

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

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Office of Proceedings
June 13, 2014
Part of
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William A. Mullins

Direct Dial: (202) 663-7823
E-Mail: wmullins@bakerandmiller.com

June 13, 2014

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: ***Piedmont & Atlantic Railroad Co. Inc., d/b/a/ Yadkin Valley Railroad Company – Lease Exemption Containing Interchange Commitment – Norfolk Southern Railway Company, STB Docket No. FD 35841.***

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding is a joint motion to strike filed by the parties to the rail line lease transaction encompassed by the above-referenced class exemption notice. The joint filers of this motion to strike are Norfolk Southern Railway Company, the subject rail line lessor, and Piedmont & Atlantic Railroad Co. Inc., d/b/a/ Yadkin Valley Railroad Company, the subject rail line lessee.

If there are any questions about this matter, please contact me at (202) 663-7823 or by email: wmullins@bakerandmiller.com, or contact YVRR's counsel at (202) 349-3660 or by email: rnardi@transportcounsel.com.

Respectfully submitted,



William A. Mullins
Attorney for Norfolk Southern Railway Company

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB 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**

MOTION TO STRIKE

**Rose-Michele Nardi
TRANSPORT COUNSEL PC
1701 Pennsylvania Ave., NW
Suite 300
Washington, D.C. 20006
Telephone: (202) 349-3660**

**William A. Mullins
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Telephone: (202) 663-7820**

**Attorneys for Piedmont & Atlantic
Railroad Co. Inc., d/b/a/ Yadkin Valley
Railroad Company**

**Greg E. Summy
General Solicitor
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510
Telephone: (757) 533-4890
Facsimile: (757) 533-4872**

**Attorneys for Norfolk Southern Railway
Company**

June 13, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 35841

**PIEDMONT & ATLANTIC RAILROAD CO., INC.,
D/B/A YADKIN VALLEY RAILROAD COMPANY
– LEASE RENEWAL EXEMPTION –
NORFOLK SOUTHERN RAILWAY COMPANY**

MOTION TO STRIKE

Norfolk Southern Railway Company (“NSR”) and Piedmont & Atlantic Railroad Co. Inc., d/b/a/ Yadkin Valley Railroad Company (“YVRR”),¹ acting through the undersigned counsel, hereby requests that certain information supplied as part of YVRR’s verified notice of exemption (the “Notice”) concurrently filed in the above-docketed proceeding be stricken from the record as beyond the intended scope and purpose of specific elements of the Board’s rail line acquisition²

¹ NSR and YVRR will be referred to herein collectively as the Moving Parties.

² 49 U.S.C. § 10902(a) makes provision for Class II and Class III carriers to “acquire or operate an extended or additional rail line.” The Board and the Interstate Commerce Commission before it have long understood “acquisitions” in matters arising under 49 U.S.C. § 10901 and post-ICCTA section 10902 to apply to acquisitions by lease. See, e.g., Information Required in Notices and Petitions Containing Interchange Commitments, STB Docket No. EP 714 (Notice of Proposed Rulemaking, STB served Nov. 1, 2012), slip op. at 12 (proposed interchange commitment disclosure rules intended to apply to “[n]oncarriers and carriers seeking an exemption to acquire (through purchase or lease) and/or operate a rail line”); Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C. 2d 810, 1985 ICC LEXIS 29, *1, n.1 (1985) (“[t]he terms ‘acquire’ and ‘operate’ include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate”). In addition, the Board’s class exemption procedures at 49 C.F.R. part 1150, subpart E, have been successfully invoked in cases such as this where a Class III railroad serving as a leasehold operator of a line seeks to renew its lease under terms differing from those of the original lease. See, e.g., New Orleans & Gulf Coast Railway Company, Inc. – Lease Exemption Containing Interchange Commitment – Union Pacific

class exemption regulations. For the reasons set forth in the following sections, the Moving Parties request that the Board excise information included in the Notice and its exhibits that is responsive to the informational requirements of 49 C.F.R. § 1150.43(h), because that information is not relevant to a lease transaction under the factual circumstances present here.

In tendering the subject Motion to Strike (the “Motion”), the Moving Parties also request that the Board use this opportunity to clarify for the future that informational requirements applicable to transactions involving interchange commitments do not apply to transactions involving the use of a lease-credit arrangement where the acquiring/leasing carrier – (a) will not by virtue of the subject purchase or lease acquire or retain a rail line connecting to a third party carrier; (b) does not have a connection to a third party carrier by virtue of its lease or ownership of a connecting line not involved in the present transaction before the Board; and (c) cannot practicably forge a connection with a third party railroad from the lines already held by that carrier or to be acquired under the proceeding then before the Board. The Moving Parties request the Board to clarify that the following interchange commitment disclosure provisions are inapplicable to lease arrangements like the one employed here:

- 49 C.F.R. § 1121.3(d) (for lease transactions pursued under the Board’s individual petition for exemption procedures);
- 49 C.F.R. § 1150.31(h) (for lease transactions entered into by a noncarrier);
- 1150.43(h) (for lease renewals under modified terms or leases of new trackage by an existing carrier); and

Railroad Company, STB Docket No. 35777 (STB served Nov. 27, 2013); C&NC R.R. – Lease Renewal Exemption – Norfolk S. Ry., STB Docket No. FD 35529 (STB served July 1, 2011) (Mulvey, dissenting); Wichita, Tillman & Jackson Railway Company – Lease Renewal Exemption – Union Pacific Railroad Company, STB Docket No. 35452 (STB served Dec. 23, 2010).

