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ENTERED
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September 30, 2016
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September 30, 2016

VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 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:

Attached for filing in the above-captioned proceeding is the **Opposition of Grand Elk Railroad, Inc. to the Reply of CSX Transportation, Inc.** dated September 30, 2016.

If you have any questions regarding the attached filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,



Robert A. Wimbish
Attorney for Grand Elk Railroad, Inc.

RAW:tjl

Enclosures

cc: Parties on Certificate of Service
Craig Richey

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35187 (SUB-NO. 1)

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

**OPPOSITION OF GRAND ELK RAILROAD, INC.
TO THE REPLY OF CSX TRANSPORTATION, INC.**

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**ATTORNEYS FOR GRAND ELK
RAILROAD, INC.**

Dated: September 30, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35187 (SUB-NO. 1)

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

**OPPOSITION OF GRAND ELK RAILROAD, INC.
TO THE REPLY OF CSX TRANSPORTATION, INC.**

For the reasons set forth herein, the portions of CSX Transportation, Inc.'s ("CSXT") responsive filing in this proceeding dated as of September 16, 2016 that do not address its petition for a stay are untimely and should be disregarded. To the extent the Board does not disregard the non-stay elements of that filing, the Board should nevertheless deny CSXT's petition to reject the filings tendered in this docket by Grand Elk Railroad, Inc. ("GDLK") on August 25, 2016, and should similarly reject as unfounded CSXT's invitation of a Board-initiated investigation of GDLK. Finally, for the reasons set forth herein, the Board should grant GDLK's petitions for partial revocation and waiver related to the class exemption notice that the Board had issued in this proceeding on September 9, 2016.

BACKGROUND

On August 25, 2016, GDLK filed a verified notice of exemption (the "Notice") pursuant to the Board's procedures at 49 C.F.R. § 1150.41, *et seq.*, to acquire by assignment from Norfolk Southern Railway Company ("NSR") incidental trackage rights over approximately 3.3 miles of CSXT-owned railroad line (the "CSXT Line") in Grand Rapids, Michigan. Accompanying the Notice were a petition for partial revocation of the class

exemption in this docket (the “Revocation Petition) to permit the subject exemption to take effect retroactively; and a petition for waiver of the 60-day advance notice requirements of 49 C.F.R. § 1150.42(e) (the “Waiver Petition”).¹ The Grand Elk Filings are the result of GDLK’s recent discovery that it had not previously obtained Board authorization to acquire the subject incidental trackage rights; CSXT’s contention that it has no record of consenting to NSR’s assignment of those rights; and most importantly, unilateral CSXT action barring GDLK from continued access to the CSXT Line after seven years of uninterrupted use by GDLK.

Subsequently, various stakeholders sought GDLK’s assistance in filing replies to the Grand Elk Filings. Most of these stakeholders are unfamiliar with the STB’s procedures and e-filing process, so GDLK arranged to have these various written comments added to the record by way of supplemental filings, intended, as the name indicated, to supplement the administrative record, and not to supplement the Grand Elk Filings themselves.² Among those stakeholders who have responded in support of GDLK, and who sought GDLK’s assistance in ensuring that their views were reflected in the record, are the following: Padnos; King Milling Company; Universal Well Services, Inc.; the Michigan Agri-Business Association; DRT, L.L.C., and Brink Farms, Inc. In all 12 parties have come forward either in direct support of GDLK or, at a minimum, urging swift resolution of the ongoing railroad service disruption, including (among those not previously mentioned) Michigan State Senator Peter MacGregor; U.S.

¹ Collectively, GDLK’s Notice, Revocation Petition and Waiver Petition will be referred to herein as the “Grand Elk Filings.”

² CSXT has misconstrued the supplements filed on September 6 through 8 as supplementing the Grand Elk Filings despite transmittal letters clearly explaining the actual purpose of the submissions. CSXT’s disingenuous characterization of the filings made on behalf of interested third parties trivializes their purpose and messages, and does not excuse CSXT’s time-barred September 16 filing. Because the additional filings were made to present comments in support of GDLK, and do not “supplement” any of the Grand Elk Filings, the relevant deadline for replies to any of the Grand Elk Filings remained September 14, 2016. See 49 C.F.R. § 1104.13(a).

