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SERVICE DATE – SEPTEMBER 16, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE

Docket No. FD 35412

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

Decided: September 13, 2010

BY THE BOARD:

Under 49 C.F.R. § 1011.7(b)(10), 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 and operation exemption should be issued, and does so here.

**Notice**

Middletown & New Jersey Railroad, LLC (M&NJ), a Class III rail carrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.41 to lease certain rail lines from Norfolk Southern Railway Company (NSR). In conjunction with the lease of the NSR rail lines, M&NJ states that it will also sublease connecting track owned by New York, Susquehanna & Western Railway (NYS&W) and receive incidental trackage rights. Pursuant to the Lease Agreement and other agreements, M&NJ will lease the following rail lines from 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 these lines, NSR is: (1) granting 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) subleasing to M&NJ NSR's lease operations over the connecting track owned by the 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 assigning 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 Lease Agreement will expire on December 31, 2020. As required at 49 C.F.R. § 1150.43(h), M&NJ has disclosed that the Lease Agreement contains a

provision that would provide for a “Lease Credit” whereby M&NJ may reduce its annual lease payments by receiving a credit for each car interchanged with NSR. M&NJ notes that NSR initially proposed a fixed rental payment with no option to reduce the rent, but M&NJ insisted on a lease credit option to provide an opportunity for M&NJ to earn a lower rental payment so it would be able to invest in improvements on the lease lines to increase traffic levels. According to M&NJ, the affected interchange point is Campbell Hall, N.Y.

M&NJ certifies that the projected annual revenues as a result of the proposed transaction will not result in M&NJ becoming a Class II or Class I rail carrier, and that its projected annual revenues will not exceed \$5 million.

M&NJ states that it expects to consummate the transaction on or shortly after October 1, 2010, which is subsequent to the effective date of the exemption (30 days after the exemption was 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 transaction. Petitions for stay must be filed not later than September 23, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35412, 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 Karl Morell, Ball Janik LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005.

Board decisions and notices are available at our website at “[WWW.STB.DOT.GOV](http://WWW.STB.DOT.GOV).”

It is ordered:

1. The delegation of authority of the Office of Proceedings, under 49 C.F.R. § 1011.7(b)(10), to determine whether to issue a notice of exemption in this proceeding is revoked.
2. This decision is effective on the date of service.

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

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VICE CHAIRMAN MULVEY, dissenting:

Once again, I must disagree with the Board's decision to allow a transaction containing a significant interchange commitment to be processed under the Board's class exemption procedures at 49 C.F.R. § 1150.41. I believe that it is incumbent for the Board to take a close look at interchange commitments before permitting them to become effective, particularly when they contain outright bans on interchange with third-party carriers or, as here, economic incentives that can only be evaluated with the provision of additional information.

Here, M&NJ seeks authorization to lease or sublease approximately 36 miles from NSR. As disclosed in the M&NJ's Verified Notice of Exemption, the lease agreement contains an interchange commitment that gives M&NJ a "credit" toward its annual lease payment for every car that it interchanges with NSR at Campbell Hall, NY. But the notice of exemption and supporting documents do not explain (1) whether the "credit" is so large vis a vis the projected carloads and annual lease payment as to eliminate any incentive by M&NJ to interchange with a third-party carrier, (2) how many shippers and carloads will be impacted by the interchange commitment, (3) and what competitive routing options are being foreclosed during the term of the lease.<sup>1</sup> I believe that all of this information, which would be obtained through the Board's more detailed application or a petition for exemption procedures, is necessary to understand the impact of this new lease.

The trickle of transactions with interchange commitments since the Board's 2008 interchange commitment disclosure rules were adopted has turned into a steady drip.<sup>2</sup> Although the disclosure rules were an important first step to regulating interchange commitments, I urge my colleagues to closely scrutinize newly proposed long-term leases that will shape competition in the rail industry for years to come.

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<sup>1</sup> Indeed, M&NJ's Verified Notice of Exemption does not even indicate how long the proposed lease would be in effect. The Board has included that information in its decision.

<sup>2</sup> E.g., Northern Plains R.R. – Lease Exemption – Soo Line R.R., FD 35382 (STB served Aug. 6, 2010) (Mulvey, dissenting); Washington & Idaho Ry. – Lease and Operation Exemption – BNSF Ry., FD 35370 (STB served Apr. 23, 2010) (Mulvey, commenting). See disclosure rules at Disclosure of Rail Interchange Commitments, EP 575 (Sub-No. 1) (STB served May 29, 2008).