

232209

LAW OFFICE  
**THOMAS F. MCFARLAND, PC.**  
208 SOUTH LASALLE STREET - SUITE 1890  
CHICAGO, ILLINOIS 60604-1112  
TELEPHONE (312) 236-0204  
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RECEIVED  
APR 18 2012  
MANAGEMENT  
STB

THOMAS F. MCFARLAND

April 17, 2012

By UPS overnight mail

Ms. Cynthia T. Brown, Chief  
Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

ENTERED  
Office of Proceedings

APR 13 2012

Part of  
Public Record

**FILED**

APR 18 2012

**SURFACE  
TRANSPORTATION BOARD**

Re: Finance Docket No. 35617, *Progressive Rail, Incorporated -- Lease and Operation Exemption -- Rail Line of Union Pacific Railroad Company in Barron and Chippewa Counties, WI*

Dear Ms. Brown:

Hereby transmitted for filing with the Board in the above proceeding are the original and 10 copies of a Verified Notice of Exemption under 49 C.F.R. § 1150.41 in behalf of Progressive Rail, Incorporated, along with a check in the amount of \$1,800 for the filing fee.

PLEASE NOTE THAT BY VIRTUE OF 49 C.F.R. § 1150.43(h)(ii), THE LEASE AGREEMENT, WHICH IS APPENDIX 5 OF THE VERIFIED NOTICE OF EXEMPTION, IS TO BE KEPT CONFIDENTIAL BY THE BOARD WITHOUT THE NEED TO FILE A MOTION FOR PROTECTIVE ORDER UNDER 49 C.F.R. § 1104.14(a).

ACCORDINGLY, I AM HEREBY TRANSMITTING AN ADDITIONAL COPY OF THE VERIFIED NOTICE OF EXEMPTION FOR RELEASE ON THE BOARD'S WEBSITE IN WHICH THE LEASE AGREEMENT IS NOT CONTAINED.

Very truly yours,

**FEE RECEIVED** Tom McFarland

APR 18 2012

Thomas F. McFarland

Attorney for Progressive Rail, Incorporated

**SURFACE  
TRANSPORTATION BOARD**

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THOMAS F. MCFARLAND

Ms. Cynthia T. Brown, Chief  
April 17, 2012  
Page 2

cc: *(by UPS overnight mail w/copy of Ver Not of Exempt.)*  
LouAnn Rinn, Esq.  
Messrs. D. Fellon  
L. VanGemert

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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PROGRESSIVE RAIL, INCORPORATED )  
-- LEASE AND OPERATION )  
EXEMPTION -- RAIL LINE OF UNION ) FINANCE DOCKET  
PACIFIC RAILROAD COMPANY IN ) NO 35617  
BARRON AND CHIPPEWA COUNTIES, )  
WI )

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VERIFIED NOTICE OF EXEMPTION  
UNDER 49 C.F.R. § 1150.41

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ENTERED  
Office of Proceedings

APR 18 2012

Part of  
Public Record

**FEE RECEIVED**  
APR 18 2012  
SURFACE  
TRANSPORTATION BOARD

PROGRESSIVE RAIL, INCORPORATED  
21778 Highview Avenue  
Lakeville, MN 55044

Applicant

THOMAS F. McFARLAND  
THOMAS F. McFARLAND, P.C.  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1112  
(312) 236-0204 (ph)  
(312) 201-9695 (fax)  
mcfarland@aol.com

Attorney for Applicant

DATE FILED: April 18, 2012

**FILED**

APR 18 2012

**SURFACE  
TRANSPORTATION BOARD**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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PROGRESSIVE RAIL, INCORPORATED )  
-- LEASE AND OPERATION )  
EXEMPTION -- RAIL LINE OF UNION ) FINANCE DOCKET  
PACIFIC RAILROAD COMPANY IN ) NO. 35617  
BARRON AND CHIPPEWA COUNTIES, )  
WI )

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**VERIFIED NOTICE OF EXEMPTION  
UNDER 49 C.F.R. § 1150.41**

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Pursuant to 49 C.F.R. § 1150.41, *et. seq.*, and 49 U.S.C. § 10502(a), PROGRESSIVE RAIL, INCORPORATED (PGR), a Class III rail carrier, hereby provides notice of its exemption from 49 U.S.C. § 10902 for its lease from Union Pacific Railroad Company (UP) and operation of a rail line that extends between Milepost 49.00 at or near Cameron and Milepost 11.70 at or near Norma, a distance of 37.3 miles in Barron and Chippewa Counties, WI (Norma Line). The Norma Line is shown on a map that is attached to this Notice as Appendix 1.