Representatives Fred Upton and Bill Huizenga; Michigan State Senator Tonya Schuitmaker; the Michigan Department of Transportation; and NSR.

On September 16, 2016, CSXT filed what it entitled a “(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” (“CSXT Response” or “Response”). On September 21, 2016, GDLK responded to the petition for stay component of the CSXT Response. In so doing, GDLK pointed out that, aside from the stay request, CSXT had not complied with the deadlines for a reply to the Grand Elk Filings. GDLK explained that CSXT’s untimely Response was not excused or explained, and noted that the delay was highly prejudicial to GDLK and to swift processing of this proceeding. GDLK argued that, under the circumstances, the Board should disregard the balance of the Response, and that it should deny CSXT’s stay request.

In a letter filing of September 23, 2016, CSXT responded to GDLK’s September 21, 2016 filing, arguing that the Response was not untimely due to GDLK’s submission of third-party statements of support responsive to the Grand Elk Filings introduced into the record on September 6 through 8.

ARGUMENT

A. The non-stay elements of the CSXT Response are procedurally defective, have been filed late in the interest of procedural delay, are highly prejudicial, and, accordingly, must be disregarded.

The portions of CSXT’s Response not directed to its stay petition amount to a petition to reject the Notice and a peculiar request for a Board-initiated investigation of “GDLK and its parent” under 49 U.S.C. § 11701 and as-yet-promulgated 49 C.F.R. part 1122. As a general matter, since CSXT nominally has characterized its Response as a “reply,” GDLK once

again points out that the deadline for a reply to the Grand Elk Filings under 49 C.F.R.

§ 1104.13(a) was September 14. CSXT missed that deadline. CSXT's disingenuous and after-the-fact excuse for its lateness plainly mischaracterizes reply comments that GDLK filed on behalf of others.³ As a self-styled "reply," the CSXT Response violates the Board's rules of procedure and should be disregarded.⁴

CSXT's untimely Response is highly prejudicial, because, in light of GDLK's explanation of the urgency of the situation, it is in CSXT's interest to delay Board action. It is also prejudicial because CSXT has used the added time to unfair advantage. For example, CSXT has addressed within the purported "Background" section of its Response arguments that NSR made in NSR's timely and directly-filed support statement of September 14, 2016. See CSXT Response at 10. In so doing, CSXT calls attention to its procedural abuse by acknowledging NSR's September 14 filing as a "reply." Because CSXT has openly used its untimely Response as an impermissible reply to a reply, the Response must be disregarded.⁵

If the Board accepts the CSXT Response despite the procedural defects and the obvious prejudice, then GDLK is entitled to a full and fair opportunity to respond, particularly since the Response includes a petition to reject the Notice and a petition for a Board-initiated

³ The support statements GDLK offered into the record do not point to any deficiency or incompleteness of the Grand Elk Filings, as CSXT alleges. Also, even if the support statements were "supplemental" to one of GDLK's filings, CSXT uses them as an excuse to respond to all of the Grand Elk Filings, and not merely to the one that CSXT believes had been supplemented.

⁴ CSXT has no excuse for late filing. In the interest of affording CSXT a full and fair opportunity to respond under the applicable rules of procedure. GDLK served CSXT with copies of the Grand Elk Filings on August 25, 2016, the same day those documents were filed with the Board. Doing so, and certifying contemporaneous service as part of the Grand Elk Filings, reinforces that GDLK has done everything it could to advance the record swiftly and in accordance with Board rules. Under the circumstances, CSXT's unexcused and intentional delay is all the more egregious.

⁵ 49 C.F.R. § 1104.13(c) ("A reply to a reply is not permitted").

investigation of GDLK. Additionally, the CSXT Response raises new arguments and requests for Board action for which considerations of fundamental due process militate in favor of affording GDLK a response. Accordingly, GDLK offers below its opposition to all but the stay component of the Response, and, in so doing, shows that rejection of the Notice would advance no public purpose and should be denied, that CSXT's calls for "investigation" of "GDLK and its parent" are unfounded, and that CSXT's purposeful delay and obfuscation here contrast to the genuine urgency associated with the abrupt suspension of a critical portion of GDLK's operations in Grand Rapids.

