

41861
EB

SERVICE DATE – LATE RELEASE SEPTEMBER 27, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35410

ADRIAN & BLISSFIELD RAIL ROAD COMPANY—CONTINUANCE
IN CONTROL EXEMPTION—JACKSON & LANSING RAILROAD COMPANY

Docket No. FD 35411

JACKSON & LANSING RAILROAD COMPANY—LEASE AND OPERATION
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

Docket No. FD 35418

JACKSON & LANSING RAILROAD COMPANY—TRACKAGE RIGHTS
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

Digest:¹ This decision denies requests to terminate: (1) a lease between Jackson & Lansing Railroad Company and Norfolk Southern Railway Company; (2) a related grant of trackage rights; and (3) authorization for Adrian & Blissfield Railroad Company to continue to control Jackson & Lansing Railroad Company upon the latter's becoming a rail carrier.

Decided: September 26, 2011

On September 20, 2010, Jackson & Lansing Railroad Company (JAIL), a noncarrier, filed a notice in FD 35211 invoking the class exemption at 49 C.F.R. § 1150.31 to lease and operate 44.5 miles of rail lines of Norfolk Southern Railway Company (NSR) in Michigan (the leased lines).² In conjunction with leasing the lines, NSR also granted to JAIL limited incidental

¹ This 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 The leased lines comprise: (1) the Lansing Secondary, located between the connection with NSR's Michigan Main Line at milepost LZ 0.0 in Jackson and milepost LZ 36.9 in Lansing (36.9 miles in length); (2) the Lansing Manufacturers Railroad, located between milepost XF 0.0 and milepost XF 5.1 in Lansing (5.1 miles); (3) the Lansing Industrial Track line segment located between milepost XM 57.1 and milepost XM 58.9 in Lansing (1.8 miles); and (4) the Lansing Industrial Track line segment between milepost UA 60.7 and milepost UA 61.4 in Lansing (approximately 0.7 miles).

trackage rights over 2.96 miles of NSR's Michigan Main Line for the sole purpose of interchanging with NSR at NSR's Jackson yard.³ The Lease Agreement between JAIL and NSR will expire on December 31, 2030, but JAIL may renew it for an additional 10 years, until December 31, 2040.⁴

Two related notices of exemption were also filed on September 20, 2010. In the first, FD 35410, Adrian & Blissfield Rail Road Company (ABDF), a Class III rail carrier, invoked the class exemption at 49 C.F.R. § 1180.2(d)(2) to continue to control JAIL upon JAIL's becoming a Class III carrier. In the second related notice, in FD 35418, JAIL invoked the class exemption at 49 C.F.R. § 1180.2(d)(7) to acquire from NSR and operate non-exclusive overhead and local trackage rights over approximately 1.06 miles of NSR's Lansing Secondary in Michigan, which is leased to CSX Transportation, Inc. (CSXT).⁵

As required by 49 C.F.R. §1150.33(h), JAIL disclosed in its notice in FD 35411 that the Lease Agreement contains an interchange commitment that would provide for a "Lease Credit," whereby JAIL may reduce its annual lease payments to NSR by receiving a credit for each car interchanged with NSR. According to the record, the amount of the credit is set at a level that will reduce JAIL's cash rental payments to a nominal fee of \$1,000, if JAIL elects to interchange with NSR the same number of cars that NSR handled on the leased lines in 2009, the year preceding JAIL's assumption of operations.⁶ JAIL states that "NSR initially proposed a fixed rental payment with no option to reduce the rent, but JAIL insisted on a lease credit option to provide an opportunity for JAIL to earn a lower rental payment so it would be able to invest in improvements on the leased lines to increase traffic levels."⁷ According to JAIL, the affected interchange point is Jackson. The third-party carriers with which JAIL would interchange at Lansing are CSXT and Canadian National Railway Company (CN).⁸

The Board served and published the notices of exemption in all four dockets on October 6, 2010, and the exemptions became effective on October 20, 2010.⁹ By petition filed

³ The incidental trackage rights are between milepost NS 72.73 and milepost NS 75.67 (equal to milepost LZ 0.0) in Jackson. See 49 C.F.R. § 1150.31(a)(f) (defining "incidental trackage rights").

⁴ See Lease Agreement dated August 13, 2010.

⁵ The overhead and local trackage rights are between milepost LZ 36.8 in Lansing and milepost LZ 37.86 in North Lansing.

⁶ NSR Comments filed Feb. 10, 2011, at 6.

⁷ Resp. of ABDF & JAIL to Pet. to Revoke, filed Oct. 29, 2010 (Railroads' Resp.) 6.

⁸ Id. at 8.

