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SERVICE DATE – SEPTEMBER 23, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC—LEASE AND OPERATION  
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

Digest:<sup>1</sup> This decision denies a labor union representative's request to terminate a lease between Middletown & New Jersey Railroad, LLC and Norfolk Southern Railway Company.

Decided: September 22, 2011

BACKGROUND

On August 31, 2010, Middletown & New Jersey Railroad, LLC (M&NJ), a Class III rail carrier, filed a notice invoking the class exemption at 49 C.F.R. § 1150.41 to lease and operate the following lines from Norfolk Southern Railway Company (NSR): (1) the Hudson Secondary located between mileposts LX 2.1 and LX 20.6 (18.5 miles in length); (2) the Walden Secondary located between mileposts DJ 5.0-DJ 10.5 and WI 29.1-WI 32.9 (9.3 miles in length); (3) the Maybrook Industrial Track located between mileposts RT 1.3 and RT 7.5 (6.2 miles in length); (4) the Greycourt Industrial Track located between mileposts IL 52.5 and IL 53.4 (1.0 mile in length); and (5) the EL Connection Track located between mileposts QK 0.0 and QK 0.8 (0.8 mile in length) (collectively, the leased lines). In conjunction with the lease of the NSR rail lines, NSR also granted to M&NJ: (1) a sublease of connecting track owned by New York, Susquehanna & Western Railway (NYS&W) located between milepost JS 63.14, at Hudson Jct., N.Y., and milepost LX 2.1, at Hudson Jct. (approximately .35 miles in length); (2) incidental overhead trackage rights over NSR's rail line located between mileposts JS 67.50 and JS 63.14 (4.36 miles in length); and (3) a partial assignment of all of NSR's rights under the NYS&W Trackage Rights Agreement for NYS&W's continued trackage rights operations over the Hudson Secondary track between Hudson Jct. and Warwick, N.Y. The leased lines connect with NSR and NYS&W. The Lease Agreement between M&NJ and NSR will expire on December 31, 2020.

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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).

As required by 49 C.F.R. § 1150.43(h), M&NJ disclosed in its notice of the proposed transaction that the Lease Agreement contains an interchange commitment provision that would provide for a “Lease Credit,” whereby M&NJ may reduce its annual lease payments to NSR by receiving a credit for each car interchanged with NSR.<sup>2</sup> According to the record, the amount of the credit is set at a level that will reduce M&NJ's monthly cash rental payments to a nominal fee, if M&NJ elects to interchange with NSR the same number of cars that NSR handled on the leased lines in the year preceding M&NJ's assumption of operations.<sup>3</sup> M&NJ states that NSR initially proposed a fixed rental payment with no option to reduce the rent, but M&NJ requested a lease credit option in order to save funds to invest in improvements and to increase traffic levels on the leased lines. According to M&NJ, the affected interchange point is located at Campbell Hall, N.Y., and the third-party carrier with which M&NJ would interchange is the NYS&W.

By decision and notice served on September 16, 2010,<sup>4</sup> pursuant to 49 C.F.R. § 1011.2(a)(6), the Board revoked the delegation of authority under 49 C.F.R. § 1011.7(b)(10) (2009) for the Director of the Office of Proceedings (Director) to determine whether to issue the notice of exemption and issued the notice of exemption itself. On September 23, 2010, United Transportation Union–New York State Legislative Board (UTU-NY) filed a petition for stay of the effective date of the exemption pending disposition of a petition to revoke. On September 28, 2010, M&NJ filed a reply in opposition to the petition for stay. By decision served on October 6, 2010, the Board denied the petition for stay. The exemption became effective on September 30, 2010.