B. In its overall procedural context, such limited "complexity" and "controversy" as may properly be before the Board can and will receive due consideration; the Notice need not be rejected in the interest of unnecessary further "regulatory scrutiny."

Although this proceeding has a rich and complex backstory, the issues for the Board to address and resolve are actually rather simple. The parties agree that GDLK did not include within the scope of its original class exemption the assignment of NSR's trackage rights over the CSXT Line. To remedy that omission, GDLK has filed a new class exemption (the Notice). CSXT contends that it "has no record" of consenting to NSR's assignment of these rights,⁶ and CSXT has made it abundantly clear that it does not now so consent. GDLK and NSR, however, differ with CSXT on the assignment issue, contending that, as a matter of contract law, NSR's assignment of incidental trackage rights over the CSXT Line to GDLK is enforceable.

⁶ CSXT is inconsistent on the issue of whether it simply has no record of supplying written consent to assignment of NSR's trackage rights or whether it specifically communicated its non-consent to the assignment. It states at one point that it has not consented to assignment "for valid business reasons." CSXT Response at 16. It would be interesting to know what "valid business reasons" CSXT has for allegedly withholding consent, but GDLK is confident such matters will be addressed in the pending state court litigation.

Behind the current disagreement over the assignment issue, GDLK and CSXT had cooperated without issue for seven years in local Grand Rapids operations whereby GDLK was repeatedly (hundreds, if not thousands, of times) given CSXT dispatcher authority to operate over the CSXT Line in tacit recognition of GDLK's assigned trackage rights. Those seven years of uncontested operations are indicative of mutual GDLK and CSXT acceptance of an assignment in the ordinary course, and neither party appears to have been aware of the regulatory oversight until recently. Certainly, for its part, GDLK was unaware. It is now up to the Board to decide whether to take action on GDLK's remedial filings.

To be perfectly clear, GDLK is not asking the Board to address or resolve the contractual issues, although it appears from CSXT's needlessly-repeated contentions of non-assignment that CSXT would have the Board take on the role of trackage rights contract interpreter – a task that, in keeping with extensive agency precedent, the Board should decline.⁷ GDLK and NSR are confident that under the various legal theories articulated in their state court

⁷ See, e.g., V&S Railway, LLC – Petition for Declaratory Order – Railroad Operations in Hutchinson, Kan., Docket No. FD 35459 (STB served Jul. 12, 2012), slip op. at 5 (“Respondents’ sur-rebuttal focuses on the interpretation of the parties’ Operating Rights Agreement, which, as explained below, the Board will not address, because such state law contract interpretation generally should be conducted by the . . . court and not the Board”); Pycos Industries, Inc. – Feeder Line Application – Lines of South Plains Switching, Ltd. Co., Docket No. FD 34890 (STB served Sep. 8, 2008) slip op. at 10 (“Determining whether or not BNSF actually sold [certain railroad property] involves the interpretation of the 1999 purchase and sale agreement . . . That is a matter of state contract law for the courts of Texas to resolve”) (footnote omitted); Ohio Valley Railroad Company – Petition to Restore Switch Connection and Other Relief, Docket No. FD 34608 (STB served Feb. 23, 2005) slip op. at 6 (“Petitioners have . . . requested that we confirm OVR’s contractual right to a direct interchange with CSXT. We usually defer to the courts in matters of contract interpretation. The Township of Woodbridge, NJ, et al. v. Consolidated Rail Corporation, Inc., STB Docket No. 42053, slip op. at 5 (STB served Dec. 1, 2000); Kansas City Terminal Railway Company and the Atchison, Topeka and Santa Fe Railway Company – Contract to Operate Exemption – In Kansas City, MO, STB Finance Docket No. 32896, slip op. at 3-4 (STB served Nov. 20, 1996). Therefore, we decline OVR’s request to confirm its disputed contractual right to interchange directly with CSXT”).

complaint, NSR's assignment of its trackage rights is legally enforceable. GDLK knows (as it expects CSXT does also) that retroactive effectiveness of the incidental trackage rights class exemption would be a significant step toward restoring the operational and competitive status quo ante.