⁹ 75 Fed. Reg. 61,817-18; 61,835-36. In Docket No. 35411, the Board, pursuant to 49 C.F.R. § 1011.2(a)(6), revoked the delegation of authority under 49 U.S.C. § 1011.7(b)(10)

(continued...)

on October 20, 2010, the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference, International Teamsters (collectively, the Unions) asked the Board to revoke the exemptions. In addition, by letters dated October 7 and November 10, 2010, respectively, Michigan State Senator Raymond E. Basham and Marie Donigan, a Michigan State Representative, filed identical letters voicing safety, labor, and shipper concerns, and asked that the Board require that an environmental impact study be completed, that the JAIL business plan be disclosed prior to making any final decision, and that employee protective conditions be imposed. ABDF and JAIL (collectively, the Railroads) jointly filed a response to the Unions on October 29, 2010. By decision served on December 28, 2010, the Board instituted a proceeding to consider revoking the notices of exemption in these cases, established a procedural schedule for the submittal of further evidence and argument, and directed JAIL to inform all shippers on the leased lines of the proceeding. On January 4 and 5, 2011, the Railroads certified that they had served a copy of the Board's order on the following customers: Alro Steel; Michigan Packaging; RSDC Regional Steel Distribution; Louis Padnos Iron & Metal Company (Padnos); Yreka Western Railroad Company (Yreka Western); Ambassador Steel; GE Railcar Services; QDC Packaging; and Americhem Sales Corporation.

In further submittals following the Board's December 28 order, NSR and Padnos filed comments opposing the revocation request. Comments in favor of revocation were filed by the Unions, Yreka Western¹⁰, and Mr. Peter Thompson, President of Local 278 (the Local) (collectively, the proponents of revocation).

We will deny the requests to revoke the notices of exemption in all 3 dockets. In addition, we deny the requests that the notice of exemption in Docket No. FD 35410 be declared void, or alternatively, be rejected.

PRELIMINARY ISSUE

The Railroads move to strike the Local's comments, arguing that they were filed late and were not properly served on the Railroads, and that one of the attachments to the comments contains some illegible documents.¹¹ The Board received the Local's comments 5 days after

(...continued)

for the Director of the Office of Proceedings to determine whether to issue the notice of exemption and issued the notice of exemption itself.

¹⁰ Yreka Western filed comments on February 10, 2011. In a letter filed on February 17, 2011, Yreka Western withdrew its comments in 2 of the 3 dockets (retaining them in FD 35418). On February 25, 2011, the Railroads jointly replied to comments of Yreka Western. Thereafter, in a letter filed on March 23, 2011, Yreka Western sought leave to withdraw the February 17 letter and thereby reinstate its comments. The Railroads filed a letter on March 29, 2011, further addressing Yreka Western's comments.

¹¹ Railroads' Reply to Comments, filed Feb. 25, 2011 (Railroads' Reply) 5.

their due date and promptly published them on its website. Notwithstanding the late filing and the alleged improper service, the Railroads fully responded to the Local's comments, demonstrating that neither the lateness of the comments nor their service prejudiced the Railroads. In light of the Railroads' response, we will deny the request to strike the comments.

DISCUSSION AND CONCLUSIONS

I. Voiding and Rejection.

Yreka Western argues that the notice of exemption in Docket No. 35410—authorizing ABDF's control of JAIL after JAIL became a rail carrier—is void ab initio because it contains false and misleading information concerning ABDF's control of rail carriers other than JAIL. In a similar vein, the Unions argue that we should reject the notice of exemption in Docket No. 35410 because it involves a Class I rail carrier, NSR, and the class exemption should not apply. For the reasons discussed below, we do not find either set of arguments sufficient to void the notice of exemption, or disallow the use of a notice of exemption for the transaction in Docket No. 35410.

A. Yreka Western's Challenge.

The published notice of exemption in Docket No. 35410 states that it would be “void ab initio” if the notice contained “false or misleading information.”¹² In arguing that the notice of exemption filed by ABDF on September 20, 2010, is void, Yreka Western challenges the truthfulness of ABDF's statement: “ABDF currently and wholly controls, through stock ownership and management, three other existing class III short line railroad common carriers subject to the [Interstate Commerce Act (IC Act), as amended by the ICC Termination Act].”¹³

Board authorization is required for a rail carrier to control another rail carrier (see 49 U.S.C. § 10902 (concerning Class I and II rail carriers); § 11323 (rail carriers of all sizes)); and Yreka Western is correct in stating that at the time of filing the September 20, 2010 notice, ABDF had not actually received Board *authorization* to control the other 3 carriers.¹⁴ In this connection, Yreka Western then reads the challenged statement as *suggesting* that ABDF “lawfully owns, operates, and manages” the 3 railroads.¹⁵ But ABDF's filing did not indicate it had obtained Board authority to control the railroads. Rather, ABDF accurately stated, and

¹² FD 35410, Notice of Exemption, slip op. at 3 (served Oct. 6, 2010). The other railroads that ABDF stated it controlled are: Detroit Connecting Railroad, Lapeer Industrial Railroad Company, and Charlotte Southern Rail Road, all in Michigan.

