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

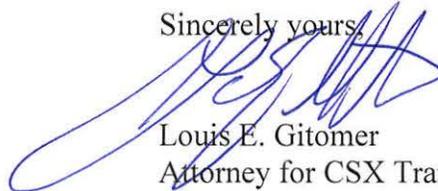
Re: Docket No. FD 35187 (Sub-No. 1), *Grand Elk Railroad, Inc.—Acquisition of Incidental Trackage Rights Exemption—Norfolk Southern Railway Company*

Dear Ms. Brown:

Enclosed is the Reply of CSXT to the (1) a Notice of Exemption under 49 CFR 1150.41; (2) a Petition to Partially Revoke Class Exemption; and (3) a Petition for Waiver of Requirements of 49 CFR 1150.42(e).

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer  
Attorney for CSX Transportation, Inc.

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35187 (Sub-No. 1)

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GRAND ELK RAILROAD, INC.—ACQUISITION OF INCIDENTAL TRACKAGE RIGHTS  
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

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CSX TRANSPORTATION, INC. (1) REPLY TO GRAND ELK RAILROAD, INC. VERIFIED  
NOTICE OF EXEMPTION; PETITION TO PARTIALLY REVOKE CLASS EXEMPTION;  
AND PETITION FOR WAIVER OF REQUIREMENTS OF 49 CFR 1150.42(e) AND (2)  
PETITION FOR STAY

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Dated: September 16, 2016

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35187 (Sub-No. 1)

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GRAND ELK RAILROAD, INC.—ACQUISITION OF INCIDENTAL TRackage RIGHTS  
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

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AND PETITION FOR WAIVER OF REQUIREMENTS OF 49 CFR 1150.42(e) AND (2)  
PETITION FOR STAY

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CSX Transportation, Inc. (“CSXT”) respectfully requests the Surface Transportation Board (the “Board”) to reject the three pleadings that the Grand Elk Railroad, Inc. (“GDLK”)<sup>1</sup> filed with the Board on August 25, 2016:<sup>2</sup> (1) a Notice of Exemption under 49 CFR 1150.41 to acquire incidental trackage rights over CSXT (the “Notice”); (2) a Petition to Partially Revoke Class Exemption to allow the retroactive assignment of incidental trackage rights as of January 30, 2009 (the “Petition”); and (3) a Petition for Waiver of Requirements of 49 CFR 1150.42(e) (the “Waiver” and collectively referred to with the Notice and Petition as the “GDLK

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<sup>1</sup> CSXT is not clear as to whether the moving party here is Grand Elk Railroad, Inc. (“Inc.”) or Grand Elk Railroad, L.L.C. (“LLC”). The Board granted an exemption to **LLC** in 2008, but the party of record in this proceeding is **Inc.** CSXT has not found a proceeding where the Board authorized or exempted Inc. to acquire the assets of LLC or for LLC to change from a limited liability company to a corporation, or perhaps, Inc. is a completely different entity than LLC (the Board authorized operator) and has no rights authorized or exempted by the Board.

<sup>2</sup> GDLK filed a Supplement on September 6, 2016, an Amended Supplement on September 7, 2016, and a Supplement on September 8, 2016, without seeking leave as required by 49 CFR 1104.11.

Pleadings”). Pursuant to Board precedent, the complex web of issues that GDLK has presented to the Board prohibits use of the Notice of Exemption process.<sup>3</sup>

CSXT requests that the Board reject the GDLK Pleadings and order GDLK to file an application under 49 U.S.C. §10902 due to the controversial and complex nature of the situation.

CSXT also requests that the Board stay the effectiveness of the Notice and institute an investigation under 49 U.S.C. §11701(a) as to the unlawful operations that GDLK has been conducting over CSXT’s track apparently since March 2009.<sup>4</sup>

In addition to instituting proceedings before the Board, GDLK and Norfolk Southern Railway Company (“NS”) filed a verified complaint against CSXT in The 17<sup>th</sup> Judicial Circuit Court for Kent County Civil Division, Case No. 16-07855-CZB, seeking a ruling, in essence, that CSXT has agreed to the assignment of certain trackage rights over CSXT from NS to GDLK (the “Complaint”). GDLK’s filing of the Complaint appears to be an effort to obtain judicial review and approval of GDLK’s unauthorized actions, which is within the exclusive jurisdiction of the Board. 49 U.S.C. §§ 10501 and 10901.

## **BACKGROUND**

CSXT owns and operates over about 21,000 miles of railroad, including about three miles of railroad line running generally north-south through Grand Rapids, MI: (1) (a) at the C&O crossover between Point of Switch at Valuation Station 8021+90 and Point of Switch at Valuation Station 8019+38, near Grandville Avenue, a distance of 202 feet, and (b) between the Point of Switch at Valuation Station 8040+44 and Valuation Station 8072+33, near Butterworth

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<sup>3</sup> *Winamac Southern Railway Company—Trackage Rights Exemption—A. & R. Line, Inc.*, STB Finance Docket No. 35208, slip op. at 2 (served January 9, 2009) (“*Winamac*”); and *ABC & D Recycling, Inc.—Lease and Operation Exemption—a Line of Railroad in Ware, Mass.*, Docket No. FD 35397 slip op. at 4 (served January 20, 2011) (“*ABC&D*”).

and Fulton Streets, a distance of 3,199 feet (the “3,401 feet”); and (2) approximately 2.45 miles between Valuation Station 8071+35, near Butterworth Street, and Valuation Station 8200+75, north of Ann Street ( the “2.45 miles” and collectively with the 3,401 feet, the “Line”). As successor to Consolidated Rail Corporation (“Conrail”), NS was and still is entitled to operate over the Line pursuant to trackage rights over CSXT.<sup>5</sup>

The trackage rights for the 3,401 feet are pursuant to an Agreement entered into as of February 6, 1980 and exempted in *FD 30385* (the “1980 Agreement”). The 1980 Agreement terminated 30 years after the Commencement date pursuant to Article 12(a) of the General Conditions – Form A to the Agreement. There is no dispute between the parties that **the 1980 Agreement has terminated**. (See Petition at 3). Article 13 of the General Conditions – Form A to the Agreement provides that “Neither party hereto shall assign or transfer this Agreement or any of its rights hereunder, without obtaining the **prior written consent** of the other party, except that the rights granted by this Agreement shall pass to the successor of substantially all of the property or franchise of Owner [CSXT].” CSXT has no record of providing written consent for the assignment of the 1980 Agreement and neither GDLK nor NS has produced a written consent in their filings in these proceedings.

The trackage rights for the 2.45 miles are pursuant to a Trackage Rights Agreement entered into as of January 24, 1984 and exempted in *FD 30449*. Pursuant to Section 8, the Trackage Rights Agreement terminated 30 years after the Commencement date. There is no

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<sup>4</sup> Notice at 3.

<sup>5</sup> See *Consolidated Rail Corporation –Trackage Rights Exemption—Chesapeake and Ohio Railway Company*, ICC Finance Docket No. 30385 (ICC served February 7, 1984) for the 3,199 feet (“*FD 30385*”), and *Consolidated Rail Corporation –Trackage Rights Exemption—Over Chesapeake and Ohio Railway Company*, ICC Finance Docket No. 30449 (served April 24, 1984) for the 2.45 miles (“*FD 30449*”).

dispute between the parties that **the Trackage Rights Agreement has terminated**. Article 13 of the General Conditions – Form A to the Agreement provides that “Neither party hereto shall assign or transfer this Agreement or any of its rights hereunder, without obtaining the **prior written consent** of the other party, except that the rights granted by this Agreement shall pass to the successor of substantially all of the property or franchise of Owner.” CSXT has no record of providing written consent for the assignment of the Trackage rights Agreement and neither GDLK nor NS has produced a written consent in their filings in these proceedings.

Operations over the Line by CSXT and NS continued through the years. NS sought to rationalize its system through a purported sale of 299 miles of track and 85.5 miles of trackage, easement and lease rights to the Michigan Central Railway, LLC (“MCR”), a subsidiary of the Watco Companies, Inc. and Watco Transportation Services, Inc. The Board denied the exemption because “In sum, under the totality of the circumstances presented here, the record shows that NSR would continue to have the power to exert such a significant degree of control over MCR, and the lines it would contribute, to preclude the proposed transaction from coming within the scope of section 10901.”<sup>6</sup> As relevant to this proceeding, MCR also sought to acquire the right “to exercise NSR’s trackage rights over lines of CSX Transportation, Inc. (CSXT) between: mileposts 0.0 – 1.0 M9 in Grand Rapids, MI....” *Id.* at 2, fn. 2 and Petition at 8.<sup>7</sup>

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<sup>6</sup> *Michigan Central Railway, LLC-Acquisition and Operation Exemption-Lines of Norfolk Southern Railway Company*, STB Finance Docket No. 35063, slip op. at 11 (served December 10, 2007) (“*FD 35063*”).

<sup>7</sup> Only a one-mile portion of the trackage rights over the Line that GDLK is claiming were inadvertently omitted in the 2008 Notice of Exemption were sought in the MCR proceeding. Even MCR did not seek incidental trackage rights over the entire Line.

NS and Watco entities<sup>8</sup> restructured the transaction into a lease of 122.9 miles of NS track and land and incidental trackage rights over 0.43 miles of NS track into Botsford Yard. GDLK filed a Notice of Exemption on November 3, 2008 (the “2008 Notice of Exemption”). The 2008 Notice of Exemption is very specific in identifying the track GDLK sought to operate on pages 3, 4, 5, 7, and 8 and in the first page of the Caption Summary. Nowhere were incidental trackage rights over CSXT ever mentioned. On pages 4-7 of the 2008 Notice of Exemption, GDLK specifically distinguished the GDLK lease from the MCR acquisition. On page 5, GDLK explicitly states:

The Grand Elk Transaction involves only a portion of the rail lines that were the subject of the much larger and significantly more complex Michigan Central Transaction. The Grand Elk Transaction concerns the lease of 122.9 miles, with incidental trackage rights over a 0.43 mile segment, to a new company, while the Michigan Central Transaction involved the capital contribution of 299 miles of rail lines and 85.5 miles of trackage rights to a joint venture company.

Over six times in the 2008 Notice of Exemption, GDLK had an opportunity to specifically include the incidental trackage rights over the Line, but it did not. Moreover, on page 5, GDLK specifically distinguished 85.5 miles of incidental trackage rights sought by MCR (which only included a portion of the Line) from the 0.43 miles of incidental trackage rights to be acquired from NS in Kalamazoo, over 40 miles from Grand Rapids. Nor did the Notice to Employees filed with the Board on December 1, 2008 mention incidental trackage rights over CSXT, even

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<sup>8</sup> CSXT is unclear as to the specific Watco entity that controls GDLK, whether it is Watco Companies, Inc., Watco Transportation Services, Inc., Watco Companies, LLC, Watco Holdings, Inc, or some other entity, and whether that entity has obtained proper authority from the Board as required by 49 U.S.C. §§11323(a)(3, 4, and 5) and 11901(a).

though it too contained a description of rail line to be operated.<sup>9</sup> As such, the notice failed to set forth “the lines that are to be transferred.” 49 CFR 1150.42(e).