Approximately seven years ago, PGR obtained an exemption for lease and operation of the Norma Line. *See* Finance Docket No. 34957, *Progressive Rail, Incorporated - Lease and Operation Exemption - Rail Line of Union Pacific Railroad Company*, Notice served October 29, 2004.<sup>1/</sup> PGR and UP have entered into a new lease for operation of the Norma Line that will replace the lease for which that exemption was issued. This Notice of Exemption relates to the new lease and operation.

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<sup>1/</sup> That Notice mistakenly referred to the northern terminus of the leased line at or near Cameron, WI as located at Milepost 50.00. The correct location is Milepost 49.00.

**INFORMATION REQUIRED BY 49 C.F.R. § 1150.43**

In accordance with 49 C.F.R. § 1150.43, PGR submits the following in support of this Notice of Exemption.

*(a) The full name and address of the Class III rail carrier applicant;*

The full name and address of applicant is Progressive Rail, Incorporated, 21778 Highview Road, Lakeville, MN 55044.

*(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;*

Applicant's representative to receive correspondence is Thomas F. McFarland, Thomas F. McFarland, P.C. 208 South LaSalle Street, Suite 1890, Chicago, IL 60604-1112, (312) 236-0204 (ph), (312) 201-9695 (fax), mcfarland@aol.com.

*(c) A statement that an agreement has been reached or details about when an agreement will be reached;*

A Lease Agreement has been reached whereby PGR will lease the Norma Line from UP.

*(d) The operator of the property;*

PGR will operate the Norma Line.

*(e) A brief summary of the proposed transaction, including:*

*(1) The name and address of the railroad transferring the subject property to the Class III rail carrier applicant;*

The lessor of the Norma Line is:

Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

(2) *The proposed time schedule for consummation of the transaction;*

The proposed lease and operation will be consummated no sooner than the 30th day after the filing of this Notice of Exemption.

(3) *The mileposts of the subject property, including any branch lines;*

Union Pacific's Norma Line extends between Milepost 49.00 at or near Cameron and Milepost 11.70 at or near Norma, WI.

(4) *The total route miles being operated;*

There are a total of 37.3 route miles that will be leased and operated.

(f) *A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and states;*

The required map is attached as Appendix 1.

(g) *A certificate that applicant's projected revenues as a result of the transaction will not result in the creation of a Class II or Class I rail carrier so as to require processing under § 1150.45.*

PGR so certifies. See verification attached as Appendix 2.

(h) *Transactions imposing interchange commitments. (1) If a proposed acquisition or operation of a rail line or change of operators involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means ("interchange commitment"), the following additional information must be provided:*

(i) *The existence of that provision or agreement and identification of the affected interchange points.*

The Lease Agreement for the Norma Line contains an interchange commitment in the form of an adjustment in the amount of rent payable in each year, depending on the percentage of total traffic transported over the Line that is interchanged with UP in that year. A relatively high percentage of traffic interchanged with UP would result in a relatively low amount of rent, and *vice versa*.

Attached to this Notice of Exemption as Appendix 3 is a verified statement of PGR's President, Mr. David Fellon. Mr. Fellon's statement establishes that any disincentive to interchange traffic with carriers other than UP resulting from such interchange commitment is not absolute nor perpetual, and would be more than counterbalanced by public benefits.

Attached to this Notice of Exemption as Appendix 4 is an Argument that establishes that an interchange commitment is to be approved in the circumstances established in Mr. Fellon's verified statement, and where it does not appear that such interchange commitment would be inconsistent with any National Rail Policy of 49 U.S.C. § 10101.