On September 27, 2010, UTU-NY filed a petition to reject the notice or revoke the exemption. On October 15, 2010, M&NJ filed a reply. By decision served on December 23, 2010, the Board instituted a revocation proceeding, established a procedural schedule, and directed M&NJ to inform all shippers on the leased lines of the proceeding (December 2010 decision). On February 4, 2011, NSR, UTU-NY, and M&NJ filed comments. M&NJ's comments included letters of support for the transaction from 4 shippers on the leased lines: Jones Chemicals, Inc. (JCI), Ampac Paper LLC (Ampac), American Lumber Company

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<sup>2</sup> Under the Board's regulations, an “interchange commitment” includes, among other provisions, an “adjustment in the . . . rental” charge or other “positive economic inducement” that “may limit future interchange with a third-party connecting carrier . . . .” 49 C.F.R. § 1150.43(h)(1).

<sup>3</sup> NSR Comments, February 4, 2011.

<sup>4</sup> 75 Fed. Reg. 56,653-54 (Sept. 16, 2010).

(American Lumber), and Reed Systems Ltd (Reed). No comments from any other entities were received. On February 22, 2011, M&NJ filed a response to UTU-NY's comments.

We will deny UTU-NY's petition to reject the notice or revoke the exemption, as discussed below.

## DISCUSSION AND CONCLUSIONS

### I. Rejection

In the December 2010 decision, we stated that, because the notice of exemption was already in effect, we would treat UTU-NY's petition as a petition to revoke. In its comments, UTU-NY asserts that we should reject the notice (rather than revoke the exemption) because the notice contains false or misleading information. UTU-NY argues that M&NJ was not a rail carrier when it filed the notice and should not have filed the notice under 49 C.F.R. § 1150.41, the exemption that applies to acquisitions or operations by Class III rail carriers under 49 U.S.C. § 10902. According to UTU-NY, the notice at issue here is false and misleading because: (1) when M&NJ was authorized to acquire and operate a 6.5-mile railroad line (the Middletown-Slate Hill line) from Middletown & New Jersey Railway Co, Inc. (MNJC),<sup>5</sup> MNJC had already abandoned that line, and M&NJ therefore could not have acquired that line; and (2) M&NJ should not have filed the notice under 49 C.F.R. § 1150.41, because it neither commenced operations on the Middletown-Slate Hill line within a timely manner after acquisition of the Middletown-Slate Hill line was authorized nor filed information on its status as a rail carrier in two industry publications, the Official Railway Station List (ORSL) and the Official Railway Guide (ORG).

In its reply to UTU-NY's comments, M&NJ asserts that, contrary to UTU-NY's claims, M&NJ has been a rail carrier since the Board authorized it to provide rail service over the Middletown-Slate Hill line, and thus properly filed the notice in this case under 49 C.F.R. § 1150.41.

UTU-NY's assertion that the Middletown-Slate Hill line had been abandoned before M&NJ acquired it from MNJC is incorrect. While MNJC had previously abandoned a separate 7.5-mile railroad line, between milepost 6.5, in Slate Hill, and milepost 14.0, in Unionville, in

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<sup>5</sup> Middletown & N.J. R.R.—Acquis. & Operation Exemption—Middletown & N.J. Ry., FD 35227 (STB served Mar. 20, 2009).

Orange County, NY,<sup>6</sup> the Middletown-Slate Hill line extends from milepost 0.0, in Middletown, to milepost 6.5, a fact clearly detailed in our acquisition decision cited in note 5, supra. Therefore, the Middletown-Slate Hill line was not abandoned and was part of the national rail network when M&NJ acquired it. M&NJ properly sought authorization to acquire the Middletown-Slate Hill line as a noncarrier.<sup>7</sup>

M&NJ became a rail carrier on the date that it acquired the Middletown-Slate Hill line pursuant to the Board's authorization of that acquisition, rather than on the date when it commenced rail operations or the date when it published information in ORSL and ORG.<sup>8</sup> Moreover, as demonstrated in the interchange reports that M&NJ filed with its Reply to Supplement, M&NJ has in fact held itself out as a common carrier and has interchanged traffic with NSR as part of the national rail system since it acquired the Middletown-Slate Hill line.<sup>9</sup> M&NJ is thus correct in stating that it became a rail carrier when it acquired the Middletown-Slate Hill line and was a carrier when it entered into the transaction at issue here. Therefore, the notice was neither false nor misleading.

For these reasons, we will decline to reject the notice and will treat UTU-NY's petition as a petition to revoke.