Over significant opposition from the Michigan Economic Corporation, United Transportation Union, State Senator Raymond E. Basham, and the Brotherhood of Locomotive Engineers & Trainmen, the Board allowed the exemption for the lease to take effect.<sup>10</sup> Indeed, in the numerous replies to opposition filed by NS and GDLK in the 2008 Notice of Exemption, both reiterate the specific track to be leased to GDLK and the limited 0.43 miles of incidental trackage rights involved. There is no mention of incidental trackage rights over CSXT.<sup>11</sup>

NS requested CSXT to agree to the assignment of trackage rights over the 1.0 mile portion of the Line involved in the MCR proceeding. Because the Board denied MCR’s request, CSXT did not act on the request. NS renewed the request for the GDLK transaction. Although the trackage rights agreements do not require CSXT to identify any reason for not consenting to assignment, CSXT determined, for valid business reasons, not to consent to the assignment to GDLK of either of the two trackage rights agreements that allowed trackage rights operations over the Line.

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<sup>9</sup> This doubtlessly misled certain NS employees who relied on that notice to determine whether they would be affected by the proposed transaction. The locomotive engineers operating over the Line had a special skill having been certified to operate over CSXT property – the Line.

<sup>10</sup> *Grand Elk Railroad, L.L.C. – Lease and Operation Exemption–Norfolk Southern Railway Company*, STB Finance Docket No. 35187 (STB served December 22, 2008); *Grand Elk Railroad, L.L.C. – Lease and Operation Exemption–Norfolk Southern Railway Company*, STB Finance Docket No. 35187 (STB served January 29, 2009); and *Grand Elk Railroad, L.L.C. – Lease and Operation Exemption–Norfolk Southern Railway Company*, STB Finance Docket No. 35187 (STB served July 13, 2009).

<sup>11</sup> See GDLK Replies filed December 12, 2008, December 24, 2008, January 16, 2009, January 23, 2009, May 1, 2009, and July 8, 2009; and NS Replies filed December 15, 2008, December 23, 2008, December 29, 2008, and January 23, 2009.

In March 2016, CSXT requested that GDLK provide CSXT with documentation of GDLK's rights to operate over the Line. Having received no documentation from GDLK, by letter dated June 14, 2016, CSXT notified GDLK that GDLK had not received authority from the Board to operate over CSXT's Line, that CSXT had not consented to the assignment of the trackage rights over the Line, and that GDLK was to cease and desist from operating over CSXT's Line within seven days. See letters in Exhibit 1. At that time, CSXT marshalled locomotives and personnel in Grand Rapids to provide the service that GDLK had been providing over CSXT's Line. CSXT granted GDLK two extensions based on requests from GDLK and the Board's Rail Customer and Public Assistance Program ("RCPA"). Finally, after unsuccessful mediation sponsored by RCPA, CSXT directed its dispatchers to prohibit GDLK trains from entering the Line as of August 10, 2016. Since that time, CSXT has made locomotives and personnel available to handle freight over the Line and NS is still available to provide service over the Line, although NS has apparently refused to do so.

GDLK then proceeded to file the Notice, Petition, Waiver, Supplements and Amendment. The Board served a Notice of Exemption.<sup>12</sup>

***At no time has CSXT prohibited NS from operating over the Line pursuant to the trackage rights between CSXT and NS and the authority received from the ICC. As CSXT is well aware of the Board's federal licensing jurisdiction, CSXT has not sought discontinuance of NS's rights, nor has CSXT found a decision by the Board granting NS discontinuance authority and terminating its common carrier obligation over the Line.***

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<sup>12</sup> *Grand Elk Railroad, Inc.—Acquisition of Incidental Trackage Rights Exemption—Norfolk Southern Railway Company*, Docket No. FD 35187 (Sub-No. 1) (served September 9, 2016).

In a Reply filed on September 14, 2016, NS reiterates the arguments made by GDLK. In addition, on page 2, NS states that “NSR provided CSXT with written notice of assignment at the time of the transaction and requested CSXT’s consent to the same. Although NSR has not been able to find record of any formal reply from CSXT, CSXT did not protest Grand Elk’s exercise of trackage rights at any point over the subsequent seven years.” NS turns the consent requirement on its head. The specific language of the trackage rights agreements requires CSXT to affirmatively provide consent in writing. There is no provision for assignment if CSXT does not object. NS is improperly trying to rewrite very clear agreements. It is obvious that NS is trying to obfuscate the clear and specific language since NS has admitted that there is no written consent.

NS and GDLK admit that GDLK had no written consent to operate over CSXT as required by the agreements and no authority from the Board to do so. GDLK cannot claim that it was mistaken about what property and other rights it was or was not obtaining from NS. CSXT is quite experienced in short line transactions and knows that at the closing of any short line transaction, one of the checklist items is routinely examining all documents, and confirming that every required consent to assignments is present, on the table, and in writing, in addition to the receipt of regulatory authority for the entire scope of the transaction. This is especially true for those portions of track that are considered integral to the operation.

Yet, despite this, NS apparently went ahead and purported to assign the trackage rights over CSXT to GDLK, and GDLK went on ahead, without CSXT consent or regulatory authority, and began operating over CSXT. Nor did GDLK provide notice to CSXT as required by the trackage rights agreements. The first day this happened was a violation of the trackage rights agreements, and unlawful operation under the Board’s statute and regulations. All that GDLK

has to offer to the STB today is the argument that, since they got away with it for so long, that they must be entitled to do it – regardless of CSXT’s property rights, the law of contract, and sections 10901 and 11901(c).

### **THE NOTICE, PETITION, AND WAIVER SHOULD BE REJECTED**

CSXT requests the Board to reject the Notice because it does not meet the exemption criteria set forth in 49 CFR 1150.41, and even if the Notice did meet the exemption criteria of 49 CFR 1150.41, the issues raised by the Notice and expanded on in the Petition are not routine and are controversial.

In general, the notice of exemption process is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board’s regulations, that ordinarily do not require greater regulatory scrutiny. Thus, notices of exemption are intended to be used for routine and non-controversial cases. In cases where unresolved issues arise, **the Board will reject a notice.** (internal citations omitted, emphasis added).<sup>13</sup>

GDLK has not presented the Board with a routine and non-controversial case.

The Notice at page 2 seeks an exemption:

to acquire by assignment from Norfolk Southern Railway Company (“NSR”) trackage rights over approximately 3.3 miles of railroad line (the “CSXT” Line”) in Grand Rapids, Michigan, owned by CSX Transportation, Inc. (“CSXT”). The subject trackage rights conveyance was incidental to GDLK’s 2009 lease and operation of NSR-owned railroad lines extending generally from Grand Rapids to Elkhart, Indiana, but was inadvertently omitted from GDLK’s notice of exemption for the transaction.

The Petition at page 2 seeks:

to partially revoke the class exemption at 49 C.F.R. § 1150.41, et seq., as necessary to allow the notice for the acquisition of incidental trackage rights that GDLK has filed in this docket to take effect retroactively (“*nunc pro tunc*”) as of January 30, 2009, the effective date of the original class exemption in Docket No. FD 35187, to which the subject proceeding relates.

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<sup>13</sup> *Winamac* at 2.

The Waiver at page 2 seeks:

a waiver of the 60-day labor notice requirements of 49 C.F.R. § 1150.42(e), to the extent those requirements are applicable to the assignment of trackage rights transaction addressed in this proceeding.

The Complaint in Paragraph 40 of Exhibit F to the Petition seeks:

a declaratory order that, as a matter of state law, the assignment of trackage rights on the Grand Rapids Track from NS to Grand Elk was valid and enforceable, or in the alternative, if the court determines that the assignment was not valid, then Grand Elk and NS are entitled to a declaration that NS retained common carrier rights that are now assignable to Grand Elk.

The Notice presents significant controversies to the Board that are contrary to Board precedent.

GDLK is seeking to acquire incidental trackage rights over seven years after the 2008 Notice of Exemption was filed. A seven-year delay in seeking incidental trackage rights is contrary to the rules in 49 CFR 1150.31(a)(4), which state: “Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation.” and the rules in 49 CFR 1150.41(d), which state: “Incidental trackage rights include the grant of trackage rights by the seller, or the acquisition of trackage rights to operate over the line of a third party, that occurs at the time of the purchase.” There is no present acquisition associated with the request for incidental trackage rights. The transaction occurred seven years ago. The request for trackage rights over the Line is no longer incidental under 49 CFR 1150.41(d).

GDLK is also seeking to acquire the incidental trackage rights without a written agreement with the owner of the property, which is contrary to the governing trackage rights agreements and Board precedent. “This serious contractual dispute raises issues of state law that the Board is not in a position to resolve and calls into question whether a key component of the

trackage rights class exemption—that the trackage rights be based on a written agreement—is met.”<sup>14</sup>

Another controversy involves the assignment of trackage rights agreements that have expired by their own terms, which raises questions including whether there are any rights to assign, whether the rights, if they exist, are assignable, and what are the rights of the landowner. Moreover, the Board may well be faced with the prospect of developing an agreement.

GDLK claims that CSXT gave written consent by entering a Private Memorandum of Understanding (the “MOU”) among CSXT, NS, GDLK, and Padnos. GDLK fails to advise the Board that the MOU is “non-binding” by its own terms and of no legal force and effect.

GDLK also relies on the Petition for Exemption filed in *FD 35063*, which the Board denied. Moreover, the Petition only sought incidental trackage rights over about one-mile of the CSXT Line in Grand Rapids, not the entire Line. See the Petition, Exhibit D, page 85.<sup>15</sup> CSXT did not give consent for those trackage rights either.<sup>16</sup>

GDLK also relies upon the Transaction Agreement (Exhibit D to the Petition) between NS and MCR in *FD 35063* as showing their intent to have the trackage rights over CSXT assigned to MCR, even though MCR did not seek exemption for the assignment of trackage rights over the entire Line, but only one-mile of the Line. And again, CSXT never consented to that assignment. However, in the 2008 Notice of Exemption, GDLK makes it abundantly clear that GDLK is not MCR. The impassioned distinction made between *FD 35063* and the 2008

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<sup>14</sup> *Winamac* at 2.

<sup>15</sup> The other trackage rights over CSXT that were sought to be assigned are in Lansing, MI, nearly 70 miles from Grand Rapids.

<sup>16</sup> It is curious that GDLK submits portions of the Transaction Agreement from the MCR transaction to the Board, but did not submit either the Transaction Agreement or Lease Agreement between NS and GDLK.

Notice of Exemption by GDLK clearly emphasizes that the only incidental trackage rights involved are over 0.43 miles of NS.

