



VIA E-FILING

October 12, 2016

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

Re: STB Finance Docket No. 36062 Lehigh Railway, LLC – Lease Exemption  
Containing Interchange Commitment – Norfolk Southern Railway Company and  
Operation Exemption

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is the reply of Lehigh Railway, LLC (“LRWY”) to the petition of the Reading Blue Mountain & Northern Railroad Company to reject/stay the Notice of Exemption filed by LRWY on September 15, 2016. Included with the LRWY filing is a highly confidential version subject to a protective order and a redacted public version.

LRWY’s reply contains a map in color. If you have any questions, please let me know.

Respectfully Submitted,

A handwritten signature in blue ink that reads 'Justin J. Marks'.

Justin J. Marks  
Attorney for Lehigh Railway, LLC

Enclosures

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**ENTERED**  
**Office of Proceedings**  
**October 12, 2016**  
**Part of**  
**Public Record**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 36062**

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**LEHIGH RAILWAY, LLC  
--LEASE EXEMPTION CONTAINING INTERCHANGE COMMITMENT--  
NORFOLK SOUTHERN RAILWAY COMPANY**

---

**LEHIGH RAILWAY, LLC REPLY TO READING BLUE MOUNTAIN & NORTHERN  
RAILROAD COMPANY PETITION TO REJECT NOTICE OF EXEMPTION  
OR FOR STAY OF EFFECTIVE DATE OF EXEMPTION**

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*Counsel for Lehigh Railway, LLC*

Dated: October 12, 2016

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On September 15, 2016, Lehigh Railway, LLC (“LRWY”) filed a Notice of Exemption to obtain Surface Transportation Board (“Board”) authority for an extension of the existing lease agreement between LRWY and Norfolk Southern Railway Company (“NSR”). On October 7, 2016, the Reading Blue Mountain & Northern Railroad Company (“RBMN”) filed a Petition requesting the Board to reject the Notice of Exemption or stay the effective date of the Notice of Exemption.<sup>1</sup> LRWY respectfully requests that the Board deny the RBMN Petition because RBMN has failed to provide any legitimate reason for the Board to reject the Notice or stay its effective date.

**INTRODUCTION**

The rail line at issue is approximately 56 miles extending between milepost IS 269.5, at Athens, PA, and milepost IS 213.5, at Mehoopany, PA, in Bradford and Wyoming Counties (the “Rail Line”). LRWY interchanges with NSR at Sayer on the north end of the Rail Line and with RBMN at Mehoopany on the south end of the Rail Line. See Exhibit A, Map of the Rail Line.

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<sup>1</sup> RBMN’s Petition is referred to herein as the “RBMN Petition” and LRWY’s Notice of Exemption is referred to herein as the “Notice.”

**Public Version -Redacted**

LRWY also interchanges on the Rail Line with RBMN at Towanda, PA, which is approximately 41 miles north of Mehoopany. RBMN owns and/or operates the approximately 4.7 branch line between Monroeton and Towanda that intersects with the Rail Line leased by LRWY at Towanda.

On October 28, 2008, LRWY entered into an agreement with NSR to lease and operate the Rail Line (“Original Lease”). The Original Lease does not expire until December 31, 2018. In 2014, RBMN and NSR purportedly entered into an agreement pursuant to which (according to RBMN) NSR “would require LRWY to haul cars for RBMN between Mehoopany and Towanda.” RBMN Petition at 3-4. In 2016, LRWY entered into an agreement with NSR to extend the term of the Original Lease through December 31, 2023 (“Amended Lease”). The Amended Lease has been executed by LRWY and NSR and will become effective upon the effective date of LRWY’s Notice, which is scheduled to occur on October 15, 2016.

In the Amended Lease, LRWY agreed with NSR that it would provide haulage service for RBMN on the Rail Line between Towanda and Mehoopany beginning on January 1, 2019 until the expiration of the Amended Lease pursuant to a haulage agreement to be executed by LRWY and RBMN.<sup>2</sup> A form Haulage Agreement was included as an attachment to the Amended Lease and contains a proposed rate for the haulage service that LRWY agreed with NSR to provide on the Rail Line for RBMN. [REDACTED]

[REDACTED]

[REDACTED] See Amended Lease at Para. 5.<sup>3</sup>

<sup>2</sup> This haulage service would provide RBMN with a commercial connection between its Monroeton – Towanda branch line and its connection with LRWY at Mehoopany, PA.