¹³ Yreka Western Comments filed Feb. 10, 2011, at 2.

¹⁴ Id.

¹⁵ Id.

presumably intended to state, strictly facts of corporate ownership and control, which appear to have been accurate at the time that the statement was made.

Upon learning of the need for Board authority to control the 3 rail carriers, ABDF filed a notice of exemption, which the Board rejected in favor of requiring a fuller explanation in an application or petition for an individual exemption.¹⁶ Next, ABDF filed a full application for the authority, which the Board granted.¹⁷ These circumstances lead us to conclude that ABDF did not make a false statement in its September 20, 2010 filing, and, accordingly, we find that the notice of exemption is not void ab initio.

B. The Unions' Challenge.

The Unions contend that NSR controls JAIL, such that it was incorrect for ABDF to state in the notice that the continuance-in-control transaction “does not involve a Class I carrier.”¹⁸ In support, the Unions point to the existence of an interchange commitment in the Lease Agreement between NSR and JAIL as an indicium that NSR controls JAIL.¹⁹ The Unions contend that a Class I carrier is involved in the continuance-in-control transaction, which would make NSR a party to the continuance-in-control transaction. The Railroads argue to the contrary, explaining that NSR holds no ownership interest in JAIL (or ABDF), holds no share in JAIL profits, holds no management rights over JAIL, and retains no trackage or haulage rights over JAIL, and that NSR does not impose a restriction on JAIL’s ability to interchange traffic with other carriers.²⁰ We find that the Railroads’ arguments are convincing, and conclude neither that JAIL is NSR’s alter ego nor that NSR controls JAIL. Accordingly, there is no Class I rail carrier involved in the continuance-in-control transaction here.²¹

¹⁶ Adrian & Blissfield R.R.—Continuance in Control—Charlotte S. R.R., Detroit Connecting RR., & Lapeer Industrial R.R., FD 35498, slip op. at 2-3 (STB served May 18, 2011).

¹⁷ Id. (STB served Aug.19, 2011).

¹⁸ Unions’ Pet. 3-4.

¹⁹ Id. at 4. The interchange commitment is discussed in detail in part II below.

²⁰ Railroads’ Resp. 7.

²¹ Cf. New Eng. & Cent. R.R.—Acquis. & Operation Exemption—Lines Between E. Alburgh, Vt. & New London, Conn., FD 32432 (ICC served Dec. 9, 1994), aff’d sub. nom. Bhd. of R.R. Signalmen v. ICC, 63 F.3d 638 (7th Cir. 1995) (Where a holding company of several rail carriers formed a noncarrier subsidiary to acquire and operate the lines of a rail carrier that was going out of existence, the ICC rejected the argument of several labor unions that the holding company was the real purchaser because the newly formed entity was sufficiently independent as not to be the alter ego of the holding company.).

II. Revocation.

Under 49 U.S.C. §10502(d), we may revoke an exemption if we find that application of a statutory provision is necessary to carry out the rail transportation policy of 49 U.S.C. §10101 (RTP). The Board has previously held that it will look to those portions of the RTP that are relevant or pertinent to the underlying statute—here, 49 U.S.C. §§ 10901 and 11323—in considering petitions to revoke. Vill. of Palestine v. ICC, 936 F.2d 1335 (D.C. Cir. 1991). The party seeking revocation has the burden of showing that regulation is necessary to carry out the RTP, 49 C.F.R. § 1121.4(f), and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary. See Consol. Rail Corp.—Trackage Rights Exemption—Mo. Pac. R.R., FD 32662 (STB served June 18, 1998). In addition, as discussed in the next section, the Board has issued specific guidance where the exemption or other regulatory approval for which revocation is sought involves an interchange commitment.

