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SERVICE DATE – JULY 15, 2011

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE

Docket No. FD 35533

EAST PENN RAILROAD, L.L.C.–LEASE AND OPERATION EXEMPTION–NORFOLK
SOUTHERN RAILWAY COMPANY

Decided: July 12, 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. See 49 C.F.R. § 1011.2(a)(6). Accordingly, the Board is revoking the delegation to the Director with respect to the issuance of this notice of exemption. The Board has determined that this lease and operation notice of exemption should be issued, and does so here.

Notice

East Penn Railroad, L.L.C. (ESPN), a Class III rail carrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.41 to lease from Norfolk Southern Railway Company (NSR) and to operate approximately 5.2 miles of rail line in York, Penn.¹ Pursuant to the lease agreement, ESPN will lease: (1) the York Industrial Track between milepost YR 7.50 and YR 12.31 (4.81 miles in length); and (2) the Wye Track between milepost YR 12.31 and milepost 12.70 (0.39 miles in length), which connects the York Industrial Track to NSR's line.²

As required under 49 C.F.R. § 1150.43(h), ESPN has disclosed that the lease agreement between it and NSR contains an interchange commitment provision that enables ESPN to reduce its lease payments by receiving a credit for each car interchanged with NSR. ESPN states that NSR initially proposed a fixed rental payment with no option to reduce the rent, but ESPN requested a lease credit option to give it an opportunity to earn a lower rental payment, which

¹ ESPN has filed a lease agreement and an interchange agreement under seal pursuant to 49 C.F.R. § 1150.43(h)(1)(ii).

² ESPN states that it will also be leasing from NSR certain real property located under the Wye Track and a service road extending from Windsor Street.

would enable it to invest in improvements on the leased lines and thereby increase traffic levels. According to ESPN, the interchange point with NSR is York.

ESPN certifies that the projected annual revenues resulting from the proposed transaction will not result in ESPN becoming a Class II or Class I rail carrier and will not exceed \$5 million annually.

The transaction is expected to be consummated on or after July 31, 2011, the effective date of the exemption (30 days after the verified notice of 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 effectiveness of the exemption. Petitions for stay must be filed no later than July 22, 2011 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35533, 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, Suite 225, 655 Fifteenth Street, N.W., Washington, DC 20005.

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.
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 class exemption procedures. I would like to have more information about the likely impact of the proposed interchange commitment before deciding whether to permit the transaction to go forward. In support of the interchange commitment provision, ESPN asserts only that it requested a “lease credit” option from NSR so that ESPN would better be able to invest in line improvements. This generic refrain, which has been used in a number of recent Board

proceedings, sheds no light on whether a provision discouraging interchange with other carriers is inconsistent with the public interest in this case.