<sup>3</sup> A copy of the Amended Lease was filed under seal with LRWY’s Notice pursuant to the Board’s confidentiality provisions.

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On September 15, 2016, LRWY filed the Notice to obtain Board authorization for its Amended Lease with NSR. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>4</sup> On October 7, 2016, RBMN filed its Petition to reject or stay the effective date of the Notice.

**ARGUMENT**

LRWY respectfully urges the Board to deny the Petition filed in this proceeding by RBMN. RBMN has failed to show that LRWY's Notice is false or misleading. RBMN's sole complaint is that NSR (not LRWY) failed to abide by a purported agreement it reached with RBMN regarding a future haulage agreement on the line of railroad leased by LRWY. The Board does not have jurisdiction over the purported agreement between RBMN and NSR; the Board does not have jurisdiction over the claim that RBMN asserts against NSR; and RBMN has no relevant agreement with LRWY and no claim (contractual or otherwise) against LRWY, let alone any claim within the purview of the Board. The Board does not have jurisdiction over haulage or haulage agreements. RBMN is invoking the Board's processes here in an effort to force LRWY to agree to a haulage rate sought by RBMN. In addition, RBMN is arguing that it will suffer irreparable harm based on a haulage rate that it views as unfavorable more than two (2) years before the ripeness of any purported contractual claim it might have against NSR if the RBMN/LRWY haulage agreement is not in place by January 1, 2019. RBMN's attempt to involve the Board in its dispute with NSR in this proceeding should be rejected. For all of the foregoing reasons, RBMN has failed to provide any legitimate basis to reject or stay the Notice filed by LRWY for the extension of its lease agreement with NSR.

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<sup>4</sup> [REDACTED]

## Public Version -Redacted

### 1. LRWY's Notice Fully Meets the Statutory Criteria

LRWY's Notice satisfies the requirements of 49 C.F.R. Part 1150, Subpart E. Under 49 C.F.R. § 1150.42(c), a notice of exemption is void *ab initio* if it “contains false or misleading information. *N. H. Central R.R., Inc., - Lease and Operation Exemption – Line of the N. H. Dept. of Transp.*, STB Finance Docket 35033, slip op at 2 (STB served Dec. 11, 2007)(“N.H. Central”).

RBMN does not even allege that LRWY's Notice is false, misleading, void *ab initio* or otherwise fails to meet the class exemption requirements. The lease extension transaction that is the subject of LRWY's Notice is a routine transaction that is consistent with the public interest and limited in scope. Therefore, there is no basis for the Board to reject or stay the effectiveness of the Notice.

### 2. RBMN Should Not Be Allowed To Pursue Its Contract Claim Against NSR In This Proceeding

RBMN's purported contractual dispute with NSR is not a valid reason for the Board to reject the Notice filed by LRWY in this proceeding. RBMN's contractual claim arises from a purported commercial agreement between RBMN and NSR that is outside of the Board's jurisdiction, that relates to a haulage arrangement that is outside of the Board's jurisdiction and that will not become ripe (based on the assertions in RBMN's Petition) until January 1, 2019. The Board has determined that its regulations under 49 C.F.R. §§ 1150.31-36 “do not require the disclosure of such third-party contractual disputes, and the existence of such a dispute is not grounds for rejecting an exemption.” *Ohio River Partners LLC – Acquisition and Operation Exemption – Hannibal Development, LLC*, STB Finance Docket No. 35984, slip op at 3 (STB served Apr. 1, 2016). Moreover, a petitioner seeking rejection of a Notice of Exemption is not prohibited “from seeking enforcement of its contractual rights in state court.” *N.H. Central* at 4.

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RBMN believes it has a claim against NSR over the terms of their 2014 commercial agreement to which LRWY was not a party. RBMN does not even allege that its dispute with NSR is subject to Board jurisdiction. RBMN Petition at 5. The Board generally does not interpret contracts relating to matters subject to Board jurisdiction. *Pyco Indus., Inc. – Feeder Line Application – Lines of S. Plains Switching, Ltd.*, STB Finance Docket 34890, slip op. at 10 (STB served Sept. 8, 2008)(interpretation of contract is a matter of state contract law for courts to decide). It follows logically that the Board should not interpret a contract when the subject matter of the contract is not before it in a pending proceeding.<sup>5</sup>

There is no reason whatsoever for the Board to reject LRWY’s Notice while RBMN attempts to misuse the Board’s processes to force LRWY to accept a haulage rate that is more favorable to RBMN.<sup>6</sup> RBMN is not a party to either the original Lease Agreement or the Amended Lease, has no rights under either of those agreements, and has no legal basis for opposing LRWY’s Notice to obtain Board authorization for the extension of its lease rights with NSR on the Rail Line.