In Exhibit E to the Petition, GDLK submits a Grand Rapids Assignment and Assumption Agreement dated as of March 5, 2009 (the “Assignment Agreement”) between NS and GDLK, which GDLK again argues shows the intent of NS and GDLK. The Assignment Agreement states that NS will assign the trackage rights “upon receiving consent from CSXT.” Page 94. The Assumption Agreement, in the penultimate Whereas clause states “CSXT has consented to such assignment.” The only method for CSXT to consent to the assignment was in writing pursuant to the agreements. NS admits that it does not have a written consent. CSXT also does not have a record or document consenting to the assignment. Obviously, had GDLK been diligent, it would have requested from NS a copy of the written assignment by CSXT, and not consummated the lease when NS could not produce it. Petition at 3. The Assumption Agreement does not demonstrate intent, it shows – at best - that neither NS nor GDLK was diligent in that NS did not obtain consent from CSXT and that GDLK did not request confirmation of assignment pursuant to the provisions of the agreements.

GDLK also claims that it has been operating under the trackage rights. CSXT disputes that claim. GDLK did not seek Board authority to operate under the trackage rights, the Board did not grant or exempt such an operation, and CSXT did not consent to the assignment of trackage rights to GDLK. Indeed, CSXT believes that GDLK has been operating surreptitiously over the Line to mislead shippers about the product it is selling. GDLK has not complied with the trackage rights agreements. GDLK has not performed the most basic requirements under the agreements, which include notifying CSXT of a change of the contact or address, seeking to renew the agreements, operating without an agreement after the term of the agreements expires,

paying for use, failing to obtain regulatory approval, and making such reports to CSXT as required by the agreements. Simply put, GDLK has not been operating under trackage rights. GRLK has been using CSXT's Line without the consent of the owner or legal authority.

Even GDLK admits that this proceeding is complex. See Petition at 3, 11, and 16. As such, Board precedent requires rejection of the GDLK Pleadings.

Not only is this proceeding complex, but GDLK misstates the reason for the proceeding when it states "The seeds of this petition were sown in the early 1980's." Petition at 4. Prior to GDLK entering the picture there were no issues regarding the trackage rights parties and the appropriate authorization from the Interstate Commerce Commission. The "seeds" of the Petition were sown when GDLK and NS failed to comply with the requirements of the trackage rights agreements that required written consent from CSXT prior to assignment and when GDLK failed to ask the Board for an exemption to acquire the incidental trackage rights through assignment in the 2008 Notice of Exemption. GDLK failed to comply with 49 U.S.C. § 10901 and has violated 49 U.S.C. § 11901(c). As a party with unclean hands, GDLK is hardly entitled to benefit from the bona fide actions of Conrail and CSXT's predecessor. GDLK then attempts to piggy back on *FD 35063*, which the Board denied because the proposed transaction sought to evade the appropriate regulatory requirements. But GDLK admits that MCR did not seek the assignment of trackage rights over the Line (Petition at 8) as required by the Board's rules. GDLK has not justified its failure to obtain consent to assignment and seek proper exemption from the Board by relying on an earlier proceeding that the Board found improper and that also failed to properly identify the railroad line in issue. In fact, making the mistake once may have been inadvertent, although CSXT does not accept that explanation, but making the mistake a second time, especially after consent to assignment was not obtained, is not inadvertent.

GDLK then argues (Petition at 9) that the 2008 Notice of Exemption informed the Board of its operations. GDLK is wrong. The 2008 Notice of Exemption did not even mention incidental trackage rights over CSXT and neither the Board nor CSXT were on notice that CSXT's property was involved under the 2008 Notice of Exemption. The agreements between NS and GDLK were not filed with the Board. The labor notice did not include operations over trackage rights. An agreement between NS and GDLK is not the same as obtaining consent from CSXT (which was withheld for valid business reasons) or seeking and receiving authority from the Board, neither of which was accomplished.

GDLK's rationale for seeking retroactive authority is critical to an existing state court review of contract issues to see if the trackage rights were properly assigned. GDLK contends that if the authority is not made retroactive, the court might decline to adjudicate whether an assignment had occurred. Petition at 15. "The Board generally disfavors granting licensing authority retroactively."<sup>17</sup>

The authority cited by GDLK is clearly distinguishable. *R.J. Corman*<sup>18</sup> involved an exemption of the transfer restriction in 49 U.S.C. §10904(f)(4)(A) where the line had been transferred prior to the end of a five year prohibition against transfer, except to the original seller. Not only did RJC Corman Property and NC Railroad, Inc., the seller, agree to the transfer and retroactive exemption, but the original seller the Tennessee Railway Company also agreed. Here, CSXT the owner of the property has not consented to and does not agree to the assignment of the

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<sup>17</sup> See, e.g., *Turtle Creek Indus. R.R.—Acquis. & Operation Exemption—Consol. Rail Corp.*, FD 35678, slip op. at 1 n.1 (STB served Oct. 26, 2012); *New Brunswick Ry.—Continuance in Control Exemption—Me. N. Ry.*, FD 35518 et al., slip op. at 3 n.2 (STB served Sept. 26, 2011).

<sup>18</sup> *R.J. Corman Railroad Property, LLC—Acquisition Exemption—NC Railroad, Inc.*, Docket No. FD 35363, et al. (served June 29, 2011).

trackage rights or to retroactive assignment. Moreover, the exemption sought by RJC Corman Property was from 49 U.S.C. §10904(f)(4)(A), not 49 U.S.C. §10901 or §10902.

GDLK claims that *Horsehead*<sup>19</sup> permits partial revocation to make authority retroactive for good cause. Petition at 15. Unlike the GDLK lease, Horsehead purchased a line as part of the rushed nature of a bankruptcy proceeding. *Id.* at 2. Horsehead also sought retroactive authority from the Board less than three months after the transaction closed, not more than seven years later as GDLK has done. GDLK's lease did not occur as part of a bankruptcy proceeding. Nor were GDLK and NS "rushed." The 2008 Notice of Exemption was filed on November 3, 2008, almost 11 months after the Board denied *FD 35063*. Failure of diligence is not a ground for granting retroactive authority. GDLK has not met the Board's standard and the Petition should be denied if it is not rejected.

Contrary to the proceedings cited by GDLK, not all of the necessary parties to the assignment of trackage rights concur in the transfer. As owner of the track and land, CSXT's written consent is required before NS can assign its rights under the trackage rights to GDLK. CSXT did not and does not consent to the assignment.

GDLK is wrong when it claims that filing the Notice is proper in light of *Saginaw Bay Southern Railway Company-Acquisition and Operation Exemption-Rail Line of CSX Transportation, Inc.*, Docket No. FD 34729 (served May 5, 2006) (the "*Saginaw Proceeding*"). Saginaw Bay Southern Railway Company ("SBS") sought to purchase track and materials and lease the land from CSXT in a Notice of Exemption filed on September 11, 2005. The notice was served on September 27, 2005. The Huron & Eastern Railway Company, Inc. ("HESR")

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<sup>19</sup> *Horsehead Corporation-Petition for Acquisition and Operation Exemption-Chestnut Ridge Railway Company*, STB Finance Docket No. 34481 (served March 12, 2004).

objected to the transfer of CSXT's trackage rights over HESR to SBS without STB authority, and without SBS negotiating with HESR over terms of the trackage rights. The trackage rights were in effect at the time the Director of the Office of Proceedings directed SBS to file another notice to obtain trackage rights authority in the *Saginaw Proceeding*. SBS filed the Notice of Exemption on May 26, 2006 to acquire "CSXT's contractual right to operate, via trackage rights" over HESR prospectively<sup>20</sup> and the STB served a Notice of Exemption in *Saginaw Bay Southern Railway Company-Acquisition and Operation Exemption-In Saginaw County, MI*, Docket No. FD 34729 (Sub-No. 1) (served June 23, 2006).

The *Saginaw Proceeding* is significantly different from the relief GDLK seeks. First, SBS took less than one year to seek STB authority, while GDLK has taken over seven years. Second, the trackage rights over HESR remained in effect, while the trackage rights between CSXT and NS have expired by their own terms, leaving no trackage rights agreements to assign. Third, HESR was willing to consent to the assignment, while CSXT has not consented to the assignment and is not willing to consent to the assignment. Fourth, GDLK has sought retroactive exemption for the trackage rights, while SBS did not seek retroactive authority. Fifth, no party requested that the Board reject the Notice of Exemption filed on May 26, 2006 by SBS. Finally, GDLK and NS have filed the Complaint seeking an interpretation under Michigan law that either CSXT has consented to the assignment of trackage rights, which CSXT has not done, or to have the court substitute its judgment for the primary jurisdiction of the Board in declaring the existence of common carrier authority and the ability to transfer such authority. The GDLK Pleadings do not present the Board with the same issues addressed by the Director in the

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<sup>20</sup> Unlike GDLK here, SBS did not seek retroactive authority going back over seven years.

*Saginaw Proceeding* and GDLK is not entitled to the same relief. Indeed, GDLK has not presented the Board with “routine and non-controversial cases.”

The situation that GDLK has placed itself in is similar to several proceedings that are more recent than the *Saginaw Proceeding* and where the Board rejected the Notice of Exemption.

In *Winamac*, the Winamac Southern Railway Company (“WSRY”) filed a Notice of Exemption seeking trackage rights over the A. & R. Line, Inc. (“A&R”) on December 11, 2008. According to WSRY, the trackage rights agreement had been entered in 1995, that WSRY did not seek authority at that time, but that it filed the notice in 2008 to remedy the error. The Toledo, Peoria & Western Railway Corporation (“TP&W”), A&R’s successor, opposed WSRY’s notice and sought to have it stayed and revoked. TP&W pointed out that it had terminated the trackage rights and that there was no agreement for the Board to exempt. The Board concluded that:

WSRY’s notice of exemption will be rejected because the record indicates that this matter is not routine and non-controversial and that use of the trackage rights class exemption is not appropriate in this case. The exemption sought here would belatedly authorize trackage rights under an agreement entered into nearly 14 years ago. Moreover, TP&W, the successor to the original granting party, is actively opposed to the grant of the exemption and asserts that the 1995 Trackage Rights Agreement is no longer in effect. WSRY “disagrees emphatically” with that assertion. This serious contractual dispute raises issues of state law that the Board is not in a position to resolve and calls into question whether a key component of the trackage rights class exemption—that the trackage rights be based on a written agreement—is met. These uncertainties preclude use of the expedited notice of exemption process here.

*Winamac* at 2. Just like the WSRY, GDLK has filed a notice of exemption where “the record indicates that this matter is not routine and non-controversial.” CSXT contends that “[t]he exemption sought here would belatedly authorize trackage rights under an agreement entered into” over seven years ago. “Moreover,” CSXT, “the ... original granting party, is actively

opposed to the grant of the exemption and asserts that the” trackage rights agreements are “no longer in effect.” In addition, the “serious contractual dispute raises issues of state law that the Board is not in a position to resolve and calls into question whether a key component of the” assignment of the trackage rights agreements is based on written consent as required by the agreements themselves “is met. These uncertainties preclude use of the expedited notice of exemption process here.”

The parallels between *Winamac* and GDLK continue where the Board stated:

Thus, even if the 1995 Trackage Rights Agreement is still operative and binding on TP&W, the very fact that TP&W nevertheless now objects suggests that a notice of exemption still would not be the appropriate mechanism for seeking Board authority for those rights. Rather, the more extensive record afforded in an application or petition for exemption proceeding likely would be needed to allow TP&W to air its objection and the Board to fully consider the matter.

