change in carrier operations. The transaction is also exempt from historic reporting requirements because it does not substantially change the level of maintenance of railroad properties. 49 CFR § 1105.8(b)(3). Finally, labor protection remains inapplicable because the transaction only concerns Class III carriers. 49 USC § 11326(c).

Likewise, exemption under 49 CFR § 1180.2(d)(7) still applies to the two Trackage Rights Agreements in Docket Nos. 35518 and 35519. The different corporate structure does not

affect the fact that there is no requirement for either an environmental report under 49 CFR § 1105.6(c)(4) or a historic report under 49 CFR § 1105.8(b)(3).

The Notice for a Modified Certificate remains warranted under 49 CFR § 1150.23 as well.

C. The Board has previously granted a single Petition for Exemption covering both 49 USC § 11323(a)(3) and 49 USC § 11323(a)(5)

The Board's June 3rd decision in Docket No. 35520 specifically cited to 49 USC § 11323(a)(5). Based on the structure of the transaction as actually enacted, however, it appears that two subsections likely applied: 49 USC § 11323(a)(3) and 49 USC § 11323(a)(5).[1] If the transaction had been correctly described in the original Petition for Exemption, it appears likely that NBRC and EMR would jointly have had to petition the Board for exemption from prior approval requirements of 49 USC §§ 11323 – 11325 as a result of 49 USC §§ 11323(a)(3) and (a)(5). In transactions such as this, where a non-carrier (like NBRC) owns an existing carrier (like EMR), and a new rail carrier (like MNRC) is proposed to connect to and be owned by the existing carrier, the Board has previously addressed both 49 USC §§ 11323(a)(3) and (a)(5) in a joint decision granting a Petition for Exemption. Twin Cities & Western Railroad Company, Douglas M. Head, Charles H. Clay, Kent P. Shoemaker, and William F. Drusch – Continuance in Control Exemption – Minnesota Prairie Line, Inc., STB Docket No. 34068 (served June 6, 2002); Richard B. Webb and Susan K. Lundy – Control Exemption – Blue Mountain Railroad, Inc. and Southeast Kansas Railroad Company, STB Docket No. 33603 (served Aug. 13, 1998). Therefore, it does not appear that a separate proceeding would have originally been necessary for NBRC, MNRC, and EMR.

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[1] The previously cited statues and regulations for the two trackage rights exemptions and the Notice for a Modified Certificate remain unchanged.

D. Retroactive, or nunc pro tunc, exemptions and/or approvals are appropriate

Retroactive, or nunc pro tunc, exemption and/or approval of the transactions in Docket Nos. 35518, 35519, and 35520 is warranted due to the circumstances surrounding inaccurate description of the corporate structure involving NBRC, MNRC, and EMR, the original filings. Additionally, MNRC requests that the Board also accept the Notice for a Modified Certificate in Docket No. 35521 on a retroactive, or nunc pro tunc, basis as well.

Retroactivity is warranted because the incorrect description of the transaction was made in good faith, and resulted merely from miscommunication and inadvertence. During the busy time that NBRC, MNRC, and EMR were focused on commencing rail operations on the State-owned rail lines, internal miscommunication occurred regarding the planned corporate structure. Promptly upon discovering the discrepancy, NBRC, MNRC, and EMR have taken the proactive step of notifying the Board. Moreover, there is no prejudice to any party. The identity of NBRC, MNRC, and EMR was disclosed in the relevant filings, and the ultimate purpose of the transactions was accurately described. The circumstances at issue here warrant retroactive exemption and/or approval under Board and Interstate Commerce Commission ("ICC") precedent.

The Board has previously granted nunc pro tunc exemption to control of Class III railroads where "non-compliance was inadvertent" and the parties' "effort in notifying the Board upon discovery was expeditious and in good faith." Iron Road Railways Incorporated, Benjamin F. Collins, John F. DePodesta, Daniel Sabin, and Robert T. Schmidt – Control Exemption – Bangor and Aroostook Railroad Company, Canadian American Railroad Company, Iowa Northern Railway Company, and the Northern Vermont Railroad Company Incorporated, STB Docket No. 32982, slip op. at 3 (served Sept. 12, 1996). Relief is even more warranted for

NBRC, MNRC, and EMR because the parties in Iron Road failed to seek any Board approval for their control transaction, let alone approval for a transaction that was inaccurately described.

Retroactive exemption was also granted where a railroad should have obtained prior approval for a lease that had expired by the time of the Board's eventual decision. Brotherhood of Maintenance of Way Employees and Soo Line System Division, Brotherhood of Maintenance of Way Employees v. Soo Line Railroad Company and Wisconsin Central Ltd., STB Docket No. 32964 (served Dec. 22, 1998). The Board granted retroactive exemption because the railroad's "failure to obtain prior approval from the ICC appears to be inadvertent and predicated on...mistaken belief." Id. at 6.

The ICC granted retroactive exemption to a control transaction where "non-compliance was inadvertent" and the party exercised "good faith in notifying the Commission upon discovering non-compliance." KKR Associates – Control Exemption, ICC Docket No. 31081, slip op. at 6 (served Sept. 23, 1987). See also CSX Transportation, Inc., and Southern Railway Company – Construction and Operation Exemption – Atlanta, GA, ICC Docket No. 30948 (Sub-No. 1) (served Aug. 14, 1987).

As an alternative to granting retroactive or nunc pro tunc exemption and/or approval, the Board has sometimes stated that nunc pro tunc is unnecessary because no enforcement action would be taken. David W. Wulfson, Gary E. Wulfson, Lisa W. Cota, Richard C. Szuch, and Peter A. Szuch – Control Exemption – Clarendon & Pittsford Railroad Company, Green Mountain Railroad Corporation, and Vermont Railway, Inc., STB Docket No. 33607, slip op. at 3 (served Aug. 20, 1998) ("The evidence demonstrates that petitioners' non-compliance was inadvertent and the record shows an absence of intent to flout the law or of a deliberate or planned violation."). Cf. Delray Connecting Railroad Company – Trackage Rights Exemption –

Consolidated Rail Corporation, STB Docket No. 35180 (served Jan. 9, 2009). Other times, the Board has simply accepted corrections into the record. Summit View, Inc. – Intracorporate Family Exemption – Merger of Pittsburgh Industrial Railroad, Inc. into the Pittsburgh & Ohio Central Railroad Company, STB Docket No. 33994 (served Nov. 25, 2008).

IV. Relief Requested

NBRC, MNRC, and EMR respectfully request that the Board accept this correction and provide nunc pro tunc approval and/or exemption of the covered transactions in Docket Nos. 35518, 35519, 35520, and 35521, in addition to any other relief the Board deems appropriate.

Respectfully submitted,

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July 13, 2011

VERIFICATION

I, William Dever, verify under penalty of perjury that the foregoing Petition for Correction is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.

William Dever
Assistant Secretary

Executed on July 13, 2011

CERTIFICATE OF SERVICE

I hereby certify that this 13th day of July 2011, I served a copy of the foregoing upon all parties of record in STB Docket No. AB-1043 (Sub-No. 1) via first-class mail, postage prepaid.

David E. Benz