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SERVICE DATE – JUNE 29, 2012

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE

Docket No. FD 35634

MIDWEST RAIL, LLC d/b/a TOLEDO, LAKE ERIE AND WESTERN RAILWAY—LEASE
AND OPERATION EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

Digest:¹ The Board is issuing a notice of exemption to permit Midwest Rail, LLC d/b/a Toledo, Lake Erie and Western Railway to lease and operate a line of railroad owned by Norfolk Southern Railway Company.

Decided: June 26, 2012

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

Midwest Rail, LLC d/b/a Toledo, Lake Erie and Western Railway (Toledo), 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 operate a 1.8-mile line of railroad between milepost TS 13.2 near Maumee, Ohio, and milepost TS 15.0 in Waterville, Ohio (the Line). According to Toledo, Toledo and NSR have entered into a Lease Agreement (Agreement) whereby Toledo will lease the Line from NSR. The term of the lease is 10 years.

Pursuant to 49 C.F.R. § 1150.43(h), Toledo has disclosed that the Agreement contains an interchange commitment in the form of lease credits, depending on the number of carloads interchanged with NSR at milepost TS 13.2 in a given year.² According to Matthew Shawver,

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 Concurrently with its verified notice of exemption, Toledo has filed under seal, pursuant to 49 C.F.R. § 1150.43(h)(1)(ii), a confidential, complete version of the Agreement. Toledo also filed a motion for protective order. The merits of Toledo's motion will be addressed in a separate decision.

owner of Toledo, the interchange commitment will allow Toledo to “invest in improvements on the leased line to increase traffic levels.”³ The Line connects only with NSR at Maumee and at Waterville with a 10-mile, stub-ended line leased and operated by Toledo.⁴

Toledo certifies that its projected annual revenues as a result of this transaction will not result in Toledo becoming a Class I or Class II rail carrier. Toledo further certifies that its projected annual revenues will not exceed \$5 million.

The earliest the transaction can be consummated is July 15, 2012, 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 effectiveness of the exemption. Stay petitions must be filed no later than July 6, 2012 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35634, 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 John D. Heffner, Strasburger & Price, LLP, 1700 K Street, N.W., Suite 640, Washington, DC 20006.

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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 Mulvey, and Commissioner Begeman. Vice Chairman Mulvey approved with a separate expression.

³ Pet. 6.

⁴ Midwest Rail d/b/a Toledo, Lake Erie and W. Ry.—Lease and Operation Exemption—Toledo, Lake Erie and W. Ry. and Museum, Inc., FD 35555 (STB served Oct. 14, 2011).

VICE CHAIRMAN MULVEY, commenting:

Interchange commitments have the potential to limit or, in some cases, to effectively eliminate, competition between rail carriers. Because this can result in long-term harm to shippers, I believe that the Board should be carefully scrutinizing transactions that include interchange commitments. Typically, such scrutiny is not possible within the Notice of Exemption process due to its short time-frames. I have long urged the Board to require that such transactions be analyzed using more detailed processes that allow the Board to consider (1) the nature of the interchange commitment, (2) how many shippers and carloads will be impacted by the interchange commitment, and (3) what competitive routing options are being foreclosed during the term of the lease.

In this case, however, there appears to be no need for concern regarding competitive harm. Toledo has confirmed that it will not connect physically to any carrier other than NSR, the carrier from whom it is leasing the line. Although the lease contains a rental credit based on the number of cars Toledo interchanges with NSR, because Toledo physically cannot interchange cars with a third-party carrier in any event, there will be no adverse competitive impact from the interchange commitment. Accordingly, I vote to approve the Notice of Exemption process for this transaction.