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SERVICE DATE – LATE RELEASE DECEMBER 23, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC—LEASE AND OPERATION
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

Decided: December 23, 2010

By this decision, the Board institutes a proceeding to consider a petition to revoke the notice of exemption in this proceeding.

The Board served and published a notice of exemption under 49 C.F.R. § 1150.41 on September 16, 2010 (75 Fed. Reg. 56,653-54). The notice permits Middletown & New Jersey Railroad, LLC (M&NJ), a Class III rail carrier, to lease the following rail lines (the lines) from Norfolk Southern Railway Company (NSR): (1) the Hudson Secondary located between mileposts LX 2.1 and LX 20.6 (18.5 miles in length); (2) the Walden Secondary located between mileposts DJ5.0-DJ 10.5 and WI 29.1-WI 32.9 (9.3 miles in length); (3) the Maybrook Industrial Track located between mileposts RT 1.3 and RT 7.5 (6.2 miles in length); (4) the Greycourt Industrial Track located between mileposts IL 52.5 and IL 53.4 (1.0 mile in length); and (5) the EL Connection Track located between mileposts QK 0.0 and QK 0.8 (0.8 mile in length). In conjunction with the lease of the lines, pursuant to the notice, NSR also: (1) granted M&NJ incidental overhead trackage rights over NSR's rail line located between mileposts JS 67.50 and 63.14 (4.36 miles in length); (2) subleased to M&NJ NSR's lease operations over the connecting track owned by the New York, Susquehanna & Western Railway (NYS&W) located between milepost JS 63.14, at Hudson Jct., N.Y., and milepost LX 2.1, at Hudson Jct. (approximately .35-miles in length); and (3) partially assigned to M&NJ all of NSR's rights under the NYS&W Trackage Rights Agreement for NYS&W's continued trackage rights operations over the Hudson Secondary track between Hudson Jct. and Warwick, N.Y. The exemption was scheduled to become effective on September 30, 2010.

On September 23, 2010, United Transportation Union–New York State Legislative Board (UTU-NY) filed a petition for stay of the effective date of the exemption pending disposition of a petition to revoke. On September 28, 2010, M&NJ filed a reply in opposition to the petition for stay. By decision served on September 29, 2010, the Board imposed a housekeeping stay of the effective date of the notice of exemption until October 7, 2010, in order to provide the Board sufficient time to fully consider the issues presented by the petition for stay. By decision served on October 6, 2010, the Board denied the petition for stay. The notice went into effect on October 7, 2010.

By petition filed on September 27, 2010, UTU-NY asks that the Board reject or revoke the notice of exemption, contending that the exemption will diminish the safety of rail operations, will harm the interests of railroad employees, and will have an anticompetitive effect.¹ M&NJ filed a reply in opposition to the request on October 15, 2010.

The Board seeks additional information on the effect of this notice of exemption, particularly on competition and shippers. Commenters may submit evidence and comment concerning the potential anticompetitive effect of the lease credit provision, disclosed pursuant to the Board's interchange commitment rules at 49 C.F.R. § 1150.43(h). See Notice of Exemption filed in FD 35412 at 6. Commenters may discuss the provision's impact on price and service. Commenters may also address safety and employee-interest issues. Any commenter may submit a response to the opening evidence/comments of any other party.

In order to ensure that all affected shippers are given an opportunity to participate in this proceeding, M&NJ is directed to provide a copy of this decision to all of the shippers on the lines for whom M&NJ has provided rail service since commencing operations.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502(d), a proceeding is instituted to consider evidence and argument addressing whether to revoke the notice of exemption in this proceeding.
2. Any interested party may submit comments and evidence by February 4, 2011.
3. Any party may submit a response to the opening submissions by February 22, 2011.
4. M&NJ shall, by January 6, 2011, serve a copy of this decision by U.S. mail or by email on all of the shippers on the lines for whom M&NJ has provided rail service since commencing operations and certify to the Board that it has made the required service.
5. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

¹ Because the notice of exemption is already in effect, UTU-NY's pleading will be treated as a petition to revoke.