A. Interchange Commitment

The Board's regulations expressly provide for the use of the class exemption process from the prior approval provisions of 49 U.S.C. 10901 for transactions involving an interchange commitment. The interchange commitment must be disclosed and a copy of the agreement made available to those requesting it. 49 C.F.R. § 1150.33(h). The notice will then go into effect, unless the Board acts to reject or stay the notice; the Board may also review an exemption after it has become effective. The Board's rules specifically addressing interchange commitments resulted from a series of petitions, hearings, and rulings by the Board in Ex Parte 575, where several parties asked that the Board provide procedures that would have created a rebuttable presumption that interchange commitments are unreasonable and contrary to the public interest, or that it set specific parameters for agreements that would, or would not, trigger further Board action. That review culminated in the 2007 and 2008 decisions in Ex Parte 575: Review of Rail Access and Competition Issues—Renewed Pet. of the W. Coal Traffic League, EP 575, et al. (STB served Oct. 30, 2007) (Review of Rail Access); and Disclosure of Rail Interchange Commitments, EP 575 (Sub-No. 1) (STB served May 29, 2008) (Disclosure Rules).

In Review of Rail Access, the Board discussed the history of interchange commitments in the industry and addressed why parties had sometimes chosen to employ them over the preceding several decades as the shortline rail industry had developed. The Board likewise discussed arguments made by different segments of the industry both in favor of and against their use. Having explained the role played by interchange commitments in the past, the Board observed that “the need for interchange commitments may diminish in future leases or sales.”²² The Board also observed that there was significant variation among the different types of these provisions, as well as the negotiating context in which they might have arisen in the past and

²² Review of Rail Access 14.

how they might be used prospectively.²³ Therefore, the Board decided that “no single rule of general applicability seems appropriate, and we will not attempt to establish such a rule.”²⁴ Instead, the Board ruled that the propriety of any given interchange commitment is best considered on a case-by-case basis.²⁵ The Board emphasized that it would “weigh the benefits of a particular interchange commitment against its potential for harm,” an inquiry considered to be “necessarily fact-specific.”²⁶

To assist in facilitating its review, the Board implemented new procedures to require the disclosure of, and expedited public access to, any new interchange commitments involved in transactions filed with the Board, as well as procedures for parties to seek access to existing agreements already in effect.²⁷ As part of the process, shippers could attempt to show that an interchange agreement is causing, or would cause, a violation of the IC Act, or that it is, or would be, contrary to a particular statutory provision under which approval was or is being sought.²⁸ The Board also clarified that the existence of the Railroad Industry Agreement would not preclude any shipper’s ability to seek such relief.²⁹

²³ “The record reflects significant diversity among interchange commitments. Some were associated with sales; others with leases of varying duration. Apparently, many interchange commitments do not have fixed termination dates. Some permit limited interchange with other Class I carriers; some do not. Some have relatively harsh penalties for interchanging with other carriers, while some have comparatively lighter consequences for non-sanctioned interchange. Some agreements contain procedures that allow a short line to seek waiver of the interchange restrictions. The specific provisions differ, as to their effect, depending on the economic situations of the particular railroads, the affected shippers and the competitive options available before and after the interchange restrictions were executed.” Review of Rail Access 4-5.

²⁴ Id. at 8.

²⁵ Id. at 14.

²⁶ Id. at 8.

²⁷ The Board stated that the new rules for future proposed agreements “should better equip the Board to monitor their usage and effect over the short and long term, and better equip shippers to challenge an agreement before it takes effect.” Id.

²⁸ Id. at 15.

²⁹ Id. In 1998, the Association of American Railroads and the American Short Line and Regional Railroad Association entered into the “Railroad Industry Agreement” to address interchange commitments, among other issues. Id. at 5.

The Board then went on to address the “factors” it would consider in its case-by-case balancing:

When the Board considers whether a proposed interchange commitment is in the public interest, we will examine the relevant facts and circumstances surrounding that agreement. We will consider whether the interchange agreement is part of a lease or a sale of a line, and we will look at the duration of the restriction. We will examine the manner in which the interchange commitment discourages interchange with other carriers and the degree to which interchange is effectively foreclosed. Parties should expect a higher level of scrutiny on agreements that contain a total ban on interchange with other carriers or go on in perpetuity.

Given the diversity among transactions, interchange commitments, and affected parties, we cannot identify every factor that the Board might consider in future cases. The factors to be considered will also depend upon the type of challenge brought before the Board. Under our case-specific review, we will examine the particular facts, the competitive conditions before and after the interchange commitment, the nature of the commitment, and its actual or likely effects. The parties to the transaction and other concerned parties will have ample opportunity to present their views.³⁰

B. The Interchange Commitment at Issue Here

The proponents of revocation argue that the exemption authorizing the lease and operation³¹ should be revoked to allow increased scrutiny of the transaction, and assert that the class exemption process is insufficient to determine whether the interchange commitment contained in the Lease Agreement is anticompetitive and thus contravenes 49 U.S.C. §§ 10101(1), (4), (5), (6), and (12).³² These provisions call for a regulatory policy that will: (A) allow competition and the demand for services to establish reasonable rates for rail transportation; (B) ensure the development and continuation of a sound transportation system with effective competition among rail carriers and with other modes of transportation; (C) foster sound economic conditions in transportation and ensure effective competition and coordination between rail carriers and other modes, respectively; (D) maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital; and (E) prohibit predatory pricing and practices, avoid undue concentrations of market power, and prohibit unlawful

³⁰ Id. at 15. Parties objecting to a transaction involving an interchange commitment may seek a stay and/or a revocation of the exemption.

