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SERVICE DATE – SEPTEMBER 18, 2014

SURFACE TRANSPORTATION BOARD  
DECISION

Docket No. FD 35841

PIEDMONT & ATLANTIC RAILROAD CO., INC., D/B/A YADKIN VALLEY RAILROAD  
COMPANY—LEASE EXEMPTION CONTAINING INTERCHANGE COMMITMENT—  
NORFOLK SOUTHERN RAILWAY COMPANY

Digest:<sup>1</sup> This decision denies the joint request of Piedmont & Atlantic Railroad Co., Inc., d/b/a Yadkin Valley Railroad Company (YVRR), and Norfolk Southern Railway Company to remove information pertaining to an interchange commitment from YVRR's notice.

Decided: September 17, 2014

On June 13, 2014, Piedmont & Atlantic Railroad Co., Inc., d/b/a Yadkin Valley Railroad Company (YVRR), a Class III rail carrier, filed a verified notice of exemption to continue to lease from Norfolk Southern Railway Company (NSR) and operate approximately 93 miles of rail line that extend: (1) approximately from milepost K-37.0 at Rural Hall, Forsyth County, N.C., to milepost K-100.2 at North Wilkesboro, Wilkes County, N.C.; and (2) approximately from milepost CF-0.0 at Mount Airy, Surry County, N.C., to milepost CF-29.8 at Rural Hall, Forsyth County, N.C.<sup>2</sup> YVRR and NSR filed the notice of exemption because they recently amended their original lease agreement. The amendment, among other things, extends the term of the original lease agreement. Notice of the exemption was served and published in the Federal Register on June 27, 2014 (79 Fed. Reg. 36,581). The exemption became effective on July 13, 2014.<sup>3</sup>

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> YVRR was granted authority to lease and operate the rail line as a sub-lessee in Piedmont & Atlantic Railroad—Lease & Operation Exemption—L&S Holding Co., FD 32462 (ICC served Mar. 29, 1994) (original lease agreement). Subsequently, YVRR became the lessee of the line at issue.

<sup>3</sup> By decision served on July 11, 2014, the Board waived the employee notice requirements of 49 C.F.R. § 1150.42(e) and allowed the exemption authority to become effective on July 13, 2014.

As part of its notice of exemption, YVRR included information pertaining to an interchange commitment that it has under the amended lease agreement with NSR, pursuant to 49 C.F.R. § 1150.43(h). On June 13, 2014, YVRR and NSR filed a joint motion to strike this information from the record. As discussed below, the joint motion to strike will be denied.

## DISCUSSION AND CONCLUSIONS

In Information Required in Notices and Petitions Containing Interchange Commitments, EP 714 (STB served Sept. 5, 2013), the Board adopted rules that established additional disclosure requirements for notices of exemption and petitions for exemption where the underlying lease or line sale includes an interchange commitment. An interchange commitment is defined as a “contractual provision[] included with a sale or lease of a rail line that limit[s] the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad.”<sup>4</sup> Under 49 C.F.R. § 1150.43(h), carriers must disclose, among other things, a list of shippers that currently use or have used the line in question within the last two years; the percentage of the leasing railroad’s revenue projected to be derived from operations on the line with the interchange commitment, and an estimate of the discounted annual value of the interchange commitment to the Class I carrier leasing the line. Disclosure of this information improves the ability of the Board and affected parties to determine at the outset whether a transaction that includes an interchange commitment is appropriate for the exemption process or raises competitive issues that require a more detailed examination.

Here, the original lease agreement and amended lease agreement include a lease-credit rental mechanism, whereby YVRR can receive a credit toward its annual lease payment to NSR for each car interchanged with NSR. YVRR states that, out of an abundance of caution and to expedite the effective date of the Board’s authority for the amended lease amendment, YVRR included the required information in its notice of exemption. However, in the motion to strike, YVRR and NSR question whether the Board intended the interchange commitment disclosure requirements<sup>5</sup> to apply categorically to all lease transactions employing a lease-credit rental mechanism. In particular, YVRR and NSR argue that the Board may have only intended for the disclosure requirements to apply to leases involving a lease-credit mechanism where the leased line does, or reasonably could, connect to the lines of a third party carrier.

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<sup>4</sup> Review of Rail Access and Competition Issues—Renewed Petition of the W. Coal Traffic League, EP 575, slip op. at 1 (STB served Oct. 30, 2007). Interchange commitments are sometimes referred to as “paper barriers.”

<sup>5</sup> Information Required in Notices & Petitions Containing Interchange Commitments, EP 714, slip op. at 2 (STB served Nov. 1, 2012) (“Interchange commitments took varying forms, including lease payment credits for cars interchanged with the seller or lessor carrier”).