*Winamac*, presents a more recent statement of the law in a proceeding where the facts more closely parallel this proceeding than the *Saginaw Proceeding*. CSXT contends that *Winamac* governs the facts presented by GDLK and should result in the rejection of the GDLK Pleadings by the Board.

Later in 2009, the Board allowed the withdrawal of a notice of exemption where the moving party admitted that “it does not currently have an underlying contractual right to operate the rail line as stated in its notice and that it would file a new verified notice of exemption if it were to obtain that right.”<sup>21</sup> GDLK has made the same admission in the Petition at 3, and throughout the Complaint. Even in the face of such consistent precedent, GDLK apparently will not withdraw the Notice, and therefore, CSXT respectfully requests the Board to reject it.

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<sup>21</sup> *Salem Industrial Railway, Inc.—Change in Operators Exemption—in Salem County, NJ*, STB Finance Docket No. 35209, slip op. at 1 (served February 23, 2009).

The Board has been consistent in its approach to unresolved issues or questions requiring considerable scrutiny as the GDLK Pleadings require. “The Board’s class exemption procedures provide an expedited means of obtaining Board authority in certain classes of transactions involving routine matters. A notice that raises unresolved issues or questions that require considerable scrutiny may be rejected.”<sup>22</sup>

It is beyond doubt that GDLK is seeking to use the class exemption in a non-routine and controversial proceeding. GDLK is not the innocent party. GDLK has been operating over CSXT property for over seven years without the required authority from the Board (which GDLK never bothered to request) and without the required written consent of CSXT. The consistent precedent developed by the Board requires the Notice, the Petition and the Waiver to be rejected, and if GDLK wants to continue to pursue this course, CSXT requests the Board require GDLK to file an appropriate application under 49 U.S.C. §10902.

#### **A STAY OF THE NOTICE IS APPROPRIATE**

If the Board determines that it requires additional information before rejecting the GDLK Pleadings, which CSXT contends it does not, CSXT respectfully requests that the Board stay the effectiveness of the Notice.

In ruling on a petition for a stay, the Board considers: (1) whether the party seeking the stay has made a strong showing that it is likely to prevail on the merits; (2) whether the party seeking the stay will suffer irreparable harm in the absence of a stay; (3) whether other interested parties will be substantially harmed by a stay; and (4) the public interest in granting or denying the stay. *See Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958).<sup>23</sup>

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<sup>22</sup> *ABC & D Recycling, Inc.—Lease and Operation Exemption—a Line of Railroad in Ware, Mass.*, Docket No. FD 35397 slip op. at 4 (served January 20, 2011).

<sup>23</sup> *Delaware and Hudson Railway Company, Inc.—Discontinuance of Trackage Rights Exemption—in Broome County, N.Y.; Middlesex, Essex, Union, Somerset, Hunterdon, and*

In seeking the stay, CSXT relies upon the facts and arguments made concerning the rejection of the GDLK Pleadings. CSXT has met the requirements for a stay.

1. CSXT has made a strong showing that it is likely to prevail on the merits.

As explained above, CSXT has demonstrated that Board precedent requires the Notice to be rejected. GDLK did not seek authority from the Board to operate over the trackage rights. The Board has not granted GDLK authority to operate over the trackage rights. And CSXT did not consent in writing to the assignment of the trackage rights from NS to GDLK. The Notice raises controversial and non-routine issues, a standard ground for the Board to reject a notice of exemption. GDLK has also waited over seven years to even seek exemption from the Board, during which time GDLK operated without authority under 49 U.S.C. § 10901 and in violation of 49 U.S.C. § 11901(c).

GDLK's failure to obtain Board authorization for more than seven years should not be accepted as a mere "oversight" by the Board.<sup>24</sup> GDLK is clearly in violation of 49 U.S.C. § 10901. The Board "has been given wide administrative discretion to tailor remedies and sanctions for violation of the statute and its own orders. *Kraus v. Santa Fe S. Pac. Corp.*, 878 F.2d 1193, 1198 (9<sup>th</sup> Cir. 1989). CSXT urges the Board to stay the effectiveness of the Notice so that it can act on CSXT's request to reject the Notice and to determine the appropriate remedy for GDLK's admitted violations of the law.

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*Warren Counties, N.J.; Cumberland, Chester, Luzerne, Perry, York, Lancaster, Northampton, Lehigh, Carbon, Berks, Montgomery, Northumberland, Dauphin, Lebanon, and Philadelphia Counties, Pa.; Cecil, Harford, Baltimore, Anne Arundel, and Prince George's Counties, and Baltimore City, Md.; The District of Columbia; and Arlington County, and The City of Alexandria, Va.*, Docket No. AB 156 (Sub-No. 27X) slip op. at 2 (served August 13, 2015).

2. CSXT will suffer irreparable harm in the absence of a stay.

GDLK has operated over CSXT's property since early 2009. During that time, there has been no agreement between CSXT and GDLK. GDLK has operated without authority from the Board.

During this time, CSXT has been exposed to liability (including environmental liability) from GDLK's access to CSXT's property without an agreement. GDLK has marketed service to shippers without including CSXT in the routing or compensating CSXT. In addition, GDLK has marketed and priced a service to CSXT customers over a route that GDLK has no legal authority to use. The potential loss of business, confusion of CSXT's customers through the usurpation of CSXT's Line without any authority from the Board resulting in the replacement of CSXT in the route, and exclusion of CSXT from that route cannot be compensated monetarily.

3. Other interested parties will not be substantially harmed by a stay.

GDLK has embarked on a complex and lengthy process to take CSXT's property, the use of CSXT's Line, without CSXT's consent. To date, GDLK's use of CSXT's property has been without authority from the Board and without the contractually required consent of CSXT.

Were it not for GDLK's unauthorized operation, no party would have made use of GDLK's service in Grand Rapids and would have had no expectation of receiving service from GDLK.

***CSXT has marshalled equipment and forces to provide service to shippers that had previously relied on GDLK's unauthorized operations. Alternative rail service is immediately available.*** Therefore, a stay of the Notice will not substantially harm other interested parties.

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<sup>24</sup> GDLK provides no justification for its failure to seek authority or exemption from the Board. GDLK's "oversight" should be considered even more egregious because the trackage rights were

4. The public interest supports granting the stay.

GDLK has operated over the Line for over seven years without authority. The public interest supports the Board enforcing its underlying statute and protecting the property rights of operating railroads from use and interference by unauthorized third parties. CSXT is ready, willing and able to serve any shippers who have been served previously by GDLK engaging in the unauthorized use of CSXT's property.

**CSXT URGES THE BOARD TO INITIATE AN INVESTIGATION OF GDLK'S  
UNAUTHORIZED OPERATIONS**

Pursuant to Section 12 of the Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110, 129 Stat. 2228 (2015), 49 U.S.C. §11701(a) was amended to authorize the Board to initiate investigations on its own initiative. Although the Board has not issued final rules, the failure of GDLK to comply with the Board's regulations and established precedent governing the transfer of trackage rights warrant a Board-Initiated Investigation.

The GDLK Pleadings admit that it has operated over CSXT property for over seven years without seeking or obtaining authority from the Board as required by 49 U.S.C. §10901(a), which is a clear violation of 49 U.S.C. §11901(c). Nor is there an agreement between GDLK and CSXT. GDLK claims that the agreements between CSXT and NS were assigned, but it has never even complied with the terms of the now-expired CSXT-NS trackage rights agreements. GDLK has not performed the most basic requirements under those agreements, which include notifying CSXT of a change of the contact or address, seeking to renew the agreements, paying for use, failing to obtain regulatory approval, and making such reports to CSXT as required by

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integral to GDLK's operations. Petition at 3.

the agreements. Simply put, GDLK has not been operating under trackage rights. It has been using CSXT's Line without the consent of the owner or legal authority from the Board.

GDLK's unauthorized operations over CSXT were a follow-up to *FD 35063*, which the Board properly denied for seeking to evade the Board's mandatory regulatory requirements. The efforts by Watco and NS to resurrect the transaction in *FD 35063* eventually led to the 2008 Notice of Exemption and a notice to NS employees that did not accurately identify the operations that GDLK apparently intended all along to assume (the notice did not indicate that trackage rights would be assigned from NS to GDLK).<sup>25</sup> GDLK then began its unauthorized operations over CSXT.

The unauthorized use of railroad property is a serious matter. Safe operations are one of CSXT's core principles. In order to ensure safe operations, CSXT, and all other railroads need to control the use and access to their property through agreements.

It is uncontroverted that in early 2009 GDLK started operating over CSXT without CSXT's written consent and without authority from the Board.

CSXT requests that the Board institute an investigation of GDLK and its parent to determine the facts leading to GDLK's operations over CSXT without CSXT's consent and without authority from the Board, and to determine GDLK's and its parent's motives for ignoring contract law and regulatory requirements. The impact on railroad employees of the failure of GDLK to provide proper notice is also an appropriate issue to be investigated.

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<sup>25</sup> "The purpose of the notice requirements at 49 C.F.R. § 1150.42(e) is to ensure that rail labor unions and employees who would be affected by the transfer of a line are given sufficient notice of the transaction before consummation. The Board takes seriously the requirements of the rule." *Reading Blue Mountain & Northern Railroad Company—Acquisition and Operation Exemption—Locust Valley Coal Company D/B/A Locust Valley Line*, Docket No. FD 36033, slip op. at 2 (served June 7, 2016).

CSXT respectfully requests the Board to initiate an investigation under 49 U.S.C. §11701(a).

### CONCLUSION

For the reasons provided in this Reply, CSXT respectfully requests that the Board: (1) reject the GDLK Pleadings; (2) stay the effectiveness of the Notice while the Board decides to reject the GDLK Pleadings; and (3) institute an investigation of GDLK's unauthorized operations over CSXT that began as early as March 2009, as well as any other violations 49 U.S.C. Subtitle IV and the Board's implementing regulations.

Respectfully Submitted,



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CSX Transportation, Inc.  
500 Water Street  
Jacksonville, FL 32202  
(904) 359-1229

Attorneys for: CSX Transportation, Inc.

Dated: September 16, 2016

## CERTIFICATE OF SERVICE

I certify that I have this day electronically served a copy of this (1) Reply to Grand Elk Railroad, Inc. Verified Notice of Exemption; Petition to Partially Revoke Class Exemption; and Petition for Waiver of Requirements of 49 CFR 1150.42(E) and (2) Petition for Stay on:

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Louis E. Gitomer  
September 16, 2016

EXHIBIT 1-LETTERS BETWEEN CSXT AND GDLK



John Widowfield  
Director Joint Facilities  
CSX Transportation  
1700 167<sup>th</sup> Street  
Calumet City, IL 60409

June 14, 2016

**VIA EMAIL: [sduffy@watcocompanies.com](mailto:sduffy@watcocompanies.com)**

Shasta D. Duffey  
V.P. Marketing & Sales - GDLK, PSWR  
Watco Companies  
8799 Lacey Rd  
Nashville, MI 49073

Re: Unauthorized Use of CSXT Tracks in Grand Rapids

Dear Shasta:

This responds to recent requests for CSX Transportation, Inc. ("CSXT") to allow Grand Elk Railroad, L.L.C. ("Grand Elk") to directly interchange with Grand Rapids Eastern Railroad Inc. ("Grand Rapids") and Marquette Rail, LLC ("MQT") using CSXT property. After thorough review, CSXT has determined that Grand Elk does not have any right to operate over CSXT in Grand Rapids, MI. As a result, CSXT requests that Grand Elk cease and desist from operating over 3.08 miles of CSXT's line between Grandville Avenue and Ann Street in Grand Rapids, MI within seven (7) days of the date of this letter.