³¹ The Unions misstate (Unions’ Pet. 4) that the relevant class exemption is codified at 49 C.F.R. § 1150.41; the correct provision is § 1150.31.

³² Unions’ Pet. 5.

discrimination. The proponents of revocation argue that, because of the questions raised by the interchange commitment, it was not appropriate to use the class exemption.

As indicated above, we take a case-by-case approach to these transactions, considering the nature of the arguments and evidence before us in the transaction at issue and the likely impact of the interchange restriction in context. JAIL has complied with the requirements set forth at 49 C.F.R. § 1150.33(h) by disclosing the interchange commitment. In the course of this revocation docket, we have received a substantial quantity of filings and factual material that are case-specific, and which are discussed further below. As a result, we believe that there is an adequate basis in this record to address the parties' arguments. Based on the facts presented, the Board is satisfied that further regulation is not necessary to carry out the RTP. Thus, the Unions have not demonstrated that revocation of the exemption is warranted.

In their joint response to the Unions' Petition, the Railroads argue that the Unions have failed to demonstrate that this particular interchange commitment, in the context in which it operates, contravenes the RTP. According to the Railroads, the interchange commitment is not anticompetitive because it neither bars JAIL from, nor penalizes it for, interchanging cars with the other carriers with which it connects rather than with NSR.³³ As the Railroads explain, the lease credit, which reduces JAIL's obligation to pay NSR rental on the leased lines for the carriage of any shipments interchanged with NSR, up to a specified number of cars per year, will enable JAIL to invest in improvements on the leased lines and increase traffic levels by making rail service better, and therefore make the lines more attractive to shippers.³⁴ The Railroads further state that, because 98% of the current traffic on the leased lines is inbound, JAIL has very limited ability, if any, to choose how to route its traffic or with whom to interchange, suggesting that, at this point in time, the interchange commitment is not foreclosing options for shippers.³⁵ NSR and the Railroads also emphasize that the lease credit applies only to the same number of cars that NSR handled on the lines in the year preceding JAIL's assumption of operations on the leased lines.³⁶ The Railroads and NSR further point out that, as long as JAIL maintains that same level of inbound traffic from NSR, any outbound traffic that JAIL generates will not be subject to the lease credit. Therefore, they argue that JAIL will have no incentive to interchange the outbound traffic with NSR rather than with other carriers.

Under the interchange commitment, JAIL receives a credit against its lease for every car that it interchanges with NSR up to a specific number annually. With the credit, JAIL would need to interchange with NSR the same number of cars per year that moved over the leased lines

³³ Railroads' Resp. 6.

³⁴ Id.; Railroads' Reply 13.

³⁵ Railroads' Reply 14.

³⁶ Id.; NSR Comments 6.

in the previous year in order to offset nearly the entire lease cost for a particular year. The lease credit will apply to the cars that JAIL interchanges with NSR until the point at which the lease cost is reduced to \$1,000. We recognize that, while the interchange commitment at issue here does not affirmatively “penalize” JAIL for interchanging traffic with other carriers rather than with NSR, it creates a disincentive for JAIL to interchange the lines’ pre-transaction traffic volume with carriers other than NSR. However, several other factors that have been presented by the parties counterbalance the apparent disincentive.

First, we note that this arrangement does not represent a total outright ban on interchange with another carrier. JAIL may still route traffic over other carriers, and JAIL states that shippers on the leased lines will have operational connections to CSXT and CN.³⁷ Therefore, the interchange commitment at issue here has less of a potential negative impact on competition, because it does not impose an outright bar to interchange between JAIL and a third party carrier.

Second, each year the lease credit will expire after JAIL interchanges the specified number of cars with NSR, and the credit for cars interchanged in one year cannot be carried over into subsequent years. JAIL will not, therefore, have an incentive to prioritize interchange with NSR over other carriers indefinitely, thus mitigating any potential anticompetitive impact. In addition, the Lease Agreement is not permanent. Both it and the interchange commitment expire in 20 years, with the option for JAIL to renew the Lease Agreement for an additional period of 10 years.³⁸ This 30-year duration is commercially reasonable. It is akin to a typical period for a residential mortgage; it offers the lessee (JAIL) the kind of certainty needed to encourage long-term rail investments to improve service over these lines; and it does not approach permanency.