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<sup>6</sup> See Middletown & N.J. Ry.—Aban. Exemption—In Orange County, N.Y., AB-762X (STB served May 20, 2008).

<sup>7</sup> In addition, in a related filing, Regional Rail, LLC sought and was granted authorization to continue in control of M&NJ, upon M&NJ becoming a Class III rail carrier. Reg'l Rail—Continuance in Control Exemption—Middletown & N.J. R.R., FD 35228 (STB served Mar. 20, 2009).

<sup>8</sup> See San Joaquin Valley R.R.—Aban. Exemption—In Tulare County, Cal., AB-398 (Sub-No. 7X) (STB served June 6, 2008) (noncarrier became a rail carrier when it consummated Board-authorized transaction to lease and operate rail lines). M&NJ discusses at length in its Reply to Supplement the manner in which it did, in fact, undertake to have accurate reports of its operations included in each of the railroad publications. See M&NJ Reply to Supplement at 4-5. See also Reply to Supplement Exhibits 1 through 4. In any event, M&NJ's appearance or lack thereof in either publication is not dispositive of its status as a carrier under our statute and governing regulations.

<sup>9</sup> MN&J Reply to Supplement Ex. 5. As the Interchange Report demonstrates, from April 7, 2009 through October 4, 2010, M&NJ interchanged with NSR 776 inbound and 531 outbound rail cars.

## 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. § 10902—in considering petitions to revoke. See 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 regarding interchange commitments.

### A. Interchange Commitments

The Board's regulations expressly provide for the use of the class exemption process from the prior approval provisions of 49 U.S.C. § 10902 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. § 1150.43(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 & Competition Issues—Renewed Pet. of the W. Coal Traffic League, EP 575, et al. (STB served Oct. 30, 2007) (Review of Rail Access); Disclosure of Rail Interchange Commitments, EP 575 (Sub-No. 1) (STB served May 29, 2008).

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.”<sup>10</sup> The Board

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<sup>10</sup> Review of Rail Access, slip op. at 14.

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 might be used prospectively.<sup>11</sup> Therefore, the Board decided that “no single rule of general applicability seems appropriate, and we will not attempt to establish such a rule.”<sup>12</sup> Instead, the Board ruled that the propriety of any given interchange commitment is best considered on a case-by-case basis.<sup>13</sup> The Board emphasized that it would “weigh the benefits of a particular interchange commitment against its potential for harm,”<sup>14</sup> an inquiry considered to be “necessarily fact-specific.”<sup>15</sup>

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 enhanced procedures for parties to seek access to existing agreements already in effect.<sup>16</sup> As part of the process, shippers could attempt to show that an interchange agreement is causing, or would cause, a violation of the Interstate Commerce Act, or that it is, or would be, contrary to a particular statutory provision under which approval

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<sup>11</sup> “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 do 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.” Id. at 4-5.

<sup>12</sup> Id. at 8.

<sup>13</sup> Id. at 14.

<sup>14</sup> Id. at 8.

<sup>15</sup> Id. at 8.

<sup>16</sup> 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. at 8.

was or is being sought.<sup>17</sup> The Board also clarified that the existence of the Railroad Industry Agreement would not preclude any shipper's ability to seek such relief.<sup>18</sup>

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.<sup>19</sup>

B. The Interchange Commitment at Issue Here

UTU-NY argues that the exemption here needs to be revoked to allow increased scrutiny of the transaction, and asserts that the class exemption process of 49 C.F.R. § 1150.41 is insufficient to determine whether the interchange commitment contained in the Lease Agreement between M&NJ and NSR is anticompetitive and thus contravenes 49 U.S.C. §§ 10101(1), (4) and

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<sup>17</sup> Id. at 15.

<sup>18</sup> Id. at 15. In 1998, the Association of American Railroads and the American Short Line and Regional Railroad Association entered into a "Railroad Industry Agreement" to address interchange commitments, among other issues. Id. at 5.