CSXT's cries of "complexity" and self-engendered "controversy" ring hollow. The Notice, in and of itself, is not complex. CSXT obscures the limited context of that filing and would have the Board disregard the important distinction that the Notice was filed with the Revocation Petition. If there is any complexity, it is subsumed within the state court proceeding and the Revocation Petition. In fact, the Revocation Petition exists as an appropriate vehicle for the necessary Board analysis and deliberation, as is reflected in the simple fact that, to this very date, the subject exemption has not yet taken effect.

As a matter of contract law, NSR's trackage rights already have been assigned to GDLK, and GDLK's rights as assignee may be fully enforceable but for the absence of appropriate Board authorization, which GDLK now seeks. The "controversy" that CSXT points to is not about the Notice per se. In fact, in the presence of a state law dispute underlying a transaction proposed under the agency's class exemption procedures, the agency assiduously has avoided prejudging such issues by allowing the exemption to take effect (rather than rejecting it), commonly adding the caveat that such authority is permissive and that Board issuance of the notice is not determinative of the state law issues.⁸ Rejection of the Notice would become a

⁸ See, e.g., Wisconsin Central Ltd. – Trackage Rights Exemption – Lines of Union Pacific Railroad Company, Docket No. FD 35992 (STB served Mar. 4, 2016); Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line, Docket No. FD 35631 (STB served Jun. 15, 2012); Rock & Rail, Inc. – Acquisition & Operation Exemption – The Burlington Northern & Santa Fe Railway Company, Docket No. FD 33738 (STB served Apr. 30, 1999).

basis for the state court to dismiss the pending complaint, believing that, in the absence of Board-issued trackage rights authority, the court has no reason to adjudicate the contract claims.

Desperate for undisclosed reasons to block the restoration of GDLK's trackage rights operations, CSXT resorts to inane allegation and innuendo to bolster its claim of controversy. To wit: "GDLK has been operating surreptitiously over the [CSXT] Line to mislead shippers about the product it is selling." CSXT Response at 14. As with any poorly-crafted fiction, the idea of GDLK sneaking around in the dead of night and through furtive efforts obtaining CSXT's unwitting clearance to operate trains over the CSXT Line strains the necessary suspension of disbelief beyond the breaking point. CSXT has known for years of GDLK's operations, and CSXT dispatchers have granted GDLK trains access to the CSXT Line hundreds, if not thousands, of times. There was nothing "surreptitious" about what GDLK was doing.

Equally ludicrous is CSXT's related claim that GDLK has set upon a plan to dupe customers in Grand Rapids concerning the scope and extent of its market presence there. The basis of GDLK's presence in Grand Rapids market is and was already well known to everyone. GDLK was stepping into the shoes of NSR in providing competitive service, and all understood that GDLK's "entry" into the Grand Rapids market (in place of NSR, and, before that, Conrail) maintained the longstanding competitive landscape among the railroads there. The record demonstrates that shippers in this case are not angry over allegedly having been misled by GDLK. Rather they are understandably upset that CSXT could act unilaterally to alter to its favor railroad operations and competition in and around Grand Rapids.

Grasping at yet other "evidence" of controversy, CSXT accuses GDLK of knowingly violating federal law, in the process impugning the credibility of GDLK's witness

verifying the contents of its Revocation Petition. The notion that GDLK has violated 49 U.S.C. § 11901(c) (CSXT Response at 15) is ridiculous and unsupported. It is also revealing of the lengths to which CSXT has gone to try to distract the Board from the real-world consequences of CSXT's unnecessary and unilateral actions, which have resulted in rail service disruption and inefficiency in Grand Rapids, all redounding to CSXT's commercial benefit. As CSXT well knows, Section 11901(c) provides for general civil penalties in the event of a "knowing" violation of 49 U.S.C. §§ 10901 – 10906. If CSXT has evidence to support its contention that GDLK has knowingly violated federal law, it has not offered it. For its part, GDLK explained that it unintentionally omitted the trackage rights assignment from its 2008 class exemption filing, and that it operated thereafter unaware of the oversight. GDLK's Arthur E. McKechnie has testified to the same by verifying the content of the Revocation Petition.