Third, as the Railroads point out, nearly all of the current traffic on the leased lines is inbound, and as a result, JAIL would have very limited ability, if any, to route that traffic in any event.

Fourth, the Railroads represent that JAIL plans to use some of the revenue benefits derived from the credits for making improvements on the line, and that JAIL hopes to increase traffic on the line as well. According to NSR’s comments, under NSR’s operations, these lines experienced declining traffic in recent years, and the amount of traffic in 2009 was about 10% of the amount in 1999.³⁹ The parties to this transaction state that they believe that leasing the lines to JAIL would help to maintain the lines, as well as improve service and traffic levels. Under the Lease Agreement, if JAIL interchanges a specific number of cars with NSR in a year, it will pay

³⁷ Railroads’ Resp. 8 & Verified Statement (V.S.) of the President of the Railroads, Mark W. Dobronski ¶ 4.

³⁸ While we have endeavored not to discuss confidential information contained in the Lease Agreement, we find it necessary to reveal the lease term for the benefit of the public.

³⁹ NSR Comments 4-5 (chart); Railroads’ Reply 12.

only nominal rent on the leased lines, leaving JAIL primarily with only labor and maintenance costs to cover. The more traffic that JAIL interchanges with NSR, up to that specific number, the more lease credits and traffic revenues achieved. These cost savings may be used to upgrade the tracks and improve service to the customers located on the leased lines. JAIL indicates that it intends to perform such upgrades.⁴⁰

Concerning the physical condition of the leased lines, the proponents of revocation argue that the Railroads will lack sufficient funds to make improvements to the leased lines, or even to maintain them. The Union Local contends that ABDF—JAIL’s parent corporation—has a high to medium risk (rating of 4 on a scale of 5) of experiencing financial stress in the next 12 months, according to Dun and Bradstreet.⁴¹ The Railroads credibly refute this with Dun and Bradstreet reports dated February 22, 2011, showing a risk rating of 3 for ABDF, the same rating as for NSR.⁴² In light of ABDF’s average rating for financial stress, we do not find it necessary to require the Railroads to provide a “business plan” for JAIL, as the Michigan legislators request.

In addition, the proponents of revocation claim that the Lease Agreement will cause rail service to deteriorate because of crowding at NSR’s Jackson rail yard and the additional interchange (from NSR to JAIL). But Padnos, a customer located on the line, instead expects that service will be faster. Padnos states that it welcomes JAIL and its proposed customer-centric services, especially JAIL’s plans to promptly furnish rail cars, which Padnos hopes will reduce delivery times for its products by 10-14 days.⁴³ Further, JAIL began operating the leased lines on October 21-22, 2010, and no shippers have filed any comments, indicating that no harmful effects are likely to arise from the transaction.⁴⁴

The Local also claims that service has slowed on the leased line. It cites occasions in December 2010 and January 2011 when “ABDF/JAIL often went days without effecting an interchange” with NSR and noting that some rail cars did not move from NSR’s Jackson yard for more than 1 week.⁴⁵ The Railroads, however, explain that these service issues were not caused by ABDF/JAIL, but instead by NSR. They explain that NSR operated with skeleton crews at the

⁴⁰ Railroads’ Reply 13.

⁴¹ Union Local Comments 2.

⁴² Railroads’ Reply, Ex. 4.

⁴³ Letter from Louis Padnos, dated Feb. 8, 2011, attached to Railroads’ submission of Feb. 10, 2011.

⁴⁴ We address below the comments filed by Yreka Western, which stored rail cars on tracks owned or leased by ABDF-owned railroads. We do not consider Yreka Western to be a traditional railroad customer, which is an entity that either ships or receives freight.

⁴⁵ Local Comments 1.

Christmas and New Year holidays and, in addition, NSR did not interchange any cars to JAIL from January 6 – 10, 2011, because several of NSR's Jackson-based locomotives were out of service.⁴⁶ The Railroads also cite 2 other occasions in 2011 when NSR did not interchange cars to JAIL. These service incidents are the type that occur from time to time in the industry and do not rise to the level of an interruption so great as to consider revoking the notices of exemption.

Based on the record, the evidence suggests that the cost reductions flowing from the lease credit, the prospective improvements to the rail line, and any further increase in traffic revenues (spreading fixed costs over a larger customer base) all hold the prospect of benefiting the customers on the line, as well as JAIL.

Concerning allegations of deterioration in service, Yreka Western gives examples purportedly to show that JAIL has provided poor service when storing rail cars. But Yreka Western does not support these claims with any evidence, either testimony or documents. In response, the Railroads' President testifies that Yreka Western's owner routed larger numbers of railcars for storage than JAIL's leased lines could accommodate, that the owner agreed to stop sending storage cars to JAIL but cars still continued to arrive, and that Yreka Western has not paid any of the Railroads' invoices for car storage.⁴⁷ The filings suggest that Yreka Western and JAIL, or NSR, may be involved in a specific commercial dispute involving car storage, and do not evidence a prediction of service issues generally for traditional customers of JAIL.

