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SERVICE DATE – JULY 1, 2011

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE

Docket No. FD 35529

C&NC RAILROAD, LLC—LEASE RENEWAL EXEMPTION—NORFOLK SOUTHERN
RAILWAY COMPANY

Decided: June 28, 2011

BY THE BOARD:

Under 49 C.F.R. § 1011.7(a)(2)(x)(A), the Director of the Office of Proceedings (Director) is delegated the authority to determine whether to issue notices of exemption for lease transactions under 49 U.S.C. § 10902. However, the Board reserves to itself the consideration and disposition of all matters involving issues of general transportation importance. 49 C.F.R. § 1011.2(a)(6). Accordingly, the Board revokes the delegation to the Director with respect to the issuance of this notice of exemption. The Board determines that this notice of lease renewal exemption should be issued, and does so here.

Notice

C&NC Railroad, LLC (C&NC), a Class III rail carrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.41 to renew its lease of approximately 21 miles of rail line from Norfolk Southern Railway Company (NSR).¹ The rail lines extend from (a) milepost CB5.4 at Beesons, Ind., to milepost 25.30 at New Castle, Ind., and (b) milepost R0.1 to milepost R1.16 at New Castle. C&NC has leased and operated the lines since 1997.² The 1997 lease agreement, by its terms, expired on December 9, 2009, and C&NC and NSR agreed to continue

¹ C&NC originally filed its notice of exemption on June 3, 2011, as a lease renewal under 49 C.F.R. § 1180.2(d)(4). That provision, however, applies to lease renewals “where the Board has previously authorized the transaction and only an extension of time is involved.” Because the new lease includes a new credit provision and milepost adjustments, on June 17, 2011, C&NC filed a motion for the notice to be considered as filed under 49 C.F.R. § 1150.41 instead of 49 C.F.R. § 1180.2(d)(4). The motion also includes a revenue certification and caption summary in compliance with the requirements for the class exemption at § 1150.41. Accordingly, the notice will be considered as filed under § 1150.41 with a filing date of June 17, 2011.

² See C&NC R.R. —Lease and Operation Exemption—Line of the Norfolk and W. Ry. and Ind. Hi Rail, FD 33475 (STB served Oct. 31, 1997).

operations under the terms of the 1997 agreement pending renegotiation of a new lease. On March 11, 2011, the parties executed a new lease.³

As required at 49 C.F.R. § 1150.43(h), C&NC has disclosed that the new lease agreement contains an interchange commitment provision that would provide for a lease credit whereby C&NC may reduce its lease payments by receiving a credit for each car interchanged with NSR. C&NC notes that NSR initially proposed a fixed rental payment with no option to reduce the rent, but C&NC requested a lease credit option to provide an opportunity for C&NC to earn a lower rental payment so it would be able to invest in improvements on the leased lines to increase traffic levels. According to C&NC, the interchange point with NSR is New Castle.

C&NC certifies that the projected annual revenues as a result of the proposed transaction will not exceed those that would make it a Class III rail carrier and further certifies that its projected annual revenues would not exceed \$5 million.

The transaction is expected to be consummated on or after July 17, 2011, the effective date of the exemption (30 days after the exemption was officially filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than July 8, 2011 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35529, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Richard R. Wilson, Esq., 518 N. Center Street, Ste. 1, Ebensburg, PA 15931.

Board decisions and notices are available at our website at “WWW.STB.DOT.GOV.”

It is ordered:

1. The delegation of authority to the Director of the Office of Proceedings, under 49 C.F.R. § 1011.7(a)(2)(x)(A), to determine whether to issue a notice of exemption in this proceeding is revoked.

³ C&NC has filed the new lease agreement under seal pursuant to 49 C.F.R. § 1150.43(h)(1)(ii).

2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Commissioner Mulvey dissented with a separate expression.

COMMISSIONER MULVEY, dissenting:

I disagree with the Board's decision to allow this transaction to be processed under the Board's class exemption procedures. A lease agreement between C&NC and NSR has been in place since 1997. I can presume that the lease has been successful given the parties' willingness to renew it for an additional term. However, the renewal lease contains a new provision that provides a disincentive for C&NC to interchange with carriers other than NSR. C&NC's pleadings do not provide an adequate justification for why this new competition-restricting provision is necessary. C&NC states that the interchange restriction, in the form of a "lease credit option," will enable it to "invest in improvements on the leased lines to increase traffic levels." But there is no reason to believe that C&NC did not have the same goal in the initial term of the lease, where C&NC did not see the need for an interchange restriction. Under these circumstances, I believe that the Board should be taking a close look at this transaction, the affected shippers, and the traffic flows, rather than allowing it to be consummated without regulatory oversight.