In sum, CSXT's Section 11901(c) claim pits CSXT's unsubstantiated allegation that, for seven years, GDLK has knowingly violated federal law against GDLK's verified Revocation Petition, the contents of which have been corroborated by NSR's September 14 support statement. If CSXT had the strength of its asserted convictions, it should have come forward with a witness of its own to question GDLK's honesty.

It is interesting to see that CSXT, even with the presence of the Revocation Petition, argues that GDLK must be required to file a full-blown "application under 49 U.S.C. § 10902." An individual petition for exemption, evidently, would not do. But why should either be required? CSXT never explains what additional regulatory scrutiny not already afforded under the Revocation Petition procedures would accomplish, or why the time-consuming application procedures are even appropriate here, unless CSXT expects the Board to interpret and enforce of the contract law matters instead of the state court.

GDLK has done exactly what Board precedent directs when a class exemption is applicable to a transaction but additional relief is desired: it filed the notice of exemption and then sought to partially revoke the class exemption to obtain the further relief. Railroad Consolidated Procedures – Trackage Rights Exemption, 1 I.C.C.2d 270, 279 (1985) (to obtain particular relief in trackage rights matters, “a carrier must have the class exemption revoked as to its particular transaction.”).⁹ GDLK’s Revocation Petition fully presented the relevant facts and issues to the Board, and CSXT had full opportunity (and then some) to respond. Various other parties (all supporting GDLK) have participated as well. This has not been a summary or abbreviated “notice of exemption” proceeding. The Board has an extensive and developed record on which to rule. Rejecting GDLK’s Notice in this context for some form of “additional regulatory scrutiny” would be duplicative and unwarranted, and simply perpetuate the ongoing disruption of rail service that CSXT has created in Grand Rapids.

Ultimately, CSXT has no answer to the general proposition that, where, as here, GDLK’s rights are disputed (at worst), the appropriate step is for the Board not to pre-judge the merits of either side of the contract dispute, and instead to allow the exemption to take effect and note that the exemption authority is permissive.

C. CSXT has given no valid reason for the Board to deny GDLK’s Revocation Petition.

GDLK agrees that retroactive class exemption authority “is critical to an existing state court review of contract issues to see if the incidental trackage rights were . . . assigned” as a matter of state law (CSXT Response at 16). And CSXT is correct that, in the absence of a Board decision granting GDLK’s Revocation Petition, it is unclear what would become of

⁹ See also, e.g., Union Pacific Railroad Company and Missouri Pacific Railroad Company – Trackage Rights Over Lines of Chicago and North Western Transportation Company Between Fremont, NE/Council Bluffs, IA and Chicago, IL, Docket No, FD 31562 (ICC served Nov. 22, 1989), slip op. at 2-3 & n.5.

GDLK's and NSR's contract law claims. (For that reason, were the Board to deny retroactivity here, such action also could be viewed as judging indirectly the merits of GDLK's contract law claims.) But GDLK has made a persuasive case for retroactivity, having explained that such relief is available to correct genuine regulatory oversight in unusual circumstances as exist here.

CSXT's abrupt, unilateral action against an established short line railroad resulting in disrupted rail operations and service inefficiencies after seven years of CSXT's active facilitation of GDLK's operations is a truly exceptional. GDLK has explained in a verified petition that its request for retroactivity would correct unintentional regulatory oversight (not only its own, actually, but also that of CSXT and NSR, both of which were equally oblivious to the oversight), and that retroactivity would facilitate the resolution of valid state contract law issues in another forum. As such, GDLK has addressed and satisfied the principle set forth in R.J. Corman¹⁰ and Horsehead.¹¹

Ignoring the legal principle guiding discretionary grants of retroactivity, CSXT would have the Board overlook the proverbial forest for the trees in arguing that the particular facts underlying R.J. Corman and Horseheads differ from the facts here. CSXT may be correct that there are factual differences among all three cases, but CSXT fails to show how these differences should play into the Board's analysis, save for CSXT's naked and patently incorrect assertion that "[f]ailure of diligence is not a ground for granting retroactive authority." CSXT Response at 17. CSXT offers not one case in which the Board has denied a request for retroactivity under analogous circumstances, and GDLK knows of none.