In summary, we find no reason to revoke the exemption on competitive grounds. A bare allegation that an interchange commitment will have anticompetitive effects or cause service to deteriorate is not sufficient to show that the exemption in this particular docket that the Board has permitted to be processed under 49 C.F.R. part 1150 should be revoked. The proponents of revocation do not provide adequate evidence that the interchange commitment in this proceeding would negatively impact development of a sound rail transportation system and the existence of reasonable rates, promote predatory pricing and discrimination, or otherwise contravene the public interest. Moreover, other pleadings and submissions in this docket suggest that the overall configuration of the transaction and the operation of the interchange commitment in the context of these arrangements do not warrant revocation of the exemptions here.

C. Labor

The Unions claim that revocation is necessary to promote fair wages and suitable working conditions in the rail industry, a goal articulated in the RTP at 49 U.S.C. § 10101(11). However, neither the Unions (nor the Local) have provided any evidence that NSR employees were furloughed or suffered other adverse employment consequences as a result of the

⁴⁶ Railroads' Reply, V.S. Dobronski 7.

⁴⁷ Railroads' Reply 6-7; V.S. Dobronski 2-5.

transaction.⁴⁸ See Ill. RailNet—Acquis. & Operation Exemption—BNSF Ry., FD 34549 (STB served Feb. 1, 2006) (denying petition to revoke on labor protection grounds where transaction was initiated by a Class III carrier and petitioner failed to identify any rail employees who suffered hardship as a result of the transaction).

D. Safety and Environmental Concerns

The proponents of revocation argue that it is unlikely that JAIL will operate the leased lines safely.⁴⁹ They base their argument on various alleged incidents since JAIL began operating the leased lines in late October 2010.

The proponents of revocation cite an incident in December 2010 in which a JAIL locomotive engineer violated safety rules by passing an absolute stop signal. The Unions also claim that the JAIL crew did not have the proper dispatcher bulletin concerning the relevant portion of the leased lines,⁵⁰ but the Railroads explain that, although papers were misplaced at the time, the relief (next) crew found the proper (current) bulletin on the locomotive.⁵¹ Acknowledging both the violation of the stop signal and its seriousness, the Railroads state that they decertified the engineer.⁵²

An incident that the Local claims occurred during the start up of JAIL operations is also disputed by JAIL. According to the Local, on October 22, 2010, JAIL's crew did not properly perform an air brake test prior to departing the Jackson yard with a defective car (a "bad order car"). The Railroads refute that allegation with the sworn testimony of 2 personnel, who testify

⁴⁸ Although the Unions claim that either 16 (Unions' Comments 6) or 11 employees would be adversely affected by these transactions (Railroads' Resp. Ex. A (printout from a Union website claiming 11 affected employees), the Railroads state that, according to NSR, NSR eliminated only 6 positions and, as of late October 2010, 1 of the 6 affected employees had been reassigned within NSR, and the remaining 5 employees had sufficient seniority to attain other NSR positions, Railroads' Resp., V.S. Dobronski ¶ 9. Moreover, JAIL projects that it will create 21 jobs to run its operations, offsetting any claimed losses. Id.

⁴⁹ Concerning safety, Yreka Western states that it concurs in the assertions made by the Unions and does not provide any additional, separate information. Yreka Western Comments 4.

⁵⁰ Unions' Comments 2.

⁵¹ Railroads' Reply, Dobronski V.S. 6.

⁵² Railroads' Reply 8 & Dobronski V.S. 6. Under a regulation of the Federal Railroad Administration, it is unlawful for a locomotive engineer to operate a locomotive or train past a signal indication that requires a complete stop prior to passing. 49 C.F.R. § 240.305(a)(1). Decertification prohibits the individual from serving as a locomotive engineer for a specified period of time.

that the JAIL crew performed a satisfactory air test for operation on Class I track, prior to a train departing the yard that day, and also that NSR had provided an “air slip” showing the completion of a satisfactory Class I air test on the train.⁵³

Similarly, the parties dispute an alleged incident on November 12, 2010. According to the Local, at 3:30 a.m., a JAIL crew became lost in the Jackson yard and sought help from a NSR trainmaster to find its way. The Railroads’ witness, who was the engineer on a JAIL train that departed the yard that day at 2:00 a.m., claims that the incident did not happen.⁵⁴ The record does not reveal whether JAIL operated any other trains at the Jackson yard during the early morning of November 12.