*(ii) A confidential, complete version of the document(s) containing or addressing that provision or agreement, which may be filed with the Board under 49 CFR 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 CFR 1104.14(b).*

A confidential, complete version of the Lease Agreement that contains the interchange commitment is filed solely with the Board under 49 C.F.R. § 1104.14(a) as Appendix 5. It is noted that the Lease Agreement is to be kept confidential by the Board without a need to file a motion for protective order under 49 C.F.R. § 1104.14(a).

#### **VERIFICATION**

See Appendix 2.

#### **ENVIRONMENTAL AND HISTORIC CONSIDERATIONS**

The proposed transaction does not require environment or historic reporting or assessment. See 49 C.F.R. § 1105.6(c)(2)(i) and 49 C.F.R. § 1105.8(b)(1).

**PROJECTED ANNUAL REVENUES LESS THAN \$5 MILLION**

Pursuant to 49 C.F.R. § 1150.42(e), PGR certifies that its projected annual revenues from the proposed lease and operation, together with PGR's other projected annual revenue, will not exceed \$5 million. *See* Appendix 2.

**LABOR PROTECTION**

Pursuant to 49 U.S.C. § 10902(d), labor protection requirements do not apply to the proposed transaction.

**CAPTION SUMMARY**

The caption summary required by 49 C.F.R. § 1150.44 is attached hereto as Appendix 6.

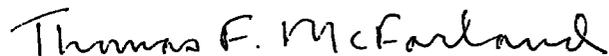
**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, within 16 days of the filing of this notice, the Director of the Office of Proceedings should publish a notice in the Federal Register of the filing of this Notice. *See* 49 C.F.R. § 1150.42(b).