¹⁰ R. J. Corman Railroad Property, LLC – Acquisition Exemption – NC Railroad, Inc., Docket No. FD 35363, et al. (STB served Jun. 29, 2011) ("R.J. Corman").

¹¹ Horsehead Corporation – Petition for Acquisition and Operation Exemption – Chestnut Ridge Railway Company, Docket No. FD 34481 (STB served Mar. 12, 2004) ("Horsehead").

D. GDLK has correctly relied upon *Saginaw Bay Southern* in crafting a remedy for its previous regulatory oversight.

Similarly, CSXT's pharisaical approach to Saginaw Bay¹² is little more than an attempt to divert the Board's focus to immaterial factual distinctions on the periphery of each case at the expense of overlooking the common factual core they share. Inconsequential details aside, Saginaw Bay Southern and the present case involve, fundamentally, the same issue: remedying the filing party's inadvertent omission of the conveyance of incidental trackage rights from the description of a larger transaction presented via a class exemption notice.

Whatever the factual differences between Saginaw Bay and the present case – the fact patterns in every separate matter before the Board differ to some degree or another – CSXT fails anywhere to explain why such differences matter and why it should be that GDLK cannot rely on the guidance of Saginaw Bay. It is true, for example, that CSXT has loudly (although only recently) objected to the idea that NSR's trackage rights have been conveyed to GDLK. Such objection was absent in Saginaw Bay. But, as a matter of as-yet-unresolved state contract law issues, it may well be that NSR's assignment of its rights has occurred and is legally enforceable, so that CSXT's after-the-fact objections are irrelevant. It is also true that, in Saginaw Bay, the trackage rights host more promptly detected and alerted the parties to the oversight, whereas, here, CSXT was an active participant in GDLK's operations over the CSXT Line, only recently registering its objections or raising issues about the regulatory status of GDLK's operating rights. It strains credulity to suppose that GDLK's remedial efforts should be made more taxing because CSXT supported GDLK's operations for seven years, and, in so doing, sat on its asserted right to object.

¹² Saginaw Bay Southern Railway Company – Acquisition and Operation Exemption – Rail Line of CSX Transportation, Inc., Docket No. FD 34792 (STB served May 5, 2006) (“Saginaw Bay”).

E. The case at hand involves an undisputed, existing trackage rights tenancy, and, as such, Winamac Southern is not controlling.

The apparent crux of CSXT's petition for rejection of GDLK's Notice is that Winamac Southern¹³ controls here, despite critical regulatory differences between the two cases, which GDLK had mentioned in its Revocation Petition. See Revocation Petition at 13, n.23. Winamac Southern involved a short line's attempt to revive a trackage rights arrangement that – (a) had expired on its terms; and (b) had not previously been authorized by the Interstate Commerce Commission. Here, on the other hand, the parties do not dispute that someone – either NSR or GDLK (depending upon the Board's handling of the Grand Elk Filings and the pending state court action) – possesses an unextinguished, federally-authorized trackage rights tenancy over the CSXT Line that cannot expire absent a Board-issued discontinuance. And, unlike in Winamac Southern, the parties dispute the conveyance of that pre-existing tenancy, not the creation of a new tenancy. As CSXT correctly notes, the purported trackage rights landlord in Winamac Southern declared, and the Board appeared not to question, that the disputed trackage rights were “terminated,” but that has not happened here, and pursuant to the legal principles enunciated in Texas Mexican,¹⁴ it cannot.

CSXT's reliance on Winamac Southern to support rejection of GDLK's notice and uphold the current operational situation in Grand Rapids is misplaced for yet other reasons. For example, if the Board were to grant GDLK's Revocation Petition, then GDLK will have possessed the requisite authority to acquire the incidental trackage rights at issue as of 2008, well before the 1980s-era agreements upon which those rights are based had expired. Accordingly, a noted deficiency in Winamac Southern – the lack of a written agreement upon which the

¹³ Winamac Southern Railway Company – Trackage Rights Exemption – A&R Line, Inc., Docket No. FD 35208 (STB served Jan. 9, 2009) (“Winamac Southern”).