- 1180.2(d)(4) and 1180.4(g)(4) (for lease renewals where only an extension of time is involved).

BACKGROUND

As is set forth in the Notice, the present transaction encompasses YVRR's extension and amendment of its long-standing leasehold interest in approximately 93 miles of interconnected rail line (collectively, the "Line") as follows: (1) from milepost K-37.0 at Rural Hall, in Forsyth County, NC, to milepost K-100.2 at North Wilkesboro, in Wilkes County, NC; and (2) from milepost CF-0.0 at Mount Airy, in Surry County, NC, to milepost CF-29.8 at Rural Hall, in Forsyth County, NC. YVRR obtained STB authority for its present leasehold interest in Piedmont & Atlantic Railroad Co., Inc. – Lease and Operation Exemption – L & S Holding Company d/b/a/ Laurinburg & Southern Railroad Co. and Yadkin Valley Railroad Company, Finance Docket No. 32462 (ICC served Mar. 29, 1994). The modified lease underlying the current transaction does not expand the scope of the leased premises subject to the aforementioned ICC proceeding, but some of the terms of the lease arrangement have been modified by agreement.³

As bears upon the subject Motion, the Line does not connect to any third party carrier, and the nearest third-party carrier rail line is approximately 11 air miles and 12.2 rail miles distant from any portion of the Line. The Line represents the full extent of YVRR's rail system -- *i.e.*, the Line (technically, two lines that extend generally to the west from a common point at Rural Hall, North Carolina) constitute the only railroad lines that YVRR leases, owns, or over which YVRR otherwise possesses a federally-licensed common carrier status.⁴

³ Accordingly, the provisions of 49 C.F.R. §§ 1180.2(d)(4) and 1180.4(g)(4) are inapplicable here.

⁴ YVRR operates over an NSR-owned track east of Rural Hall, NC, exclusively for the purpose of accomplishing traffic interchange with NSR at a mutually convenient off-line location, but the governing interchange agreement, as is typical in such agreements, does not permit YVRR to use

ARGUMENT

As demonstrated by the preceding section, YVRR's Line is not accessible to a third party rail carrier; YVRR's only interchange partner is and will be NSR. Third party interchange and possible constraints upon such interchange are simply non-factors. Accordingly, the Board should have no concern over third party interchange issues arising under this transaction, and the Board should not subject such a transaction to the disclosure requirements (and burdens) of section 1150.43(h).

However, both the lease and the amended lease make use of a lease-credit rental mechanism of the sort discussed in the Board's recent decision in Information Required in Notices and Petitions Containing Interchange Commitments, STB Docket No. EP 714 (STB served Sept. 5, 2013) ("Interchange Commitments-2") (clarified by Entire Board Decision served on Nov. 26, 2014).⁵ In Interchange Commitments-2, the Board, in response to previously-tendered NSR comments regarding lease-credit arrangements, stated as follows:

The Board has defined an interchange commitment as a "provision or agreement that may limit future interchange with a third-party connecting carrier, whether by

SR's line to interchange traffic with any third party carrier. Accordingly, YVRR could not, for all practical purposes, use the interchange track to connect with a third party carrier. Long-standing precedent holds that operating rights granted exclusively for the purpose of accomplishing interchange at an off-line location are not subject to agency regulation, and therefore do not trigger agency licensing processes. See Black v. Interstate Commerce Com., 837 F.2d 1175 (D.C. Cir. 1988).

⁵ The Moving Parties, of course, recognize that certain disclosure requirements for so-called "paper barriers" preexisted the Interchange Commitments-2 decision, as did the prescribed processes pursuant to which interested parties may obtain information provided under seal where an interchange commitment is involved. See Disclosure of Rail Interchange Commitments, STB Docket No. EP 575 (Sub-No. 1) (STB served May 29, 2008) ("Interchange Commitments-1"). The subsequent Interchange Commitments-2 rulemaking, however, expanded substantially on the Interchange Commitments-1 informational requirements, and it addressed in particular the issue of lease-credit arrangements.

outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means.” Moreover, in the [notice of proposed rulemaking], the Board recognized that lease credits are a type of interchange commitment. Accordingly, the Board . . . clarifies that we consider the [lease-credit] agreements described by NSR to be interchange commitments.⁶

The above-quoted pronouncement could be read to mean that the Board’s interchange commitment disclosure requirements, such as those found at 49 C.F.R. § 1150.43(h), apply categorically to all lease transactions employing a lease-credit rental mechanism. However, the Moving Parties believe that it is more plausible and logical to construe the Board’s statement as applying the disclosure requirements for interchange commitments only to situations where (1) a lease-credit form of agreement is used, *and* (2) the leased premises do, or reasonably could, connect to the lines of a third-party carrier, *unlike the situation here*. Because the above-quoted pronouncement in Interchange Commitments-2 is subject to different interpretations on the issue, out of an abundance of caution and to expedite the effective date of STB authority for the lease amendment, YVRR has elected in the Notice to comply with the disclosure requirements pursuant to section 1150.43(h). But, for the reasons supplied herein, all of the information that YVRR has supplied in its Notice pursuant to section 1150.43(h) should be deemed inapplicable under the circumstances and, accordingly, should be removed from the record.