CSXT's conclusion is based on analysis of two trackage rights agreements between CSXT and Norfolk Southern Railway Company ("NSR"). CSXT (by its predecessor the Chesapeake and Ohio Railway Company ("C&O")) granted trackage rights to Consolidated Rail Corporation ("Conrail") in Grand Rapids, MI (1) at the C&O crossover between Point of Switch at Valuation Station 8021+90 and Point of Switch at Valuation Station 8019+38, near Grandville Avenue, a distance of 202 feet, and (2) between the Point of Switch at Valuation Station 8040+44 and Valuation Station 8072+33, near Butterworth and Fulton Streets, a distance of 3,199 feet ("Grand Rapids CR TR 1"). See Consolidated Rail Corporation –Trackage Rights Exemption—Chesapeake and Ohio Railway Company, ICC Finance Docket No. 30385 (ICC served February 7, 1984).

By a Trackage Rights Agreement dated as of January 24, 1984, CSXT (by its predecessor the C&O) granted trackage rights to Conrail in Grand Rapids, MI over approximately 2.45 miles between Valuation Station 8071+35, near Butterworth Street, and Valuation Station 8200+75, north of Ann Street ("Grand Rapids CR TR 2"). See Consolidated Rail Corporation –Trackage Rights Exemption—Over Chesapeake and Ohio Railway Company, ICC Finance Docket No. 30449 (served April 24, 1984).

NSR succeeded to Conrail's rights to operate over the CSXT under Grand Rapids CR TR 1 and Grand Rapids CR TR 2 (collectively referred to as the "Trackage Rights") as part of the arrangement for splitting Conrail between CSXT and NSR.

Grand Elk leased from NSR approximately 122.9 miles between: (1) milepost KH 1.4 at Elkhart, IN, and milepost KH 27.4 at Three Rivers, MI; (2) milepost FB 27.3 at Three Rivers, MI, and milepost FB 102.3 at Grand Rapids, MI; (3) milepost KZ 94.25 and milepost KZ 95.0 (Kalamazoo Industrial Track); (4) milepost OW 66.6 and milepost OW 70.24 (Plainwell Industrial Track); (5) milepost XH 88.10 and milepost XH 92.40 (Hastings Running Track); (6) milepost CQ 42.8 and milepost CQ 43.9 (CK&S Industrial Track); (7) milepost KY 0.0 and milepost 3.2 ( B O Secondary); (8) milepost UP 0.0 and milepost UP 6.7 (Upjohn Secondary); (9) milepost QY 421.2 and milepost QY 421.3 (Quincy Secondary); (10) milepost VW 106.0 and milepost VW 106.9 (Comstock Industrial Track); (11) milepost AZ 69.6 and milepost AZ 70.4 (Airline Extension); and (12) milepost IJ 44.3 and milepost IJ 44.7 (CK&S Industrial Track), along with the yard tracks in Botsford Yard located between milepost MH 141.8 and milepost MH 142.7. NSR also granted Grand Elk incidental trackage rights over approximately 0.43 miles of NS rail line located between milepost 143.03 and milepost 142.6 at Botsford Yard. Grand Elk Railroad, L.L.C.–Lease and Operation Exemption–Norfolk Southern Railway Company, Finance Docket No. 35187 (served November 17, 2008).

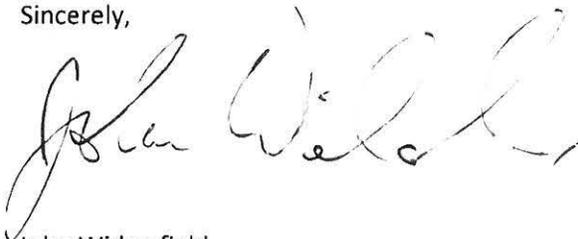
Based on our review, no documentation supports that NSR assigned the Trackage Rights over CSXT in Grand Rapids to Grand Elk. Similarly, CSXT has no record of consenting to any assignment of the Trackage Rights, a condition set forth in Article 13 of the General Conditions Form A to Grand Rapids CR TR 1 and Article 15 of the General Conditions Form A to Grand Rapids CR TR 2.

Because NSR did not assign its Trackage Rights to Grand Elk, CSXT did not consent to an assignment of the Trackage Rights, and Grand Elk did not obtain STB authority to operate over the Trackage Rights, Grand Elk does not have any right to use CSXT's trackage in Grand Rapids, MI. Accordingly, Grand Elk must stop its unauthorized use of CSXT's trackage as soon as possible and, in any event, no later than June 21, 2016. If Grand Elk does not comply with this request, CSXT dispatchers will prevent Grand Elk trains from entering CSXT property.

This letter is without prejudice to CSXT's rights under the Trackage Rights Agreements, under applicable law, regulation and in equity, all of which are expressly reserved.

Please contact me if you have any questions regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "John Widowfield". The signature is written in a cursive, flowing style.

John Widowfield  
CSX Transportation  
Chicago Director Joint Facilities  
708-832-2150



John Widowfield  
Director Joint Facilities  
CSX Transportation  
1700 167<sup>th</sup> Street  
Calumet City, IL 60409

June 17, 2016

**VIA EMAIL: [sloeb@watcocompanies.com](mailto:sloeb@watcocompanies.com)**

Stefan Loeb  
Executive Vice President & Chief Marketing Officer  
Watco Companies, LLC  
315 West 3rd Street  
Pittsburg, KS 66762

Re: Unauthorized Use of CSXT Tracks in Grand Rapids

Dear Stefan:

CSX Transportation, Inc. ("CSXT") notified Grand Elk Railroad, L.L.C. ("Grand Elk") by electronic communication dated June 14, 2016 (the "June 14<sup>th</sup> Notice") that Grand Elk must cease and desist from operating over 3.08 miles of CSXT's line between Grandville Avenue and Ann Street in Grand Rapids, MI (the "Line") as soon as possible and in any event no less than seven (7) days from the date of that notice, June 21, 2016 (the "Deadline").

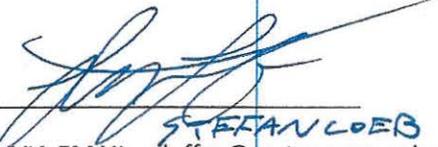
At the request of Grand Elk in response to the June 14<sup>th</sup> Notice, and subject to its agreement to indemnify CSXT and its affiliates for any damages related to Grand Elk's continued use of the Line, CSXT will extend the Deadline to June 28<sup>th</sup>. Provided, however, that if we are unable to amicably resolve this matter on or before June 28, 2016, CSXT reserves the right after said date to instruct its dispatchers to prevent Grand Elk trains from entering CSXT property. This letter is without prejudice to the parties' rights, if any, under the Trackage Rights Agreements (defined in the June 14<sup>th</sup> Notice), under applicable law, regulation and in equity, all of which are expressly reserved.

Please acknowledge your understanding and agreement with this letter by signing the acknowledgment and emailing a scanned copy to my attention at [John\\_Widowfield@csx.com](mailto:John_Widowfield@csx.com).

Sincerely,

John Widowfield

ACKNOWLEDGED this 18<sup>th</sup> day of June, 2016

By: 

STEFAN LOEB  
Cc: **VIA EMAIL: [sduffey@watcocompanies.com](mailto:sduffey@watcocompanies.com)**



John Widowfield  
Director Joint Facilities  
CSX Transportation  
1700 167<sup>th</sup> Street  
Calumet City, IL  
60409

July 7, 2016

**VIA EMAIL: [sloeb@watcocompanies.com](mailto:sloeb@watcocompanies.com)**

Stefan Loeb  
Executive Vice President & Chief Marketing Officer  
Watco Companies, LLC  
315 West 3rd Street  
Pittsburg, KS 66762

Re: Unauthorized Use of CSXT Tracks in Grand Rapids

Dear Stefan:

In response to a request from the Rail Customer and Public Assistance Program ("RCPA") of the Surface Transportation Board (the "Board"), CSX Transportation, Inc. ("CSXT") is willing to grant a further extension of the requirement that requiring Grand Elk Railroad, L.L.C. ("Grand Elk") cease and desist from operating over 3.08 miles of CSXT's line between Grandville Avenue and Ann Street in Grand Rapids, MI (the "Line"). The extension shall run until the conclusion of the meeting being arranged by RCPA between CSXT and Grand Elk in early August 2016. The extension is subject to certain conditions for the protection of CSXT, in addition to the prior agreement by Grand Elk to indemnify CSXT. The conditions governing insurance, liability, management and operation of the Line, and compensation are contained in the Attachment to this letter.

If Grand Elk is unwilling to accept and abide by the reasonable and industry standard conditions contained in the Attachment, CSXT will not extend the requirement that Grand Elk cease and desist from using the Line, and will immediately enforce that requirement.

Neither party hereto may disclose the provisions of this letter and Attachment to a third party, excluding a parent, subsidiary or affiliate company, counsel, or the Surface Transportation Board, without the written consent of the other party, which shall not be unreasonably withheld, conditioned or delayed, except as otherwise required by law, regulation or ruling.

Please acknowledge your understanding and agreement with this letter by signing the acknowledgment, initialing each page of the Attachment, and emailing a scanned copy to my attention at [John\\_Widowfield@csx.com](mailto:John_Widowfield@csx.com).

Sincerely,  
John Widowfield

ACKNOWLEDGED this \_\_ day of July, 2016,

By: \_\_\_\_\_

Cc: **VIA EMAIL: [sduffey@watcocompanies.com](mailto:sduffey@watcocompanies.com)**

## ATTACHMENT

The following terms will govern the rail operation of Grand Elk Railroad, L.L.C. ("Grand Elk") over the CSX Transportation, Inc. 3.08-mile line between Grandville Avenue and Ann Street in Grand Rapids, MI (the "Line") pursuant to the extension of time from the requirement that Grand Elk cease and desist from operating over Line (the "Extension").