Respectfully submitted,

PROGRESSIVE RAIL, INCORPORATED  
21778 Highview Avenue  
Lakeville, MN 55044

Applicant

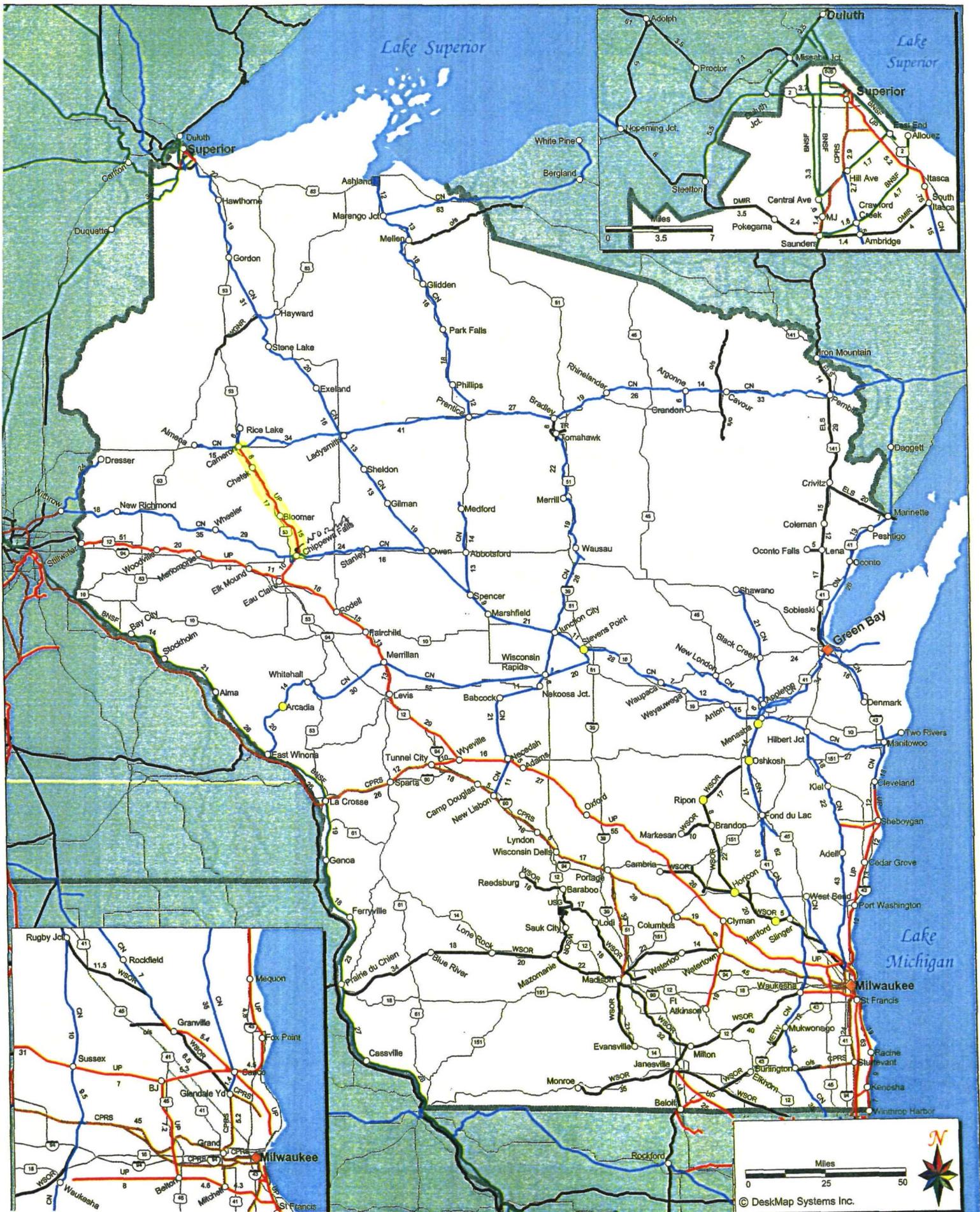


THOMAS F. McFARLAND  
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Attorney for Applicant

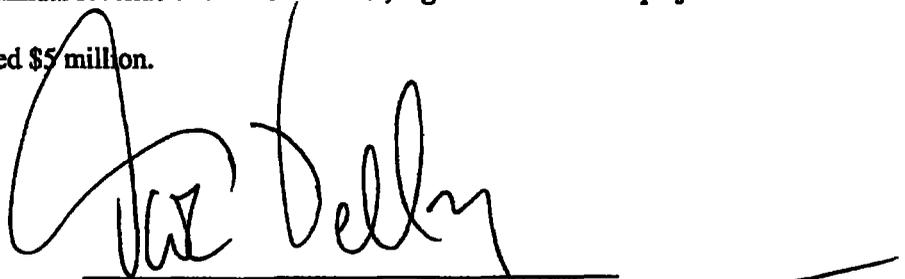
DATE FILED: April 18, 2012

WISCONSIN • Milwaukee, Superior

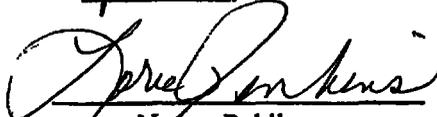


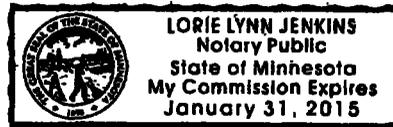
VERIFICATION

DAVID FELLON, being duly sworn, states that he is President of Progressive Rail, Incorporated (PGR); that he is familiar with the facts asserted in the foregoing Notice of Exemption; that all of those facts are true and correct; that the projected annual revenues of PGR as a result of the proposed transaction will not result in creation of a Class I or Class II rail carrier; and that the projected annual revenue of the Norma Line, together with PGR's projected annual revenue, does not exceed \$5 million.

  
\_\_\_\_\_  
DAVID FELLON

SUBSCRIBED AND SWORN to  
before me this 12 day  
of April, 2012

  
\_\_\_\_\_  
Notary Public



My Commission Expires: 1-31-15

**VERIFIED STATEMENT OF DAVID FELLON**

My name is David Fellon. I am President of Progressive Rail, Incorporated (PGR). PGR is a Class III rail carrier headquartered at Lakeville, MN.

