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Office of Proceedings
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Part of
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September 14, 2016

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

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

Dear Ms. Brown:

By this letter, Norfolk Southern Railway Company (“NSR”) hereby replies in strong support of Grand Elk Railroad, Inc.’s (“Grand Elk”) request for remedial and retroactive Board authorization of incidental trackage rights related to Grand Elk’s lease and operation of NSR-owned lines in Michigan dating back to 2009. *See Grand Elk Railroad, L.L.C. - Lease and Operation Exemption - Norfolk Southern Railway Company*, Docket No. FD 35187 (STB served Nov. 17, 2008) (“Grand Elk Lease”). As part of the Grand Elk Lease transaction, NSR assigned to Grand Elk roughly 3.3 miles of trackage rights held by NSR over rail lines owned by CSX Transportation, Inc. (“CSXT”) in Grand Rapids, Michigan. These rights were necessary to Grand Elk and its customers then, and they continue to be necessary now, for the reasons set forth in Grand Elk’s August 25, 2016, filings and in the statements in support of Grand Elk that have since been added to the record in this proceeding.

After the close of the lease transaction, Grand Elk operated over these trackage rights for seven years pursuant to the assignment without protest or interruption by CSXT. Indeed, CSXT affirmed Grand Elk’s possession of the now-disputed trackage rights in subsequent dealings with Grand Elk, NSR, and customers served by Grand Elk. CSXT’s abrupt move to prohibit Grand Elk’s access upsets an operational arrangement dating back over thirty years. NSR joins Grand Elk in urging the Board to act expeditiously on Grand Elk’s petition for partial revocation of the class exemption and to provide any other relief the Board finds appropriate to protect the interests of affected shippers.

The at-issue trackage rights originated in a series of transactions in the early 1980s when Consolidated Rail Corporation (“Conrail”) and CSXT’s predecessor, The Chesapeake & Ohio Railway Company (“C&O”), agreed at the request of the City of Grand Rapids to consolidate adjacent rail lines to allow for city development. As part of the joint project, Conrail abandoned designated lines and in their place received trackage rights over an adjacent C&O line, thereby enabling Conrail to continue to serve its existing customers and interchange with the Grand Rapids Eastern Railroad (and its predecessors). *See Consolidated Rail Corporation – Trackage Rights Exemption – Over Chesapeake and Ohio Railway Company*, Docket No. FD 30385 (ICC served Feb. 7, 1984); *Consolidated Rail Corporation – Trackage Rights Exemption – Over Chesapeake and Ohio Railway Company*, Docket No. FD 30449 (ICC served Apr. 24, 1984). C&O also received limited trackage rights over Conrail’s lines to preserve its access to what is now the Grand Rapids Eastern Railway. *See Chesapeake & Ohio Railway Company – Trackage Rights – Consolidated Rail Corporation*, Docket No. FD 30698 (ICC served Jul. 5, 1985). These trackage rights, as supplemented in 1993, have been operated in conjunction with the adjoining Conrail track ever since, thereby maintaining the preexisting *status quo* in Grand Rapids. NSR subsequently received Conrail’s lines in Grand Rapids and the associated trackage rights as part of the NSR-CSXT Conrail transaction.

In early 2009, NSR and Grand Elk consummated the Grand Elk Lease transaction under which, among other things, Grand Elk assumed leasehold operations over NSR-owned lines in Grand Rapids connecting to the balance of Grand Elk’s leased lines by way of the longstanding trackage rights over CSXT. As part of that transaction, NSR expressly assigned its interest in the trackage rights to Grand Elk. Indeed, without these rights, the transaction would not make operational sense – Grand Elk would have assumed the obligation to operate several isolated track segments in Grand Rapids with no ability to operate between them. From March of 2009 onward, Grand Elk operated over the CSXT trackage rights line without incident, until very recently.

CSXT now is prohibiting Grand Elk’s use of these trackage rights under a recently-formulated theory that NSR did not successfully assign its rights to Grand Elk. Such a position is meritless. NSR provided CSXT with written notice of the 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 a formal reply from CSXT, CSXT did not protest Grand Elk’s exercise of trackage rights at any point over the subsequent seven years.

Moreover, CSXT was fully aware of Grand Elk’s exercise of the assigned trackage rights. CSXT had responsibility for qualifying Grand Elk’s crews when operations began. In fact, just last year, CSXT entered a “Private Memorandum of Understanding” with NSR, Grand Elk, and a customer affirming Grand Elk’s trackage rights as part of a state-sponsored transportation infrastructure project. *See Grand Elk Amended Supplement at 4*, Docket No. FD 35187 (Sub-No. 1) (filed Sept. 7, 2016); *see also* Letter Filing from Kirk T. Steudle at 2, Docket No. FD 35187 (Sub-No. 1) (filed Sept. 12, 2016).

Further, any suggestion that NSR retains, and therefore should be the one to exercise, the disputed trackage rights is operationally impracticable because, as a result of the Grand Elk Lease, NSR has no operations, locomotives, or crews based in the area. In the meantime, CSXT continues to assert its right to operate over Grand Elk-leased track under rights CSXT secured

pursuant to the very same 1980s agreements that CSXT now relies upon to contend that NSR's assignment of rights to Grand Elk is invalid.

NSR agrees that Grand Elk's remedial class exemption filing in this proceeding is necessary to address the inadvertently omitted reference to the incidental assignment of these trackage rights in Grand Elk's 2008 notice filing. Grand Elk's invocation of the class exemption procedures now and its petition for partial revocation are incredibly modest in their scope, in that Grand Elk seeks simply to establish retroactive regulatory authorization for operations it had undertaken for seven years, and which its predecessor operators had relied upon for more than twenty years before. As the Board is aware, Grand Elk and NSR are pressing for a resolution of CSXT's misplaced contract assertions in state court so as to restore the pre-existing service to affected shippers.

NSR encourages the Board to grant expeditiously Grand Elk's simultaneously-filed notice and petitions to minimize further railroad service disruption. NSR also urges the Board to provide any other relief it may find appropriate and in the public interest to protect affected shippers.

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett D. Urban". The signature is fluid and cursive, with a large initial "G" and "U".

Garrett D. Urban
Attorney for Norfolk Southern Railway
Company

cc: Parties of Record

Certificate of Service

I hereby certify that copies of this letter were sent on September 14, 2016, via electronic mail to the following parties of record regarding Docket No. FD 35187 (Sub No. 1), Grand Elk Railroad, Inc. – Acquisition of Incidental Trackage Rights Exemption – Norfolk Southern Railway.

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