### 1. INSURANCE

- A. During the Extension, Grand Elk at its sole cost and expense, shall procure and maintain in effect a policy of Comprehensive Railroad liability insurance, with limits of not less than Five Million Dollars (\$5,000,000.00) single limit, bodily injury and/or property damage, for damages arising out of bodily injuries to or death of all persons in any one occurrence and for damage to, or destruction of property, including the loss of use thereof, in any one occurrence, subject to a self-insured retention limit not to exceed Two Hundred Fifty Thousand Dollars (\$250,000), including contractual liability insurance, which names CSXT as an additional insured. If Grand Elk receives notification that an insurance carrier providing an insurance policy is changing or cancelling such policy, Grand Elk shall promptly notify CSXT of such fact. Failure to procure and maintain such insurance in force shall result in the immediate implementation termination of the Extension.
- B. This Insurance coverage shall be effected under standard form policies issued by insurers of financial responsibility, which are rated "A" or better by either Best's Insurance Reports, Standard & Poor's Insurance Rating Service or Moody's Investors Service. CSXT reserves the right to reject as inadequate coverage by an insurance company rated less than "A" by the aforementioned rating services.
- C. The insurance shall be evidenced by a current certificate furnished by Grand Elk to CSXT as an additional insured with its return of this executed letter. Such certificate shall be subject to the prior approval of CSXT's Insurance Department. All of the required endorsements and notice provisions shall be stated on the certificate of insurance that is provided to CSXT. In addition, Grand Elk shall provide CSXT's Insurance Department notice of any claim arising under this Extension and any other correspondence dealing with insurance and insurance matters directly relating to this Extension.
- D. During the Extension, it is understood that CSXT is self-insured.

### 2. LIABILITY and CLAIMS

#### I. Liability

The responsibility and liability between the parties for: (i) any personal injury or death of any person (including employees of the parties and third persons), (ii) any real or personal property damage of any person (including property of the parties and third persons), (iii) any damage or destruction to the environment (including land, air, water, wildlife and vegetation), and (iv) all cleanup and remedial expenses, court costs, settlements, claims, judgments, litigation expenses and attorney's fees resulting from the use of the Line by CSXT or Grand Elk during the Extension, all of which are collectively referred to as a "Loss", shall be divided as follows:

- A. If a Loss occurs involving the trains, locomotives, engines and/or employees of only one of

the parties, then the involved party shall be solely responsible for the Loss, even if caused partially or completely by the other party.

- B. If a Loss occurs on the Line involving the trains and locomotives of both CSXT and Grand Elk, then: (i) each is solely responsible for any Loss to its own employees, locomotives and equipment in its own account including lading and (ii) the parties are equally responsible for any Loss to the Line and Loss sustained by third parties, regardless of the proportionate responsibility between them as to the cause of the Loss.
- C. For purposes of assigning responsibility of a Loss as between CSXT and Grand Elk, a Loss involving one of the parties and a third party or parties shall be construed as being the sole responsibility of that one party.
- D. Whenever any liability, cost, or expense is assumed by or apportioned to a party hereto under the foregoing provisions, that party shall forever protect, defend, indemnify, and save harmless the other party and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents, and employees from and against that liability, cost and expense assumed by that party or apportioned to it, regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, nonfeasance, or misfeasance of the indemnitee or its directors, officers agents, or employees.
- E. In every case of death or injury suffered by an employee of either Grand Elk or CSXT, when compensation to such employees or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employers' liability or other law, and either of said parties is required to pay said compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying any such future installments by reason of the cessation of service over the Line prior to any of the respective dates upon which any such future installments are to be paid.
- F. For purposes of determining liability, pilots furnished by CSXT to Grand Elk shall be considered as the employees of Grand Elk while such employees are on duty as pilots.
- G. For the purpose of determining liability associated with construction, maintenance, repair and renewal of connections, all work performed by CSXT shall be deemed performed for the sole benefit of Grand Elk and, Grand Elk shall be fully liable for all cost and expense of any and all loss, damage, destruction, injury and death resulting from, arising out of, incidental to or occurring in connection with said construction, maintenance repair and renewal. Grand Elk shall protect, indemnify, and save harmless CSXT and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against any and all expense and liability for which Grand Elk is responsible.
- H. If any suit or action shall be brought against either party for damages which are in whole or in part the responsibility of the other party, said other party shall be notified in writing by the party sued, and the party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay a proportionate part of the judgment and costs, expense and attorneys' fees incurred in such suit according to its liability assumed hereunder.
- I. In the event of a Loss as set out herein, CSXT and Grand ELk shall be bound by the Freight Claim Rules, Principles, and Practices of the AAR as to the handling of any claims for the loss or damage to lading.

- J. Watco Companies, LLC, Watco Transportation Services, LLC, and Watco Holdings, Inc., shall assume all liabilities that Grand Elk is unable or unwilling to pay.

## **II. Claims**

- A. Except as provided in B below, all claims, injuries, death, property damages and losses arising out of or connected with this Extension shall be investigated, adjusted and defended by the party bearing the liability, cost, and expense therefor under these provisions.
- B. Each party shall investigate, adjust and defend all freight loss and damage claims filed with it in accordance with 49 U.S.C. Section 11706 and CFR 1005, or in accordance with any applicable transportation contract.
- C. In the event a claim or suit is asserted against CSXT or Grand Elk which is the other's duty hereunder to investigate, adjust or defend, then, unless otherwise agreed, such other party shall, upon request, take over the investigation, adjustment and defense of such claim or suit.
- D. All costs and expenses in connection with the investigation, adjustment and defense of any claim or suit under the Extension shall be included as costs and expenses in applying the liability provisions set forth in this letter, except that salaries or wages of full-time agents, full-time attorneys and other full-time employees of either party engaged directly or indirectly in such work shall be borne by such party.
- E. Excluding freight loss and damage claims filed in accordance with 49 U.S.C. Section 11706 or CFR 1005, neither party shall settle or compromise any claim, demand, suit or cause of action for which the other party has any liability under this letter without the concurrence of such other party if the consideration for such settlement or compromise exceeds Fifty Thousand Dollars (\$50,000).
- F. Grand Elk agrees to indemnify and hold harmless CSXT and its parent corporation, subsidiaries and affiliates, and all their respective directors, officers, agents and employees from and against any and all costs and payments, including benefits, allowances and arbitration, administrative and litigation expenses, arising out of claims or grievances made by or on behalf of Grand Elk's or CSXT's employees, either pursuant to a collective bargaining agreement.
- G. It is understood that nothing in this Claims section shall modify or waive the conditions, obligations, assumptions or apportionments provided in the Liability section.

## **3. MANAGEMENT AND OPERATIONS**

- A. Grand Elk shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains (locomotives and cars) while such trains, locomotives, cars, and equipment are being operated over the Line. Grand Elk shall indemnify, protect, defend, and save harmless CSXT and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against all fines, penalties and liabilities imposed

upon CSXT or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents and employees under such laws, rules, and regulations by any public authority or court having jurisdiction in the premises, when attributable solely to the failure of Grand Elk to comply with its obligations in this regard.

- B. Grand Elk in its use of the Line shall comply in all respects with the safety rules, operating rules and other regulations of CSXT, and the movement of Grand Elk 's trains (locomotives and cars,) over the Line shall at all times be subject to the orders of the transportation officers of CSXT. Grand Elk 's trains shall not include locomotives or cars which exceed the width, height, weight or other restrictions or capacities of the Line as published in Railway Line Clearances, and no train shall contain locomotives or cars which require speed restrictions or other movement restrictions below the maximum authorized freight speeds as provided by CSXT 's operating rules and regulations without the prior consent of CSXT.
- C. Grand Elk shall make such arrangements with CSXT as may be required to have all of its employees who shall operate its trains, locomotives and cars over the Line qualified for operation thereover, and Grand Elk shall pay to CSXT, upon receipt of bills therefor, any cost incurred by CSXT in connection with the qualification of such employees of Grand Elk, as well as the cost of pilots furnished by CSXT, until such time as such employees are deemed by the appropriate examining officer of CSXT to be properly qualified for operation as herein contemplated.
- D. CSXT may conduct an investigation at its option if a Grand Elk 's employee working on CSXT's property is alleged to have violated CSXT 's safety rules, operating rules, regulations, orders, practices or instructions, or if an incident occurs which requires an investigation under applicable agreement rules. To exercise its option, CSXT shall schedule the investigation and notify Grand Elk 's local Transportation Officer in the territory thereof, who shall, in turn, arrange to issue proper notice to the Grand Elk 's employee(s) of the investigation. CSXT 's scheduling of the investigation must comply with the time limits provided in the applicable agreement on Grand Elk 's railroad. CSXT shall provide its regulations, supplements, and safety rules to Grand Elk at Grand Elk's cost.
- E. If CSXT conducts an investigation, CSXT shall have the right to exclude from the Line any employee of Grand Elk except officers, determined by CSXT, as the result of CSXT 's investigation or hearing described below, to be in violation of CSXT 's rules, regulations, orders, practices or instructions.
- F. In a major offense, such as violation of Rule "G", dishonesty, insubordination, or a serious violation of operating rules, wherein CSXT desires to bar Grand Elk 's employee from service on CSXT 's territory pending an investigation by CSXT, immediate verbal notification shall be given to the appropriate Transportation Officer of Grand Elk so that proper written notice can be issued to the employee.
- G. If CSXT conducts an investigation, its officer shall conduct the investigation, but an officer of Grand Elk shall be present to assure compliance with Grand Elk 's labor agreement and practices with respect to investigation procedures. After the investigation is concluded, CSXT shall promptly furnish Grand Elk with two copies of the transcript and a recommendation as to the discipline to be assessed. Grand Elk 's Transportation Officer shall arrange to assess discipline, subject to receipt of CSXT 's recommended discipline, within the applicable time limits. If CSXT recommends dismissal, Grand Elk reserves the right to change the

recommendation to the extent of barring the individual from operating over CSXT's territory.

- H. CSXT shall reimburse Grand Elk for all payments that Grand Elk might be required to make as a result of a challenge being made by the employee or his representative as to the discipline recommended by CSXT and assessed by Grand Elk. Grand Elk agrees to notify CSXT before committing itself to making payment of any claim. In the event a claim is progressed to an Adjustment Board, CSXT shall be given an opportunity to review Grand Elk's submission. Any payments made to employees, as a result of an investigation being "overturned", shall include not only actual wages, but in addition, shall include expenses which Grand Elk may be required to pay covering vacation allowances, Railroad Retirement taxes, unemployment insurance taxes and any other payroll tax or fringe benefits.
- I. The trains, locomotives, cars and equipment of Grand Elk, CSXT, and any other present or future user of the Line or any portion thereof, shall be operated without prejudice or partiality to either party and in such manner as shall afford the most economical and efficient manner of movement of all traffic.
- J. In the event that a train of Grand Elk shall be forced to stop on Line, and such stoppage is due to insufficient hours of service remaining among Grand Elk 's crew, or due to mechanical failure of Grand Elk 's equipment, or any other cause not resulting from an accident or derailment, and such train is unable to proceed, or if a train of Grand Elk fails to maintain the speed required by CSXT on the Line, or if in emergencies, crippled or otherwise defective cars are set out of Grand Elk 's trains on the Line, CSXT shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew Grand Elk 's train) as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Line, and Grand Elk shall reimburse CSXT for the cost of rendering any such assistance.
- K. If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Line, such work shall be done by CSXT, and Grand Elk shall reimburse CSXT for the cost thereof.
- L. In the event CSXT and Grand Elk agree that CSXT should retain employees or provide additional employees for the sole benefit of Grand Elk, the parties hereto shall enter into an agreement under which Grand Elk shall bear all cost and expense for any such retained or additional employees provided, including without limitation all cost and expense associated with labor protective payments which are made by CSXT and which would not have been incurred had the retained or additional employees not been provided.