The Motion is presented as a request to strike, rather than as a mere request for clarification, for the practical purpose of avoiding uncertainty concerning any potential third party effort to access the interchange commitment information that is the subject of this Motion. As the Board is well aware, some of the information provided pursuant to section 1150.43(h) is commercially

⁶ Interchange Commitments-2, slip op. at 7-8 (footnotes omitted). The quoted passage suggests that the Board’s focus was upon the use of lease-credit arrangements where the leasing party has, or will by virtue of the transaction gain, feasible third party interchange options.

sensitive, and is deserving of protection from public disclosure. Although the Board's rules at section 115.43(h) provide the YVRR with certain protections from unnecessary disclosure, only the removal of the interchange commitment information from the record can afford YVRR complete protection. Accordingly, if the Board agrees that it is unnecessary under the circumstances, the Moving Parties request that the information YVRR has supplied under seal pursuant to 49 C.F.R. 1150.43(h) be removed from the record altogether.

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 or as likely contemplated under the language in Interchange Commitments-2, slip op. at 7-8. For these reasons, this lease transaction and others like it should be deemed to be excused from the regulatory requirements of section 1150.43(h), which provisions the Moving Parties believe the Board intended to apply only to transactions where an existing, or reasonably practicable future, third party interchange could be impaired because of an interchange-limiting commitment.

As the use of a lease-credit arrangement in this case should already suggest, NSR and its short line partners frequently engage in lease-credit-structured leases for business reasons having nothing to do with interchange. Among the advantages of such an arrangement are the following:

- The lease does not require the short line to pay any rental at all for the use of an NSR-owned line, provided the agreed-upon annual carload threshold (typically arrived at based upon historic carload levels and agreed-upon future traffic expectations) is met. This results in improved cash flow and capital availability.

- A short line operating under a lease-credit arrangement has a financial incentive to exceed its annual carload threshold, as all carload revenues over an established carload number accrue exclusively to the short line operator, so that the short line is rewarded for expanding its traffic base and attracting more customers to rail transportation.

These are some of the reasons that NSR and YVRR agreed to engage in a transaction employing a lease-credit mechanism. The advantages identified above have no practical connection to limiting a short line's interchange options, and also serve to advance objectives articulated in the rail transportation policy at 49 U.S.C. § 10101.

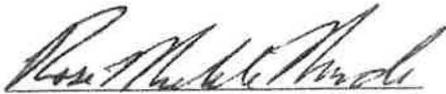
CONCLUSION

Because the Line, which comprises the full extent of YVRR's rail system, does not connect with and cannot practicably be made to connect with any rail carrier other than NSR, the Moving Parties respectfully request that the Board acknowledge that the lease-credit arrangement employed by agreement of NSR and YVRR has no relation to the agency's interest in interchange-limiting commitments. As explained above, the lease-credit form of rental used here and in similar situations is of mutual benefit to the lessor and lessee, and it would be unfortunate if the Board were to impose regulatory burdens on the parties in such future similar transactions by requiring information disclosures that have no practical bearing upon interchange considerations.

For these reasons, the Moving Parties request that the information included in the Notice pursuant to the informational requirements of 49 C.F.R. § 1150.43(h) be stricken from the Notice. Moreover, the Moving Parties encourage the Board to clarify that, where a lease-credit form of rental is used in a transaction where the leasing party's rail system cannot and will not connect with a third party carrier, and where the leasing carrier cannot feasibly establish such a third party connection to its rail system, the interchange commitment information required under the following regulations need not be supplied as part of the Board's licensing processes:

- 49 C.F.R. § 1121.3(d) (for lease transactions pursued under the Board's individual petition for exemption procedures);
- 49 C.F.R. § 1150.31(h) (for lease transactions entered into by a noncarrier);
- 1150.43(h) (for lease renewals under modified terms or leases of new trackage by an existing carrier); and
- 1180.2(d)(4) and 118.4(g)(4) (for lease renewals where only an extension of time is involved).

Respectfully Submitted,



Rose-Michele Nardi
TRANSPORT COUNSEL PC
1701 Pennsylvania Ave., NW
Suite 300
Washington, D.C. 20006
Telephone: (202) 349-3660

Attorneys for Piedmont & Atlantic
Railroad Co. Inc., D/B/A/ Yadkin Valley
Railroad Company



William A. Mullins
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Telephone: (202) 663-7820

Greg E. Summy
General Solicitor
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510
Telephone: (757) 533-4890
Facsimile: (757) 533-4872

Attorneys for Norfolk Southern Railway
Company

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