<sup>19</sup> Id. at 15. Parties objecting to a transaction involving an interchange commitment may seek a stay and/or a revocation of the exemption. See 49 U.S.C. 10502(d), 49 C.F.R. §§ 1121.4(f), 1150.32(c), 1150.42(c),

(5).<sup>20</sup> Those 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 rail transportation system with effective competition among rail carriers and with other modes of transportation; and (C) foster sound economic conditions in transportation and ensure effective competition and coordination between rail carriers and other modes, respectively. UTU-NY states that, because of the competition questions raised by the interchange commitment, an application or petition for exemption would be more appropriate than a notice filed under the class exemption.<sup>21</sup>

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. M&NJ has complied with the requirements set forth at 49 C.F.R. § 1150.43(h) by disclosing the interchange commitment. In the course of this revocation docket, we have already 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 UTU-NY's arguments. Based on the facts presented, the Board is satisfied that further regulation is not necessary to carry out the RTP. Thus, UTU-NY has not demonstrated that revocation of the exemption is warranted.

In its responses to UTU-NY, M&NJ states that UTU-NY has failed to demonstrate that this particular interchange commitment, in the context in which it operates, contravenes the RTP.<sup>22</sup> According to M&NJ, the interchange commitment is not anticompetitive because it neither bars M&NJ from nor penalizes it for interchanging cars with NYS&W, the only carrier other than NSR with which it connects. M&NJ argues that the lease credit merely allows M&NJ to save money that M&NJ can use to upgrade the leased lines, thereby potentially rendering rail service over the leased lines more attractive to shippers. M&NJ further states that, because all of its current traffic is inbound, M&NJ cannot choose how to route its traffic or with whom to interchange, suggesting that at this point in time, the interchange commitment is not foreclosing any particular options for shippers. NSR and M&NJ also emphasize that the lease credit only applies to the same number of cars that NSR handled on the lines in the year preceding M&NJ's assumption of operations on the leased lines. The carriers further point out that, as long as M&NJ maintains that same level of inbound traffic from NSR, any outbound traffic that M&NJ generates will not be subject to the lease credit. Therefore, they argue that M&NJ will have no incentive to interchange the outbound traffic with NSR rather than with NYS&W.

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<sup>20</sup> UTU-NY Pet. 7.

<sup>21</sup> Id.

<sup>22</sup> M&NJ Reply, Oct. 15, 2010, at 6.

Under the interchange commitment, M&NJ receives a credit against its lease for every car that it interchanges with NSR. With the credit, M&NJ would need to interchange with NSR the same amount of traffic that moved over the leased lines 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 M&NJ interchanges with NSR until the point at which the lease cost is reduced to the nominal amount. We recognize that, while the interchange commitment at issue here does not affirmatively “penalize” M&NJ for interchanging traffic with NYS&W rather than with NSR, it creates a disincentive for M&NJ to interchange the line’s 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. M&NJ may still route traffic over NYS&W, and M&NJ states that it will do so upon reasonable request of a shipper or when it is economically more beneficial for M&NJ.<sup>23</sup> Therefore, the interchange commitment at issue here has less of a potential impact on competition because it does not impose an outright bar to interchange between M&NJ and a third party carrier.

Second, both the lease agreement and the interchange commitment expire in 10 years.<sup>24</sup> Moreover, the lease credit will expire after M&NJ interchanges a specific number of cars with NSR every year, and cars interchanged in one year cannot be carried over into subsequent years. M&NJ will not, therefore, have an incentive to prioritize interchange with NSR over other carriers indefinitely, thus mitigating any potential anticompetitive impact.

Third, as MN&J points out, all of the current traffic on the leased lines is inbound, and as a result, M&NJ would have very limited ability, if any, to route that traffic in any event.

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<sup>23</sup> M&NJ declares: “The only rail connection M&NJ will have, other than NS, is the New York, Susquehanna & Western Railway (“NYS&W”). The interchange commitment in the Lease Agreement does not preclude M&NJ from interchanging with NYS&W nor is M&NJ penalized if it does so. To the extent a routing via the NYS&W is economically more beneficial to M&NJ or is reasonably requested by a shipper on the Leased Lines, M&NJ will route the traffic via NYS&W and not NS.” M&NJ Reply to UTU Pet. for Stay 6.

