

# FLETCHER & SIPPEN LLC

ATTORNEYS AT LAW

29 North Wacker Drive  
Suite 920  
Chicago, Illinois 60606-2832

ROBERT A. WIMBISH  
(312) 252-1504  
rwimbish@fletcher-sippel.com

241540

ENTERED  
Office of Proceedings  
September 21, 2016  
Part of  
Public Record

Phone: (312) 252-1500  
Fax: (312) 252-2400  
www.fletcher-sippel.com

September 21, 2016

## VIA ELECTRONIC FILING

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W., Room 1034  
Washington, DC 20006

Re: **Docket No. FD 35187 (Sub-No. 1)**  
**Grand Elk Railroad, Inc. – Acquisition of Incidental Trackage**  
**Rights Exemption -- Norfolk Southern Railway Company**

### **Reply to Petition for Stay**

Dear Ms. Brown:

On the afternoon of Friday, September 16, 2016, CSX Transportation, Inc. (“CSXT”) filed in the above-referenced proceeding what it entitled as a “(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(e) and (2) Petition for Stay” (hereinafter, the “Reply”). CSXT’s Reply – which includes a petition to reject GDLK’s class exemption filing and a request for an “investigation of GDLK and its parent” – was tendered 22 days after Grand Elk Railroad, Inc. (“GDLK”) had filed its exemption notice, petition for partial revocation of the class exemption, and petition for waiver with the Board on August 25, 2016.<sup>1</sup> Pursuant to 49 C.F.R. § 1104.13(a), CSXT, represented here by experienced counsel, had until September 14, 2016 – 20 days – to reply to GDLK’s various August 25, 2016 filings. The deadline for stay requests, however, was prescribed as September 16, 2016.

All but the petition for stay component of CSXT’s Reply is late. CSXT has not requested leave to late file, nor did it give any reason why it was unable to comply with the 20-day deadline. CSXT’s willful disregard of the Board’s rules of procedure is highly prejudicial and should not be sanctioned. CSXT is aware of GDLK’s request for expedited consideration, and knows that procedural delay harms GDLK and its customers by prolonging what the Board should regard as an utterly unnecessary and unwarranted disruption in rail service.

---

<sup>1</sup> In the interest of advancing this proceeding expeditiously, GDLK’s filings to which CSXT purports now to respond were served upon CSXT on that same date, August 25, 2016, even though not specifically required under the Board’s regulations.

# FLETCHER & SIPPEL LLC

Ms. Cynthia T. Brown  
September 21, 2016  
Page 2

GDLK is limiting its response here to CSXT's stay request, which should be denied out of hand. (GDLK reserves the right to respond separately to the other elements of the so-called Reply on or before the applicable procedural deadline, unless in the interim the Board – in acknowledgement of the exigencies of the current rail service and competition disruption in Grand Rapids, Michigan – appropriately disregards the balance of the Reply as untimely, offered as a calculated, dilatory tactic, and made in knowing abrogation of the Board's rules, and proceeds accordingly.) However, GDLK acknowledges that the subject class exemption cannot take effect prospectively until the Board grants GDLK's waiver petition or, if the waiver were to be denied, until such time as GDLK were to comply with the advance notice requirements from which it is seeking a waiver.

CSXT devotes only about two-and-a-half pages of its roughly 22-page Reply to arguing that it is entitled to a Board-imposed stay of GDLK's acquisition of incidental trackage rights class exemption under the four-part "Holiday Tours"<sup>2</sup> standard in the event that "the Board determines that it requires additional information before rejecting the GDLK Pleadings."<sup>3</sup> CSXT's stay request is essentially pro forma and fails to make a persuasive case under any of the four Holiday Tours prongs, much less all four as is required. CSXT's stay petition is nothing more than a vehicle by which CSXT has attempted a time-barred collateral attack on GDLK's class exemption notice and the petitions for partial revocation and waiver, as indicated above.

CSXT will not prevail on the merits. To the extent that there is controversy here, that controversy involves state law issues that the Board specifically should recognize are appropriate for state court adjudication. The fact that CSXT and GDLK (along with NSR) differ on the contract assignment issue is not adequate basis for a stay. See Wisconsin Central Ltd – Trackage Rights Exemption – Lines of Union Pacific Railroad Company and Illinois Central Railroad Company, Docket No. FD 35992 (STB served Mar. 4, 2016) slip op. at 2 ("... this is a contractual dispute. The Board's exemption authority is permissive, and we do not typically resolve contract disputes. The contractual dispute between UP and WCL is a matter for another forum to decide and need not be resolved before the Board's permissive authority is allowed to take effect"). Moreover, GDLK has filed appropriate individual petitions for exemption and

---

<sup>2</sup> Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 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).

<sup>3</sup> CSXT does not say what "additional information" it thinks the Board should require, nor, for that matter, does CSXT explain what additional regulatory scrutiny would accomplish here, when the dispute among GDLK, Norfolk Southern Railway Company ("NSR"), and CSXT turns upon whether NSR's assignment of those rights is legally enforceable under one or more state contract law theories presented in another forum.