¹⁴ Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946) (“Texas Mexican”).

purported trackage rights could be based – would not exist here. And even if the Board were to deny the Revocation Petition but otherwise allow for the Notice to take effect prospectively, it is possible that the Michigan court could infer the continued application of the 1980s-era trackage rights agreements under a holdover tenancy construct.¹⁵

Finally, CSXT’s reliance on Salem Industrial¹⁶ to support rejection of the Notice is badly misplaced. That case supports the proposition that, where a class exemption filer admits that it lacks the underlying contractual right to operate over the subject railroad lines, the proper course is for the notice filer to seek to withdraw the notice of exemption. How that case has any bearing on this proceeding defies explanation. Here, GDLK and NSR maintain that GDLK received by assignment, and therefore possesses, the contractual right to operate over the CSXT Line (pending Board authorization of the assignment). GDLK has never said here or in the state court complaint that it lacks the underlying contract rights or acknowledged that those rights remain with NSR, unassigned. CSXT’s claim that GDLK has acknowledged the absence of contract rights is patently false, and amounts to yet another of CSXT’s many purposeful and irresponsible misreadings of GDLK’s filings before this agency and the Michigan court.¹⁷

¹⁵ Assuming for the moment that the Michigan court were to find that NSR had not successfully assigned its trackage rights interests in the CSXT Line to GDLK, and that NSR remained the putative tenant, it would nevertheless be true that, despite the expiration of the 1980s trackage rights agreements, NSR would still possess a right of use pursuant to Texas Mexican. NSR would hold a tangible, conveyable property interest. CSXT cannot have it both ways. Either the 1980s trackage rights agreements survive in the absence of a replacement agreement under a holdover tenancy theory (and there are thus still written agreements that govern), or those agreements no longer govern, in which case it logically follows that any restrictions against assignment contained therein are now inapplicable and unenforceable.

¹⁶ Salem Industrial Railway, Inc. – Change of Operators Exemption – in Salem County, NJ, Docket No. FD 35209 (STB served Feb. 23, 2009) (“Salem Industrial”).

¹⁷ CSXT states that GDLK has admitted that it lacks the underlying contract rights to be able to operate over the CSXT Line, citing the Revocation “Petition at 3 and throughout the complaint.” There is no such admission on page 3 of the Revocation Petition; there is instead

F. The idea that the Board should initiate an investigation against “GDLK and its parent” is absurd, but it appears to be part of CSXT’s larger litigation scheme; CSXT’s conduct, however, warrants Board inquiry in a separate proceeding.

As part of CSXT’s posturing, it has insisted that the Board should exercise its newly-gained authority under 49 U.S.C. § 11701(a) to commence a “Board-Initiated Investigation” of “GDLK and its parent” company to “determine the facts leading to GDLK’s operations over CSXT without consent and without authority from the Board, and to determine GDLK’s and its parent’s motives for ignoring contract law and regulatory requirements.” CSXT Response at 24, 25. Of course, any such investigation would be predicated on not-yet-promulgated regulations.¹⁸

As ridiculous as it would be for the Board to devote its very first investigation to “GDLK and its parent” in these circumstances – and the Board should roundly reject the very notion – it appears that CSXT’s request may be designed as a backdoor attempt to frustrate the contract law proceeding in Michigan court. Specifically, the idea that the Board would or could investigate whether GDLK had commenced operations in the alleged absence of “consent,” and whether GDLK had “ignored” contract law, could serve as a device to argue before the Michigan court that the contract law issues pending there should be dismissed, because, as the argument would go, the Board has exclusive jurisdiction to resolve those issues under CSXT’s “currently-pending” investigation request. As such, CSXT’s tactic is bogus, and it may be nothing more than a device to be used to press the Michigan court to dismiss the contract complaint as presenting issues within the scope of the Board’s exclusive investigatory and adjudicatory

only an admission that GDLK lacks appropriate Board authority for the trackage rights. Nor are any such alleged admissions to be found anywhere in the state court complaint, much less throughout.