A branch line owned by Union Pacific Railroad Company (UP) extends from Eau Claire, WI approximately 50 miles via Chippewa Falls, WI to terminus at Cameron, WI (see map attached to PGR's Notice of Exemption as Appendix 1). Prior to 2004, UP studied a major portion of that line generally north of Chippewa Falls for abandonment. In 2004, PGR leased that segment from UP between Norma, WI (Milepost 11.7 north of Chippewa Falls) and Cameron (Milepost 49.0) ("Norma Line"). Industrial development efforts undertaken by PGR and UP have preserved the Norma Line in operation.

PGR interchanges Norma Line traffic with UP at Norma. There is a rail line owned by Canadian National Railway Company (CN) at Cameron. CN traffic from Cameron must be transported to Ladysmith, WI in order to be moved over the CN rail system (see map, Notice of Exemption, Appdx. 1). That has not been possible for many years because the CN Cameron-Ladysmith rail line has been officially out-of-service, and would require extensive rehabilitation to be made operable. Shippers on the Norma Line have not called upon PGR to interchange traffic with CN at Cameron.

There is a CN rail line at Chippewa Falls. The Norma Line does not extend to Chippewa Falls. There is no connection between CN and UP rail lines at Chippewa Falls. Consequently, shippers on the Norma Line cannot route traffic via UP-Chippewa Falls-CN.

PGR and UP have recently agreed on a new lease of the Norma Line to replace the 2004 lease. I have been personally involved in behalf of PGR in negotiating the new Lease Agreement with UP.

The new Lease Agreement contains an interchange commitment in the form of an adjustment in the amount of rent payable, depending on the percentage of total traffic transported over the Norma Line that is interchanged with UP in each year. A relatively high percentage of traffic interchanged with UP would result in a relatively low amount of rent (or no rent), and *vice versa*.

During the course of negotiations for a new Lease Agreement, UP provided options for different interchange commitments. PGR freely chose the interchange commitment that is contained in the new Lease Agreement because it will enable PGR to dramatically improve rail service on the Norma Line and because UP has agreed to share risk under that commitment.

It is evident that the interchange commitment in the new PGR-UP Lease Agreement does not impose an outright barrier to interchange between PGR and a carrier other than UP. The interchange commitment does not prohibit such interchange, but instead requires a greater amount of rental payable depending on the extent of such interchange.

PGR will not have an incentive to prioritize interchange with UP for an indefinite period of time as a result of the interchange commitment. Each year, the provision for adjustment of the rental amount will be treated independently of any other year. The percentage of traffic interchanged with UP in any year will not be carried over into the following year.

The Lease Agreement is not perpetual. It has a 30-year term. The 30-year term is commercially reasonable. A term of that duration will provide the kind of certainty that PGR needs to make long-term investments to improve rail service over the Norma Line.

The interchange commitment will result in vital public benefits because it will enable PGR to make substantial improvements to track and bridges on the Norma Line. There are opportunities for PGR to grow outbound traffic dramatically if the Norma Line were to be significantly improved. To that end, PGR intends to perform major renewals of main tracks, sidetracks, and bridges, and to construct a number of new sidings and yard tracks to enable staging of railcars for loading and to achieve efficiencies in railcar switching.

Improvements of that magnitude will require a very large investment. PGR can borrow the required funds only if its lender is assured that there will be a steady long-term stream of cash flow sufficient to service the debt and to recover the costs associated with materially increased rail traffic. If PGR were required to pay full market rental for the Norma Line, PGR would be unlikely to afford to make the required investments. The interchange commitment is structured to provide the essential flexibility needed by PGR to successfully finance the prospective track and bridge improvements.

The extensive improvements to track and bridges to be made by PGR will result in dramatically improved rail service for the benefit of Norma Line shippers. PGR and UP will also benefit from the resulting increased rail traffic volume.

Equally beneficial will be the significant boost to the local economy resulting from those track and bridge improvements and the increased traffic volume. Increased activity of that kind

will be sure to generate numerous direct and indirect new jobs, providing vital benefits to hundreds of families in what has traditionally been the most economically depressed region in Wisconsin.