# FLETCHER & SIPPEL LLC

Ms. Cynthia T. Brown  
September 21, 2016  
Page 3

waiver, which had provided a forum for further comment and analysis, so CSXT's arguments that the Board lacks adequate opportunity to evaluate the transaction are false.

In addition, CSXT has offered no evidence to support its suggestion that GDLK long has been aware of its regulatory oversight and yet has done nothing to remedy it.<sup>4</sup> Seven years of CSXT-facilitated GDLK operations reflects that both railroads had interacted on the common assumption that GDLK's trackage rights already were, in fact, Board-authorized, and neither had reason to question that assumption. Ultimately, CSXT's new scheme to introduce and then preserve railroad service disruption and inefficiency in Grand Rapids neither advances nor upholds the public interest. Accordingly, CSXT will not prevail on the merits here.

CSXT will suffer no irreparable harm; the idea that it would is laughable. CSXT has been an active participant for seven years in GDLK's operations over CSXT's lines in Grand Rapids, and it has yet to allege any past harm occasioned thereby. As CSXT already well knows, the liability issues it raises can and will easily be resolved through liability and indemnity provisions that are standard in trackage rights agreements between short line tenants and class I landlords – which reasonable terms GDLK would be willing to accept as a condition to the restoration of its operations. Appropriate Board action here, coupled with a successful resolution of GDLK's and NSR's contract law claims against CSXT in state court, would, in fact, restore the competitive status quo ante, so perhaps the harm that CSXT fears is that its scheme to amass increased market power in Grand Rapids will be recognized for what it is and be stopped.

Without question, GDLK is harmed by its loss of access to its lines and customers in Grand Rapids. GDLK's customers, also, have come forward to protest the disruption in GDLK's operations, stating that they are harmed.<sup>5</sup> Evidently, CSXT believes that its assessment

---

<sup>4</sup> CSXT suggests that GDLK's omission of the incidental trackage rights from its earlier filings was intentional and that operations conducted thereafter amount to a knowing violation of federal law. See, e.g., Reply at 24 (“GDLK's failure to obtain Board authorization for more than seven years should not be accepted as mere ‘oversight’”). GDLK's petition for partial revocation states that GDLK's omission was inadvertent, and the content of that petition was verified by GDLK's Arthur E. McKechnie III. Without opposing testimony, CSXT has argued that Mr. McKechnie cannot be believed. If the Board accepts Mr. McKechnie's unrefuted testimony and allows the class exemption to take effect retroactively, then CSXT can no longer argue that GDLK has willfully violated federal law nor would it have any basis to demand an “investigation.”

<sup>5</sup> See reply statements in support of GDLK filed by Padnos, King Milling Company, Universal Well Services, Inc., DRT, L.L.C., and Brink Farms, Inc.; and see also and the support statement of the Michigan Agri-Business Association. GDLK filed these responses to GDLK's STB filings at each shipper's and shipper association's request between September 6 and 8, 2018

# FLETCHER & SIPPEL LLC

Ms. Cynthia T. Brown  
September 21, 2016  
Page 4

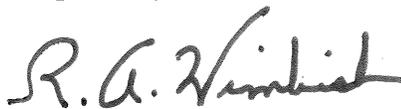
of \$300 worth of one-way intermediate switching charges (\$600 round trip) is not a “substantial” harm, although it is. And inserting another carrier (CSXT) into the movement of traffic through Grand Rapids is inefficient to the detriment of the shipping public. CSXT’s antagonism and severe tactics plainly have reduced railroad service competition in Grand Rapids because CSXT, through its calculated actions, has made longstanding service alternatives less efficient and more costly. As such, the public interest militates against a stay, not for one.

As the Board may well appreciate, the “effective date” of GDLK’s class exemption is already in question, pending Board action on the aforementioned waiver petition. GDLK recognizes that, practically speaking, its exemption authority cannot take effect without either compliance with the 60-day notice requirements (however such compliance might be carried out under the circumstances) or the requested waiver.

The Board hardly needs reminding that GDLK’s petition for exemption retroactivity is central to this proceeding and the case before the Michigan state court. As such, the critical “effective date” determination in GDLK’s view is the one tied to its petition for partial revocation. For this reason, GDLK again urges the Board to give that petition expedited consideration. A decision on GDLK’s request for retroactivity will have a direct and immediate bearing on other elements of this proceeding and upon the state court contract proceeding.

For the foregoing reasons, the Board should deny CSXT’s stay petition for failure to satisfy the four-part standard for an injunctive remedy. GDLK continues to urge swift Board action to address and remedy service disruption and operating inefficiencies resulting from CSXT’s refusal to work with GDLK to reach a mutually acceptable accommodation on trackage rights operations going forward.

Respectfully submitted,



Robert A. Wimbish  
Attorney for Grand Elk Railroad, Inc.

cc: all parties of record