#### **4. COMPENSATION**

- A. The factor to be used in calculating payments to be made by Grand Elk for use of the Line at any time and during the Extension shall be One hundred five dollars and zero cents (\$105.00) per car using the Line (hereinafter referred to as the "Current Charge").
- B. Grand Elk shall pay CSXT a sum computed by multiplying: (i) the Current Charge by (ii) the number of cars (loaded and empty), and locomotive and units moved by Grand Elk with its own crews and power over the Line by. Each locomotive unit, for the purpose of this Extension shall be counted as one car.

- C. Grand Elk shall furnish CSXT information concerning all loaded and empty cars in Electronic Data Interchange (EDI) transmission between the carriers. This procedure shall be required at the time the Association of American Railroads (AAR) defines the standard reporting procedures for trackage rights carriers. The carriers shall determine the minimal data requirements.
- D. Grand Elk shall furnish to CSXT, in agreed upon format, care of Director-Joint Facility Services, CSX Transportation, 500 Water Street, J801, Jacksonville, FL 32202, and to [JFreports@CSX.com](mailto:JFreports@CSX.com), at the end of each month, a statement of the number of locomotive units and loaded and empty cars operated over the Line during the month. In addition, by July 31, 2016, Grand Elk shall furnish to CSXT, in agreed upon format, care of Director-Joint Facility Services, CSX Transportation, 500 Water Street, J801, Jacksonville, FL 32202, and to [JFreports@CSX.com](mailto:JFreports@CSX.com), a statement of the number of locomotive units and loaded and empty cars operated over the Line by month since Grand Elk commenced operations on March 8, 2009.
- E. CSXT shall on or about the tenth day of each month render billing to Grand Elk for the previous month's service on the Line computed in accordance with Section B.
- F. All payments called for under this letter shall be made by Grand Elk within fifteen (15) days after receipt of bill therefor. No payments shall be withheld by Grand Elk because of any dispute as to the correctness of items in the bills rendered, and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month.



Corporate Office:  
315 West 3<sup>rd</sup> Street  
Pittsburg, KS 66762  
PH: (620) 231-2230  
FAX: (620) 231-0812

July 8, 2016

VIA EMAIL: [John.Widowfield@csx.com](mailto:John.Widowfield@csx.com)

John Widowfield  
Director Joint Facilities  
CSX Transportation  
1700 167<sup>th</sup> Street  
Calumet City, IL 60409

Re: Use of CSXT Tracks in Grand Rapids

Dear John,

In response to your July 7, 2016 letter, the Grand Elk Railroad ("GDLK") and Watco Companies, L.L.C. are agreeable to the conditions governing insurance, liability, management and operation of the line as set forth in paragraphs 1 through 3 and all subparts in order to maintain the status quo as it existed prior to the cease and desist notice.

With respect to the compensation requested by CSXT, it is GDLK's position that these charges should not be made part of this agreement as it is inconsistent with maintaining the status quo. Additionally, such charges would hinder the ability of a number of customers to utilize rail services as they have previously. Over the last seven (7) years such compensation has not been an aspect of the trackage rights agreement. In the past, CSXT has not sought compensation and likewise NS and GDLK have not requested compensation for use of the interchange tracks connecting to GRE South of Ann Street. Accordingly, to maintain the status quo we believe it is in all the parties interest to comply with STB's request and provide all the assurances requested by CSXT to maintain the status quo excluding compensation for use of the trackage rights in question.

We maintain our desire to meet with you all in August to arrive at a mutually beneficial resolution of this matter. Thank you in advance and please contact me if you have any questions with respect to this letter and our position.

Respectfully,

Stefan Loeb



John Widowfield  
Director Joint Facilities  
CSX Transportation  
1700 167<sup>th</sup> Street  
Calumet City, IL  
60409

July 13, 2016

**VIA EMAIL: [sloeb@watcocompanies.com](mailto:sloeb@watcocompanies.com)**

Stefan Loeb  
Executive Vice President & Chief Marketing Officer  
Watco Companies, LLC  
315 West 3rd Street  
Pittsburg, KS 66762

Re: Unauthorized Use of CSXT Tracks in Grand Rapids

Dear Stefan:

In response to a request from the Rail Customer and Public Assistance Program ("RCPA") of the Surface Transportation Board (the "Board"), on July 7, 2016, CSX Transportation, Inc. ("CSXT") offered to grant a further extension of the requirement that Grand Elk Railroad, L.L.C. ("Grand Elk") cease and desist from operating over 3.08 miles of CSXT's line between Grandville Avenue and Ann Street in Grand Rapids, MI (the "Line"), subject to certain conditions governing insurance, liability, management and operation of the Line, and compensation. Grand Elk was advised that

"If Grand Elk is unwilling to accept and abide by the reasonable and industry standard conditions contained in the Attachment, CSXT will not extend the requirement that Grand Elk cease and desist from using the Line, and will immediately enforce that requirement."

Grand Elk responded on July 8, 2016 and rejected the compensation condition. Rather than immediately implementing the Cease and desist requirement, CSXT is giving Grand Elk the opportunity to reconsider its rejection of paying CSXT for the use of its property. If Grand Elk again refuses to pay CSXT for the use of its property, CSXT will immediately implement procedures to prevent Grand Elk trains from using CSXT property and to serve shippers needing access over the Line.

The July 8 letter contains a number of factual inaccuracies. Among other things, it is clear that Grand Elk has no right to operate over the Line. There is no trackage rights agreement between CSXT and Grand Elk. Norfolk Southern Railway Company ("NSR") did not assign its trackage rights over the Line to Grand Elk because it never obtained consent from CSXT, as is required by the agreements. Grand Elk never sought nor obtained authority or exemption from the Board to operate over the Line via trackage rights or any other method. As a result, Grand Elk is and has been operating for more than seven years over the Line unlawfully.

In an email dated July 1, 2016, RCPA asked CSXT to voluntarily "forgo enforcement of its cease and desist letter and **maintain the status quo insofar as Grand Rapids operations** are concerned during the interim period." RCPA did not ask CSXT to forgo charging for use of its property. It merely asked

CSXT to allow Grand Elk to continue to use its property. Indeed, in a situation like this, the Board could not lawfully order CSXT to allow Grand Elk to use CSXT's property without paying for the use. In addition, as Grand Elk well knows, it is a clear violation of an underlying principle of the Rail Industry Agreement for Grand Elk not to pay CSXT for the use of its property.

Grand Elk claims that if it paid CSXT for the use of CSXT's property, it "would hinder the ability of a number of customers to utilize rail services as previously." This statement has no validity. First, it does not demonstrate or even suggest why customers will not use rail service. Second, it ignores Grand Elk's option to absorb the charge, which is between CSXT and Grand Elk, not CSXT and the shipper. Third, Grand Elk ignores the option of CSXT providing alternate service to the shippers.

Grand Elk also admits that it has not paid CSXT for use of the Line for seven years for trackage rights. CSXT reiterates that Grand Elk does not and never did have trackage rights over the Line, and CSXT reserves the right to collect seven years of compensation from Grand Elk.

Grand Elk appears to be making a veiled threat to interfere with the lawful interchange of traffic between CSXT and the Grand Rapids Eastern Railroad Inc. ("GRE"). As Grand Elk should know, CSXT's trackage rights over the line owned by NSR remain in effect until CSXT obtains discontinuance authority from the Board. CSXT has no intention of seeking such authority, and will take all steps necessary to preserve the interchange in order to serve our customers.

CSXT asks Grand Elk to reconsider its position and provide notification of its decision by 5:00 pm eastern time on July 13, 2016. Failure to do so will require CSXT to implement the cease and desist requirement.

Please acknowledge your understanding and agreement with the conditions required by CSXT by signing the acknowledgment at the end of this letter, and initialing each page of the Attachment to the July 7, 2016 letter (attached for your convenience), and emailing a scanned copy to my attention at [John\\_Widowfield@csx.com](mailto:John_Widowfield@csx.com).

Sincerely,



John Widowfield

ACKNOWLEDGED this \_\_\_ day of July, 2016,

By: \_\_\_\_\_

Cc: *VIA EMAIL: [sduffey@watcocompanies.com](mailto:sduffey@watcocompanies.com)*

## ATTACHMENT

The following terms will govern the rail operation of Grand Elk Railroad, L.L.C. ("Grand Elk") over the CSX Transportation, Inc. 3.08-mile line between Grandville Avenue and Ann Street in Grand Rapids, MI (the "Line") pursuant to the extension of time from the requirement that Grand Elk cease and desist from operating over Line (the "Extension").

### 1. INSURANCE

- A. During the Extension, Grand Elk at its sole cost and expense, shall procure and maintain in effect a policy of Comprehensive Railroad liability insurance, with limits of not less than Five Million Dollars (\$5,000,000.00) single limit, bodily injury and/or property damage, for damages arising out of bodily injuries to or death of all persons in any one occurrence and for damage to, or destruction of property, including the loss of use thereof, in any one occurrence, subject to a self-insured retention limit not to exceed Two Hundred Fifty Thousand Dollars (\$250,000), including contractual liability insurance, which names CSXT as an additional insured. If Grand Elk receives notification that an insurance carrier providing an insurance policy is changing or cancelling such policy, Grand Elk shall promptly notify CSXT of such fact. Failure to procure and maintain such insurance in force shall result in the immediate implementation termination of the Extension.
- B. This Insurance coverage shall be effected under standard form policies issued by insurers of financial responsibility, which are rated "A" or better by either Best's Insurance Reports, Standard & Poor's Insurance Rating Service or Moody's Investors Service. CSXT reserves the right to reject as inadequate coverage by an insurance company rated less than "A" by the aforementioned rating services.
- C. The insurance shall be evidenced by a current certificate furnished by Grand Elk to CSXT as an additional insured with its return of this executed letter. Such certificate shall be subject to the prior approval of CSXT's Insurance Department. All of the required endorsements and notice provisions shall be stated on the certificate of insurance that is provided to CSXT. In addition, Grand Elk shall provide CSXT's Insurance Department notice of any claim arising under this Extension and any other correspondence dealing with insurance and insurance matters directly relating to this Extension.
- D. During the Extension, it is understood that CSXT is self-insured.

### 2. LIABILITY and CLAIMS

#### I. Liability.

The responsibility and liability between the parties for: (i) any personal injury or death of any person (including employees of the parties and third persons), (ii) any real or personal property damage of any person (including property of the parties and third persons), (iii) any damage or destruction to the environment (including land, air, water, wildlife and vegetation), and (iv) all cleanup and remedial expenses, court costs, settlements, claims, judgments, litigation expenses and attorney's fees resulting from the use of the Line by CSXT or Grand Elk during the Extension, all of which are collectively referred to as a "Loss", shall be divided as follows:

- A. If a Loss occurs involving the trains, locomotives, engines and/or employees of only one of

the parties, then the involved party shall be solely responsible for the Loss, even if caused partially or completely by the other party.