<sup>24</sup> 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 and future litigants.

Fourth, M&NJ represents that it plans to use some of the revenue benefits derived from the credits for making improvements on the line, and that it hopes to increase traffic on the line as well. According to NSR's comments, under NSR operation, shippers on the lines generated persistently low traffic volumes relative to the amount of trackage needed to serve them, and the lines were somewhat remote from other NSR local operations, making them costly to operate. The parties to this transaction state that they believed that leasing the track to M&NJ would help to maintain the lines, as well as improve service and traffic levels. Under the lease agreement, if M&NJ interchanges a specific number of cars with NSR, it will pay only nominal rent on the leased lines, leaving M&NJ primarily with only labor and maintenance costs to cover. The more traffic carried up to that level, the more lease credits and traffic revenues achieved. These cost savings may be used to upgrade the tracks and improve service to the shippers located on the leased lines. M&NJ states that it intends to perform such upgrades, and we expect M&NJ to follow through on that intention.<sup>25</sup>

Significant here, 4 of the 9 shippers—those entities who presumably are the parties in interest with respect to any harmful competitive or service effects—have stated that rail service has improved or proven to be excellent since M&NJ commenced operations on the leased lines.<sup>26</sup> No shippers have noted any price increases or other restraints on competition resulting from the interchange commitment, and no shippers have filed any comments indicating any harmful effects likely to arise from the transaction. 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 redounding to the benefit the shippers on the line, as well as MN&J.

In summary, UTU-NY has not provided sufficient evidence in this proceeding to support revocation of the exemption on competitive grounds. A bare allegation that an interchange commitment will have anticompetitive effects 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. UTU-NY does no more than cite to the RTP; it does not explain how the interchange commitment in this proceeding would, based on the facts and anticipated effects here, negatively impact development of a sound rail transportation system or contravene the public interest. Moreover, other pleadings and submissions in this docket suggest that the overall configuration of the transactions, and the operation of the interchange commitment in the context of these arrangements, do not warrant revocation of the exemption here.

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<sup>25</sup> M&NJ Reply to UTU Pet. for Stay 10.

<sup>26</sup> Those shippers are JCI, Ampac, American Lumber, and Reed. See M&NJ Comments filed Feb. 4, 2011.

### C. Labor

UTU-NY argues throughout this proceeding that the exemption will take work and earnings away from NSR crews, contrary to the provision of the RTP favoring fair wages and safe and suitable working conditions in the railroad industry. See 49 U.S.C. § 10101(11). However, UTU-NY has not provided any evidence that NSR employees were furloughed or suffered other adverse employment consequences as a result of the transaction. See III. RailNet—Acquis. and 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.

UTU-NY argues that the substantial involvement of Metro North Commuter Railroad Company (MNCR) passenger operations on a portion of the leased lines raises important safety concerns implicating 49 U.S.C. § 10101(8), which establishes a policy favoring operation of transportation facilities and equipment without detriment to the public health and safety.<sup>27</sup> UTU-NY states that M&NJ, “a small carrier with unknown personnel, would be operating on important commuter trackage.”<sup>28</sup> UTU-NY states that the safety risk to MNCR’s passenger operations cannot be determined in a class exemption proceeding.

UTU-NY has not submitted evidence that persuades us that M&NJ’s operations would undermine safety in contravention of the RTP, nor has UTU-NY shown that M&NJ has a history of unsafe operations or a history of negative impacts on commuter operations.<sup>29</sup> MNCR, which shares operations over a portion of the leased lines with M&NJ, has not raised any concerns with the Board regarding safety and its passenger operations. M&NJ states that the use of the rail

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<sup>27</sup> UTU-NY Pet. 7.

<sup>28</sup> Id.