Relying on an undated document, the Local claims that on January 22, 2011, a JAIL crew did not properly line their route and “ran through” switch 15 at the east end of the Jackson yard. The Railroads’ President claims that the evidence does not support that a JAIL crew ran through the track 15 switch.⁵⁵

The Local further claims that JAIL trains exceeded the maximum speed on the leased lines on a number of occasions. The Local relies on reports from a scanning device located at a specific milepost outside of Jackson.⁵⁶ The Railroads’ President states that these devices are not reliable indicators of speed, as demonstrated by a scanner report (submitted by the Union Local) showing a passing train with 5 axles—a physical impossibility—and that the Railroads’ clandestine observation of train speeds near that milepost have revealed no trains operating at excessive speed.⁵⁷

Although rail safety generally is the province of the Federal Railroad Administration (FRA), the Board takes seriously the national policy to ensure that rail facilities are operated safely and does not condone any rail carrier flouting the goals of the RTP. Watco Cos., Inc.—Continuance in Control Exemption—Boise Valley R.R., FD 35260 (STB served Aug. 27, 2010). This record reveals that JAIL promptly decertified an engineer who passed through a stop signal, as FRA rules require. The Railroads refute all of the remaining safety issues raised by the proponents of revocation, regarding safety tests, speed of trains, and the like. On balance, the proponents of revocation fail to demonstrate how additional information regarding JAIL’s

⁵³ Id., Dobronski V.S. 7 & V.S. of Byron C. Babbish, conductor of JAIL train JL1 on October 21-22, 2010, at 1-2.

⁵⁴ Id., Babbish V.S. 2.

⁵⁵ Id., Dobronski V.S. 8.

⁵⁶ Thompson Comments 2-3. These scanner reports include many documents that are unreadable, mentioned above.

⁵⁷ Railroads’ Reply, Dobronski V.S. 9, referring to Thompson Comments, Ex. B-20.

operations and safety practices would ultimately be relevant in determining whether applications for authority sought by JAIL under 49 U.S.C. 10901 (lease and trackage rights) or an application for authority sought by ABDF under § 11323 (continuance-in-control transaction) would be granted.

Finally, the Local and the State legislators argue that the Board should require an environmental impact study for this exemption because of contamination on land adjacent to the leased lines. The Local concedes, however, that under the Board's rules, no environmental documentation is needed in these proceedings.⁵⁸ Although the Board can choose to require environmental documentation even when its regulation would not require it, doing so here would not serve the public interest because the reported contamination is on land owned by an automobile manufacturer, not land owned by a railroad.

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

It is ordered:

1. The requests to declare void or reject the notice of exemption in FD 35410 are denied.
2. The requests to revoke the notices of exemption in all of these dockets are denied.
3. This decision is effective on its service date.

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 not to revoke the exemption in this case. The lease at issue contains a long-term interchange commitment that creates a disincentive for JAIL to interchange with carriers other than NSR.

Interchange commitments, even those in the form of a rental "credit" instead of a restriction, can effectively limit a short line railroad's ability to offer the best competitive options to its shippers. For this reason, my belief is that the public interest is better served by railroad

⁵⁸ Local Comments 3.

sales and leases that do not limit competitive routings. This is particularly so given that the railroad industry is in a far better economic position today to attract buyers for lines than it was in the 1980s and 1990s when most existing interchange commitments were established. Accordingly, when transactions involving interchange commitments are proposed by the carriers, the Board must carefully scrutinize their impact on short line railroads and shipper options.

Here, as the Board's decision points out, there are particular facts that may reduce the anticompetitive impact of the interchange commitment. For example, the vast majority of JAIL's traffic will be inbound, where JAIL would have little or no control over routing. In addition, the rental credit is structured in such a way that the incentive for JAIL to interchange traffic with only NSR is reduced for traffic beyond the pre-transaction levels handled by NSR itself. Finally, JAIL asserts that it will be able to invest the savings it realizes from the interchange commitment into the line. I hope that the railroad follows through on that commitment.

Nonetheless, I remain concerned with the duration of the interchange commitment. With regard to a newly proposed lease, 30 years is too long to put in place this restriction on competition. Our predecessor, the Interstate Commerce Commission, authorized long-term interchange commitments that have diminished competition for decades. We should not repeat that error. I am disappointed by the Board's implication that anything less than a permanent interchange commitment is unworthy of serious scrutiny. While it is true that in Review of Rail Access the Board identified interchange restrictions that go on in perpetuity as particularly worrisome, long-term interchange commitments are also problematic. In this case, I would have at least revoked the exemption to the extent necessary to remove authorization for the 30-year interchange commitment.