

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE

Docket No. FD 35729

ANN ARBOR RAILROAD, INC.—LEASE EXEMPTION—NORFOLK SOUTHERN
RAILWAY COMPANY

Digest:¹ The Board is issuing a notice of exemption to permit Ann Arbor Railroad, Inc., to lease and operate two lines of railroad owned by Norfolk Southern Railway Company.

Decided: July 9, 2013

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 under 49 U.S.C. § 10502 for lease and operation 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 issuance of the notice of exemption for lease and operation of the rail line at issue in this case. The Board determines that this notice of exemption should be issued, and does so here.

Notice

Ann Arbor Railroad, Inc. (AARR), 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) two rail lines totaling 3.69 miles: (1) a line of railroad between milepost CS 1.26 and milepost CS 2.65 in Toledo, Ohio; and (2) a line of railroad between milepost GY 85.40 and GY 87.70 in Toledo (the Lines). According to AARR, it has entered into a Lease Agreement (Agreement) with NSR whereby AARR will lease the Lines from NSR. The term of the lease is 10 years.

Pursuant to 49 C.F.R. § 1150.43(h), AARR has disclosed that the Agreement contains an interchange commitment in the form of lease credits, depending on the number of carloads interchanged with NSR in a given year.² AARR states that the interchange commitment will

¹ 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).

² AARR has filed under seal, pursuant to 49 C.F.R. § 1150.43(h)(1)(ii), a confidential, complete version of the Agreement. On July 1, 2013, the Brotherhood of Locomotive Engineers
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enable it to “invest in improvements on the lines and increase traffic levels.”³ The Lines connect with AARR at AARR milepost 0.0 (Galena Street) and AARR milepost 1.0 (Manhattan Junction) in Toledo. Traffic moving to and from the Lines will have access to AARR connecting carriers NSR, Canadian National Railway Company (CN), CSX Transportation, Inc., and Wheeling & Lake Erie Railway in Toledo; the Indiana and Ohio Railway and CN in Diann, Mich.; NSR in Milan, Mich.; and Great Lakes Central Railroad in Ann Arbor, Mich.⁴

AARR certifies that its projected annual revenues as a result of this transaction will not result in AARR becoming a Class I or Class II rail carrier but that its projected annual revenues will exceed \$5 million. On June 24, 2013, AARR certified to the Board that it posted the notice required by 49 C.F.R. § 1150.42(e) at the workplace of the employees on the Lines, and that it served a copy of the notice on the national offices of the labor unions with employees on the Lines.

The earliest the transaction can be consummated is August 23, 2013, (60 days after AARR submitted its certification to the Board). See 49 C.F.R. § 1150.42(e); Progressive Rail Inc.—Acquis. & Operation Exemption—Rail Lines of Crab Orchard & Egyptian R.R., FD 35656, slip op. at 2-3 (STB served Oct. 5, 2012).

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 would not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than August 16, 2013 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35729, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on Karl Morell, BALL JANIK LLP, 655 Fifteenth Street, N.W., Suite 225, Washington, DC 20005.

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and Trainmen filed a motion for access to the Agreement. That motion will be addressed in a separate decision.

³ Notice 4.

⁴ Id. at 5.

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 because I believe that additional scrutiny of the interchange commitment is necessary. Although AARR asserts that the interchange commitment (which takes the form of a per car lease credit) will enable it to invest in the two leased lines, this is a generic rationale that sheds no light on how the interchange commitment will affect competition. Moreover, the leased lines, although short, contain many potential interchange points. The interchange commitment in the lease agreement creates a disincentive for AARR to interchange with the five other carriers with which it connects. The Board needs to take a closer look at transactions such as these that purport to increase investment incentives but also serve to limit competition that might otherwise develop.¹

¹ In Information Required in Notices and Petitions Containing Interchange Commitments, EP 714 (STB served Nov. 1, 2012), the Board proposed new rules that would require carriers to disclose more information when proposing transactions, such as this one, that contain an interchange commitment. The comment period in this rulemaking closed in January 2013 and the matter remains pending at the Board.