<sup>29</sup> Moreover, according to M&NJ, its principals have extensive experience in the railroad industry and have managed other short lines that operate over rail lines with freight and passenger operations. M&NJ also states that all of its employees have passed the Northeast Operating Rules Advisory Committee (NORAC) testing and the NORAC Rules and NSR Rules Tests administered by an official from NSR and attended by a trainmaster from MNCR. M&NJ Resp. to Pet. for Stay 7-8.

lines will be limited to time windows determined by MNCR in the same manner that MNCR previously determined the time windows for NSR's use.<sup>30</sup>

UTU-NY's unsupported assertion that rail operations conducted by a small carrier on an important commuter track raise safety concerns is not sufficient to carry the burden of proof to show that an exemption that the Board has permitted to be processed under 49 C.F.R. part 1150 should be revoked.

E. Scope of the Transaction.

UTU-NY argues that the proposed transaction is beyond the scope of the typical carrier acquisition and operation exemption both because of the number of carriers involved and the number of agreements involved in the transaction. According to UTU-NY, the Lease Agreement and 5 other related agreements submitted by M&NJ involve M&NJ, NSR, NYS&W, and the lines of a fourth carrier, MNCR. UTU-NY states that, under § 10902 and the Board's accompanying regulations at 49 C.F.R. § 1150.41, there should be no more than 3 carriers involved in the transaction in order for that transaction to qualify for the Board's class exemption.

As we stated in our October 6, 2010 decision denying UTU-NY's petition for stay, the Board's regulations cited by UTU-NY do not limit the class exemption to transactions involving 3 carriers. In any event, there is no evidence in the record that more than 3 carriers are involved in the transaction relevant to this proceeding: M&NJ (the lessee); NSR (the lessor); and NYS&W (the grantor of incidental trackage rights). Although the Lease Agreement submitted by M&NJ mentions MNCR because it operates passenger service over one of the affected lines, MNCR is not a party to the transaction and did not sign any of the agreements. Nor has UTU-NY shown why the number of transaction agreements filed by M&NJ is relevant.

For all of the above-cited reasons, we will deny the petition, filed by UTU-NY, to reject the notice or revoke the exemption.

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

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<sup>30</sup> M&NJ Resp. to Pet. for Stay 7-8.

It is ordered:

1. The petition to reject or revoke the notice of exemption is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Commissioner Mulvey commented with a separate expression.

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COMMISSIONER MULVEY, commenting:

In Review of Rail Access, the Board indicated that it would begin to take a hard look at railroad lease and sale transactions involving interchange commitments. This policy shift changed the agency's prior practice of not scrutinizing and, in many cases, not even receiving a copy of contractual provisions that could profoundly limit a short line's ability to interchange traffic with a carrier other than the seller/lessor carrier. The Board announced that it would examine the legality of interchange commitments on a case-by-case basis, considering the nature of the interchange restriction or incentive, its duration and its likely impact on competition (among other factors). In this case, shippers, representatives of labor, the involved carriers and other interested parties had the opportunity to express their views on the interchange commitment at issue.

Although I believe that interchange commitments can have very negative impacts on competition, there are several case-specific reasons that lead me to conclude that the request for revocation has not been supported here. First, the shippers on the line - the entities that would be the most impacted by an anticompetitive interchange commitment - weighed in to support, rather than to oppose, the transaction. Second, the 10-year lease term is of a shorter duration than restrictions in other recent cases. Third, a relatively small amount of traffic is impacted, given that almost 60% of M&NJ's traffic on the line is in-bound, meaning that M&NJ would not exercise routing control in any event. Fourth, the agreement provides that M&NJ will only receive a lease credit for cars interchanged with NSR up to the pre-transaction traffic levels on the line, making it more likely that new business developed by M&NJ may be interchanged with either NYS&W or NSR.

Against this shipper support and fact-driven evidence, UTU-NY, which opposed the transaction, did not provide specific or compelling evidence and argument regarding the

interchange commitment's impact on competition. While, in my opinion, it would be preferable that the line be leased without restrictions, the case-specific factors listed above tend to reduce the possibility of harm here. The risk of harm is not reduced to zero, however, and the Board retains the jurisdiction to examine the transaction in the future should a shipper or other interested party determine that the interchange commitment is, in fact, having a negative impact on competition.