- B. If a Loss occurs on the Line involving the trains and locomotives of both CSXT and Grand Elk, then: (i) each is solely responsible for any Loss to its own employees, locomotives and equipment in its own account including lading and (ii) the parties are equally responsible for any Loss to the Line and Loss sustained by third parties, regardless of the proportionate responsibility between them as to the cause of the Loss.
- C. For purposes of assigning responsibility of a Loss as between CSXT and Grand Elk, a Loss involving one of the parties and a third party or parties shall be construed as being the sole responsibility of that one party.
- D. Whenever any liability, cost, or expense is assumed by or apportioned to a party hereto under the foregoing provisions, that party shall forever protect, defend, indemnify, and save harmless the other party and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents, and employees from and against that liability, cost and expense assumed by that party or apportioned to it, regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, nonfeasance, or misfeasance of the indemnitee or its directors, officers agents, or employees.
- E. In every case of death or injury suffered by an employee of either Grand Elk or CSXT, when compensation to such employees or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employers' liability or other law, and either of said parties is required to pay said compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying any such future installments by reason of the cessation of service over the Line prior to any of the respective dates upon which any such future installments are to be paid.
- F. For purposes of determining liability, pilots furnished by CSXT to Grand Elk shall be considered as the employees of Grand Elk while such employees are on duty as pilots.
- G. For the purpose of determining liability associated with construction, maintenance, repair and renewal of connections, all work performed by CSXT shall be deemed performed for the sole benefit of Grand Elk and, Grand Elk shall be fully liable for all cost and expense of any and all loss, damage, destruction, injury and death resulting from, arising out of, incidental to or occurring in connection with said construction, maintenance repair and renewal. Grand Elk shall protect, indemnify, and save harmless CSXT and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against any and all expense and liability for which Grand Elk is responsible.
- H. If any suit or action shall be brought against either party for damages which are in whole or in part the responsibility of the other party, said other party shall be notified in writing by the party sued, and the party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay a proportionate part of the judgment and costs, expense and attorneys' fees incurred in such suit according to its liability assumed hereunder.
- I. In the event of a Loss as set out herein, CSXT and Grand ELk shall be bound by the Freight Claim Rules, Principles, and Practices of the AAR as to the handling of any claims for the loss or damage to lading.

- J. Watco Companies, LLC, Watco Transportation Services, LLC, and Watco Holdings, Inc., shall assume all liabilities that Grand Elk is unable or unwilling to pay.

## **II. Claims**

- A. Except as provided in B below, all claims, injuries, death, property damages and losses arising out of or connected with this Extension shall be investigated, adjusted and defended by the party bearing the liability, cost, and expense therefor under these provisions.
- B. Each party shall investigate, adjust and defend all freight loss and damage claims filed with it in accordance with 49 U.S.C. Section 11706 and CFR 1005, or in accordance with any applicable transportation contract.
- C. In the event a claim or suit is asserted against CSXT or Grand Elk which is the other's duty hereunder to investigate, adjust or defend, then, unless otherwise agreed, such other party shall, upon request, take over the investigation, adjustment and defense of such claim or suit.
- D. All costs and expenses in connection with the investigation, adjustment and defense of any claim or suit under the Extension shall be included as costs and expenses in applying the liability provisions set forth in this letter, except that salaries or wages of full-time agents, full-time attorneys and other full-time employees of either party engaged directly or indirectly in such work shall be borne by such party.
- E. Excluding freight loss and damage claims filed in accordance with 49 U.S.C. Section 11706 or CFR 1005, neither party shall settle or compromise any claim, demand, suit or cause of action for which the other party has any liability under this letter without the concurrence of such other party if the consideration for such settlement or compromise exceeds Fifty Thousand Dollars (\$50,000).
- F. Grand Elk agrees to indemnify and hold harmless CSXT and its parent corporation, subsidiaries and affiliates, and all their respective directors, officers, agents and employees from and against any and all costs and payments, including benefits, allowances and arbitration, administrative and litigation expenses, arising out of claims or grievances made by or on behalf of Grand Elk's or CSXT's employees, either pursuant to a collective bargaining agreement.
- G. It is understood that nothing in this Claims section shall modify or waive the conditions, obligations, assumptions or apportionments provided in the Liability section.

## **3. MANAGEMENT AND OPERATIONS**

- A. Grand Elk shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains (locomotives and cars) while such trains, locomotives, cars, and equipment are being operated over the Line. Grand Elk shall indemnify, protect, defend, and save harmless CSXT and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against all fines, penalties and liabilities imposed

upon CSXT or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents and employees under such laws, rules, and regulations by any public authority or court having jurisdiction in the premises, when attributable solely to the failure of Grand Elk to comply with its obligations in this regard.

- B. Grand Elk in its use of the Line shall comply in all respects with the safety rules, operating rules and other regulations of CSXT, and the movement of Grand Elk 's trains (locomotives and cars,) over the Line shall at all times be subject to the orders of the transportation officers of CSXT. Grand Elk 's trains shall not include locomotives or cars which exceed the width, height, weight or other restrictions or capacities of the Line as published in Railway Line Clearances, and no train shall contain locomotives or cars which require speed restrictions or other movement restrictions below the maximum authorized freight speeds as provided by CSXT 's operating rules and regulations without the prior consent of CSXT.
- C. Grand Elk shall make such arrangements with CSXT as may be required to have all of its employees who shall operate its trains, locomotives and cars over the Line qualified for operation thereover, and Grand Elk shall pay to CSXT, upon receipt of bills therefor, any cost incurred by CSXT in connection with the qualification of such employees of Grand Elk, as well as the cost of pilots furnished by CSXT, until such time as such employees are deemed by the appropriate examining officer of CSXT to be properly qualified for operation as herein contemplated.
- D. CSXT may conduct an investigation at its option if a Grand Elk 's employee working on CSXT's property is alleged to have violated CSXT 's safety rules, operating rules, regulations, orders, practices or instructions, or if an incident occurs which requires an investigation under applicable agreement rules. To exercise its option, CSXT shall schedule the investigation and notify Grand Elk 's local Transportation Officer in the territory thereof, who shall, in turn, arrange to issue proper notice to the Grand Elk 's employee(s) of the investigation. CSXT 's scheduling of the investigation must comply with the time limits provided in the applicable agreement on Grand Elk 's railroad. CSXT shall provide its regulations, supplements, and safety rules to Grand Elk at Grand Elk's cost.
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- F. In a major offense, such as violation of Rule "G", dishonesty, insubordination, or a serious violation of operating rules, wherein CSXT desires to bar Grand Elk 's employee from service on CSXT 's territory pending an investigation by CSXT, immediate verbal notification shall be given to the appropriate Transportation Officer of Grand Elk so that proper written notice can be issued to the employee.
- G. If CSXT conducts an investigation, its officer shall conduct the investigation, but an officer of Grand Elk shall be present to assure compliance with Grand Elk 's labor agreement and practices with respect to investigation procedures. After the investigation is concluded, CSXT shall promptly furnish Grand Elk with two copies of the transcript and a recommendation as to the discipline to be assessed. Grand Elk 's Transportation Officer shall arrange to assess discipline, subject to receipt of CSXT 's recommended discipline, within the applicable time limits. If CSXT recommends dismissal, Grand Elk reserves the right to change the

recommendation to the extent of barring the individual from operating over CSXT's territory.

- H. CSXT shall reimburse Grand Elk for all payments that Grand Elk might be required to make as a result of a challenge being made by the employee or his representative as to the discipline recommended by CSXT and assessed by Grand Elk. Grand Elk agrees to notify CSXT before committing itself to making payment of any claim. In the event a claim is progressed to an Adjustment Board, CSXT shall be given an opportunity to review Grand Elk's submission. Any payments made to employees, as a result of an investigation being "overturned", shall include not only actual wages, but in addition, shall include expenses which Grand Elk may be required to pay covering vacation allowances, Railroad Retirement taxes, unemployment insurance taxes and any other payroll tax or fringe benefits.
- I. The trains, locomotives, cars and equipment of Grand Elk, CSXT, and any other present or future user of the Line or any portion thereof, shall be operated without prejudice or partiality to either party and in such manner as shall afford the most economical and efficient manner of movement of all traffic.
- J. In the event that a train of Grand Elk shall be forced to stop on Line, and such stoppage is due to insufficient hours of service remaining among Grand Elk 's crew, or due to mechanical failure of Grand Elk 's equipment, or any other cause not resulting from an accident or derailment, and such train is unable to proceed, or if a train of Grand Elk fails to maintain the speed required by CSXT on the Line, or if in emergencies, crippled or otherwise defective cars are set out of Grand Elk 's trains on the Line, CSXT shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew Grand Elk 's train) as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Line, and Grand Elk shall reimburse CSXT for the cost of rendering any such assistance.
- K. If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Line, such work shall be done by CSXT, and Grand Elk shall reimburse CSXT for the cost thereof.
- L. In the event CSXT and Grand Elk agree that CSXT should retain employees or provide additional employees for the sole benefit of Grand Elk, the parties hereto shall enter into an agreement under which Grand Elk shall bear all cost and expense for any such retained or additional employees provided, including without limitation all cost and expense associated with labor protective payments which are made by CSXT and which would not have been incurred had the retained or additional employees not been provided.

#### **4. COMPENSATION**

- A. The factor to be used in calculating payments to be made by Grand Elk for use of the Line at any time and during the Extension shall be One hundred five dollars and zero cents (\$105.00) per car using the Line (hereinafter referred to as the "Current Charge").
- B. Grand Elk shall pay CSXT a sum computed by multiplying: (i) the Current Charge by (ii) the number of cars (loaded and empty), and locomotive and units moved by Grand Elk with its own crews and power over the Line by. Each locomotive unit, for the purpose of this Extension shall be counted as one car.

- C. Grand Elk shall furnish CSXT information concerning all loaded and empty cars in Electronic Data Interchange (EDI) transmission between the carriers. This procedure shall be required at the time the Association of American Railroads (AAR) defines the standard reporting procedures for trackage rights carriers. The carriers shall determine the minimal data requirements.
- D. Grand Elk shall furnish to CSXT, in agreed upon format, care of Director-Joint Facility Services, CSX Transportation, 500 Water Street, J801, Jacksonville, FL 32202, and to [JFreports@CSX.com](mailto:JFreports@CSX.com), at the end of each month, a statement of the number of locomotive units and loaded and empty cars operated over the Line during the month. In addition, by July 31, 2016, Grand Elk shall furnish to CSXT, in agreed upon format, care of Director-Joint Facility Services, CSX Transportation, 500 Water Street, J801, Jacksonville, FL 32202, and to [JFreports@CSX.com](mailto:JFreports@CSX.com), a statement of the number of locomotive units and loaded and empty cars operated over the Line by month since Grand Elk commenced operations on March 8, 2009.
- E. CSXT shall on or about the tenth day of each month render billing to Grand Elk for the previous month's service on the Line computed in accordance with Section B.
- F. All payments called for under this letter shall be made by Grand Elk within fifteen (15) days after receipt of bill therefor. No payments shall be withheld by Grand Elk because of any dispute as to the correctness of items in the bills rendered, and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month.