Under YVRR and NSR's claim, the lease-credit mechanism in this transaction would not be considered an interchange commitment. YVRR and NSR state that the leased line in this transaction does not connect to the lines of a third-party carrier and cannot do so absent substantial construction or unauthorized operations over connecting NSR-owned lines. Therefore, YVRR and NSR assert that the lease-credit mechanism does not limit or foreclose YVRR's traffic interchange options, as no such options exist or are likely to exist. Accordingly, they conclude that the lease transaction at issue here, and others like it (where there is no third party connection or reasonable possibility of a connection), should not be considered an interchange commitment and thus should be excused from the requirements of § 1150.43(h).

We deny YVRR and NSR's motion. NSR raised related arguments in EP 714, asserting that NSR's lease-credit arrangements are not interchange commitments at all. There, NSR argued, among other things, that "[i]f the leasing carrier is the only carrier with which the shortline connects, then the existence of an interchange commitment such as a lease credit arrangement has no effect on a shipper's competitive options."<sup>6</sup> The Board subsequently clarified that lease credit arrangements are within the definition of interchange commitments. Information Required in Notices & Petitions Containing Interchange Commitments, EP 714, slip op. at 7-8 (STB served Sept. 5, 2013).

YVRR and NSR argue for a narrower interpretation of what constitutes an interchange commitment—excluding provisions where there is no third party connection or reasonable possibility of a connection—based on the contention that the Board should not be concerned about the competitive impact of the interchange commitment in this particular case and ones like it. We will not interpret the definition of interchange commitment as narrowly as YVRR and NSR implicitly request. Although not all lease-credit mechanisms pose competition concerns in the present, such concerns could arise in the future. YVRR and NSR argue that the Board should only require disclosure in situations where another carrier might “reasonably” connect in the future, but whether a line might “reasonably” connect is a subjective determination and may not be definitive in each instance. Accordingly, a broader interpretation of interchange commitments—one that includes all instances where a lease-credit mechanism exists—is needed.

Having found that YVRR and NSR properly disclosed the required information pertaining to the interchange commitment, we find no basis for granting the motion to strike. YVRR and NSR argue that a motion to strike is appropriate here because the information provided pursuant to § 1150.43(h) is commercially sensitive, and striking the information from the record would ensure “complete protection” from unnecessary disclosure of such information. We find this argument unpersuasive. If a shipper or affected party seeks access to confidential documents, a protective order and confidentiality undertaking would be issued<sup>7</sup> that would

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<sup>6</sup> NSR comments 5, 7-9, EP 714 (filed Dec. 18, 2012).

<sup>7</sup> See 49 C.F.R. § 1150.43(h)(2).

provide adequate safeguards from unauthorized or unintended disclosure. Parties may also designate the documents as “Highly Confidential,” thus providing further protection by limiting access to the information to a party’s outside counsel and consultants. YVRR and NSR fail to show why these afforded protections are insufficient.

Therefore, YVRR’s notice must include the information required under 49 C.F.R. § 1150.43(h), and YVRR and NSR’s motion to strike will be denied.

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

It is ordered:

1. YVRR and NSR’s joint motion to strike is denied.
2. This decision is effective on its date of service.

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

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COMMISSIONER BEGEMAN, dissenting:

I dissented in Docket No. EP 714, Information Required in Notices and Petitions Containing Interchange Commitments, because the record failed to convince me that the usefulness of the new requirements for disclosing interchange commitments outweighed the additional reporting burdens. I found the added reporting especially problematic as it was unclear how the Board would even use the required information, if at all.

This case confirms my misgivings about EP 714. The parties credibly establish that their lease arrangement is not an interchange commitment that warrants disclosure here:

Because the Line does not connect to a third party carrier, and YVRR could not reasonably forge a connection to a third-party carrier absent substantial rail construction or unauthorized operations over connecting NSR-owned lines, the lease-credit mechanism cannot be said directly or indirectly to limit or foreclose YVRR’s traffic interchange options. As such, the lease-credit rental structure is not a form of interchange-limiting commitment, at least not under the circumstances present here .... (See Joint Motion to Strike at 8.)

Rather than refute the parties’ argument by analyzing the actual likelihood of a connection, the majority takes the “you never know” approach: “whether a line might

‘reasonably’ connect is a subjective determination and may not be definitive .... a broader interpretation of interchange commitments—one that includes all instances where a lease-credit mechanism exists—is needed.” The Board will now hold on to this agreement—despite its uncontested lack of impact on any actual or likely interchanges with third parties—without any real regard for whether retaining it is either necessary or even reasonable absent a service restriction.

I dissent from the Board’s decision.