In view of those extensive and widespread benefits, the proposed PGR-UP Lease Agreement, including its interchange commitment, is strongly in the overall public interest.

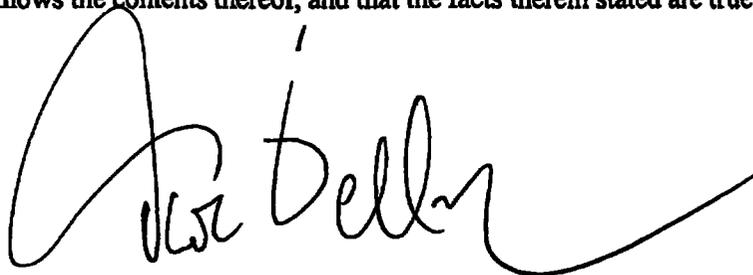
An additional positive aspect of the proposed interchange commitment is that UP thereby undertakes to share risk with PGR. The contingent rent arrangement of the interchange commitment essentially makes UP a joint venturer with PGR because UP thereby trades the certainty of a cash flow from market rental payments for an uncertain opportunity for increased revenue from additional traffic to be developed by PGR as a result of the improvements that PGR will make to the Norma Line. Likewise, if economic conditions reduce volume at some point, UP shares the risk and PGR avoids the burden of a fixed cost.

The Board is urged to permit the Lease Agreement to become effective without delay. PGR is poised to begin to install crossties in the Norma Line within minutes after winter frost leaves the soil. Prompt action is needed because the local industries on the Norma Line are coming out of the worst Recession since the Great Depression, and efficient rail service is their lifeline to renewed economic success.

VERIFICATION

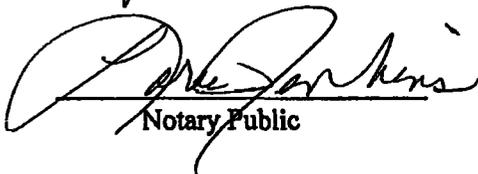
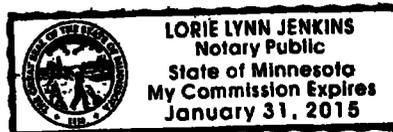
STATE OF WISCONSIN    )  
                                  ) SS:  
COUNTY OF DAKOTA    )

DAVID FELLON, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.



\_\_\_\_\_  
DAVID FELLON

SUBSCRIBED AND SWORN to  
before me this 12 day  
of April, 2012.

  
\_\_\_\_\_  
Notary Public

My Commission Expires: 1-31-15

**ARGUMENT RE INTERCHANGE COMMITMENT**

To assess whether a particular interchange commitment is consistent with the public interest, the Board weighs the benefits of the interchange commitment against its potential for harm. *Review of Rail Access and Competition Issues - Renewed Petition of the Western Coal Traffic League*, 2007 STB LEXIS 632 at \*16 (Ex Parte No. 575, decision served October 30, 2007). The Board in that decision said (*id.* at \*34):

. . . We will consider whether the interchange agreement is part of a lease or sale of a line, and we will look at the duration of the restriction. We will examine the manner in which the interchange commitment discourages interchange with other carriers and the degree to which interchange is effectively foreclosed. Parties should expect a higher level of scrutiny on agreements that contain a total ban on interchange with other carriers or go on in perpetuity.

An interchange commitment will be approved where a disincentive to interchange with other carriers is not absolute nor perpetual, and where such disincentive is counterbalanced by public benefits. *See Jackson & Lansing R. Co. - Lease and Oper. Exempt. - Norfolk Southern Ry. Co.*, 2011 STB LEXIS 454 at \*23-24 (Finance Docket No. 35411, decision served September 27, 2011).<sup>2/</sup>

The verified statement of PGR President Fellon (Appendix 3) establishes that the interchange commitment in the PGR-UP Lease Agreement is in accordance with those standards, and, therefore, should be approved.