¹⁸ See Rules Relating to Board-Initiated Investigations, Docket No. EP 731 (STB served May 16, 2016).

authority, only then for CSXT to argue here that the Board is not the appropriate forum for the interpretation and enforcement of trackage rights contracts. GDLK urges the Board to act swiftly to reject CSXT's invitation to investigate GDLK, acknowledging the role of the state court in adjudicating the contract issues.

While there is no basis whatsoever for the Board to investigate "GDLK and its parent," the Board would be justified in considering whether CSXT's conduct in the Grand Rapids market – including the accumulation of market power by forcing railroad service alternatives to CSXT to be less efficient and more costly – amounts to a matter of "regional significance" warranting Board investigation. It is not clear why CSXT has acted as it has – its draconian prohibition against continued GDLK operations and its contemporaneous ramping up of intermediate switching charges in Grand Rapids is extreme, even in the case of a contract dispute – but its unilateral actions unquestionably have disrupted railroad service options in the second largest metropolitan area in Michigan¹⁹ and have allowed CSXT, temporarily at least, to reduce competition to its benefit. Accordingly, the Board could investigate whether CSXT's conduct here is driven by inappropriate, anticompetitive objectives or some other scheme to maximize its own revenue at the expense of others.

G. The Board should not lose sight of what is at stake here; GDLK and those supporting it urge the Board to move forward expeditiously and purposefully.

Ultimately, the CSXT Response is about delay and obfuscation. CSXT's allegations that GDLK has "operated surreptitiously" and has defrauded shippers and the Board through calculated, illegal operations are baseless and diversionary, as is CSXT's contract law-based demand for a Board investigation. Moreover, CSXT's disregard of Board procedure by filing its Response two days after the applicable deadline, and then offering an after-the-fact

¹⁹ https://en.wikipedia.org/wiki/Grand_Rapids,_Michigan

explanation that it was entitled to file late because GDLK had supplemented the record with independent statements of support from local stakeholders, is prejudicial and abusive – all designed to delay Board deliberation.

GDLK has urged expedited consideration of its Revocation Petition, which is central to the pending Michigan court proceeding. Prompt action is truly warranted, and would give credence to the proposition that the Board can and does act swiftly and decisively in appropriate circumstances. While the Board deliberates, shippers that had come to rely on GDLK's services are finding that they must now deal with CSXT as an unwanted intermediate switching carrier, and their traffic is now suddenly subject to switching charges that CSXT has nearly (and conveniently) trebled in the wake of its decision to bar GDLK from operating over the CSXT Line. CSXT has not claimed – nor could it – that its unilateral actions here are not disruptive to service and competition. CSXT has not pointed to a single interested party that approves of its actions here, while many have come forward objecting to what CSXT has done and urging the Board to take appropriate action, swiftly.

With the record now more than adequately developed, the parties look to the Board. As the Board well knows, GDLK and NSR are pursuing state law remedies in conjunction with the present proceeding. CSXT would like nothing better than to have the state court dismiss the contract action on the incorrect assumption that the issues presented there are within the Board's exclusive jurisdiction, thus leaving NSR and GDLK without any remedy. For that reason, GDLK urges the Board to reinforce in its decision(s) in this proceeding that the agency will look to the state court to address the contract law issues properly lodged there.

WHEREFORE, GDLK asks that CSXT's unfounded request for rejection of the Grand Elk Filings be disregarded as untimely, and, in the alternative, that CSXT's rejection

request and request for a Board-initiated investigation of “GDLK and its parent” be denied. Finally, GDLK urges expedited consideration of its Revocation Petition and encourages the Board to take whatever additional remedial action it deems appropriate to restore competitive service in the Grand Rapids area.

Respectfully submitted,

By: 

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**ATTORNEYS FOR GRAND ELK
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Dated: September 30, 2016

CERTIFICATE OF SERVICE

The undersigned states that on September 30, 2016, he caused a copy of the foregoing to be served upon the following parties via deposit in the United States Mail chute located at 29 North Wacker Drive, Chicago, Illinois, 60606, with proper postage prepaid and/or via more expeditious means of delivery.

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