Thus, the interchange commitment is neither absolute, nor perpetual. Interchange with rail carriers other than the Lessor is not prohibited. Instead, any such interchange would result in

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<sup>2/</sup> The lead docket in that decision is Finance Docket No. 35410, *Adrian & Blissfield R. Co. - Contin. in Control Exempt. - Jackson & Lansing R. Co.*

higher rental payment, depending on the extent of such interchange. The Lease Agreement in which the interchange commitment is contained is not open-ended. Instead, each year of its 30-year term is treated independently as to the effect of the interchange commitment. There are no “carry-overs” whereby one annual period could influence others.

The public benefits that will flow from the interchange commitment more than counterbalance any disincentive to interchange traffic with carriers other than UP. Thus, PGR’s ability to minimize or to avoid market rental payments by virtue of the structure of the interchange commitment will enable PGR to invest heavily in the Norma Line to renew track and bridges and to construct a number of new sidings and yard tracks that will permit staging of railcars for loading and greatly increased efficiency of switching. The resulting substantial improvement in quality of rail service on the Norma Line will greatly benefit (1) shippers through more prompt and reliable train service; (2) PGR and UP by enabling them to share in the significantly increased rail traffic volume resulting from more efficient service; and (3) perhaps most importantly, hundreds of local citizens and families in the economically depressed area near the Norma Line by virtue of the availability of numerous additional direct and indirect jobs made possible by increased rail traffic volume and associated economic activity at and near the Norma Line. Thus, the interchange commitment is strongly and broadly in the public interest.

There is no indication that the interchange commitment would be inconsistent with any of the national rail policies, such as the prohibition of predatory pricing and practices. 49 U.S.C. § 10101(12). On the contrary, UP would share risk with PGR by virtue of the interchange commitment. Thus, the contingent rental agreement essentially makes UP a joint venturer with

PGR because UP trades the certainty of cash flow from recurring market rental payments for the uncertain opportunity for increased revenue from traffic to be developed by PGR on the Norma Line. In addition, PGR avoids the burden of a fixed cost and UP shares the risk if traffic volume declines due to economic conditions.

WHEREFORE, for all the reasons stated, the Board should permit the PGR-UP Lease Agreement to take effect as scheduled.

Respectfully submitted,

PROGRESSIVE RAIL, INCORPORATED  
21778 Highview Avenue  
Lakeville, MN 55044

Applicant



THOMAS F. McFARLAND  
THOMAS F. McFARLAND, P.C.  
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(312) 201-9695 (fax)  
mcfarland@aol.com

Attorney for Applicant

DATE FILED: April 18, 2012

**F.D. No. 35617**

**Appendix 5**

**Lease Agreement**

(CONFIDENTIAL)

**CAPTION SUMMARY**

**SURFACE TRANSPORTATION BOARD**

**Notice of Exemption**

STB Finance Docket No. 35617

*Progressive Rail, Incorporated --  
Lease and Operation Exemption -- Rail Line of  
Union Pacific Railroad Company,  
in Barron and Chippewa Counties, WI*

Progressive Rail, Incorporated (PGR), a Class III rail carrier, has filed a notice of exemption for its lease from Union Pacific Railroad Company (UP) and operation of the Norma Line that extends between Milepost 49.00 at or near Cameron and Milepost 11.70 at or near Norma, a distance of 37.3 miles in Barron and Chippewa Counties, WI.<sup>1/</sup>

Comments must be filed with the Board and served on PGR's representative, Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1890, Chicago, IL 60604-1112, 312-236-0204 (ph), (312) 201-9695 (fax), mcfarland@aol.com.

The notice is filed under 49 C.F.R. § 1150.41. If the notice contains false or misleading information, the exemption is void *ab initio*. The filing of a petition to revoke will not automatically stay the transaction.

By the Board

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<sup>1/</sup> A Board Notice in Finance Docket No. 34957, *Progressive Rail, Incorporated - Lease and Operation Exemption - Rail Line of Union Pacific Railroad Company*, served October 29, 2004, relating to an earlier lease of the Norma Line that is being replaced by the lease covered by the Notice of Exemption under consideration, mistakenly referred to the northern terminus of the leased line at or near Cameron, WI as located at Milepost 50.00. The correct location is at Milepost 49.00.