### **3. The Board Has No Jurisdiction Over the Haulage Rate Negotiations Between RBMN and LRWY**

RBMN’s express motive is to attempt to “force” LRWY to agree to RBMN’s desired haulage rate. RBMN acknowledges that it cannot ask the Board to regulate the establishment of a haulage agreement or its terms and conditions. RBMN Petition at 5. RBMN’s sole complaint here is about the haulage rate that LRWY has offered RBMN for moving RBMN’s cars over the Rail Line between Towanda and Mehoopany, a distance of approximately 41 miles. Although RBMN concedes that any haulage arrangement between LRWY and RBMN is not subject to

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<sup>5</sup> RBMN does not assert that it has a contract claim against LRWY.

<sup>6</sup> RBMN admits in its Petition that it may not have “any direct way *to force*” LRWY to accept its haulage rate proposal. RBMN Petition at 7 (emphasis added). RBMN’s attempt to use this proceeding to extract a more favorable haulage rate from LRWY is improper and unwarranted.

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Board jurisdiction, it claims that the purported obligation of LRWY to negotiate a haulage agreement with RBMN is subject to Board jurisdiction because it is included as a term of the Lease Amendment. This is a baseless proposition. Contrary to RBMN's assertion, the finalization of a haulage agreement between LRWY and RBMN is not a "pre-condition" to the effectiveness of the Lease Amendment. [REDACTED]

[REDACTED]

The Board has consistently determined that it does not have jurisdiction over haulage agreements. See, e.g., *Del. & Hudson Ry. Co., Inc.— Discontinuance of Trackage Rights in Susquehanna Cnty, Pa. and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Cnties, NY*, STB Docket AB-15(Sub-No. 25X), et al., slip op. at 11 (Board approval not required for the initiation or termination of haulage agreements "because such arrangements are entirely voluntary on the part of the carriers and no regulatory rights and responsibilities are created that would require the carriers to keep the arrangement in place."). The Board has jurisdiction over LRWY's continued lease and operation of the Rail Line for an extended period, but other contractual terms in that underlying lease are not subject to Board jurisdiction merely because they are contained within the lease.

LRWY has never agreed with RBMN to provide it with haulage between Towanda and Mehoopany at any specified rate. [REDACTED]

[REDACTED]

[REDACTED] However, the Amended Lease contemplates that LRWY and RBMN would have the right to negotiate mutually acceptable rates and terms for the haulage [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RBMN’s dislike of the haulage rate being offered by LRWY does not give it any rights to create Board jurisdiction over its haulage rate negotiations with LRWY, in a blatant attempt to use the Board’s process here to “force” LRWY into accepting RBMN’s rate proposal. The negotiation of the haulage rate between LRWY and RBMN is a private contractual negotiation between the parties and over which the Board does not have any jurisdiction. *See Ballard Terminal Railroad Company, LLC – Lease Exemption – Line of Eastside Community Rail, LLC*, STB Finance Docket 35730 (STB served May 1, 2013). Similarly, RBMN appears to believe it has a breach of contract claim against NSR if it is true (as RBMN alleges) that NSR promised not to extend the LRWY lease unless LRWY agreed to haulage terms with RBMN.<sup>7</sup> Any contractual dispute between RBMN and NSR likewise is not subject to Board jurisdiction and irrelevant to the effectiveness of LRWY’s Notice in this proceeding.

**4. RBMN Has Failed to Support Its Request for a Stay or Even a “Housekeeping” Stay of the Effective Date of the Notice**

The criteria governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. *Wash. Metro. Area Transit Comm 'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), and *Va. Petroleum Jobbers Ass 'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

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<sup>7</sup> We have not seen the purported agreement between NSR and RBMN and therefore cannot determine the validity of RBMN’s claim about what NSR may have committed to it.

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The Board should deny RBMN's stay petition and its request for a housekeeping stay because RBMN has failed to demonstrate that it is likely to prevail on the merits, that it would be irreparably harmed by a stay or that a stay is in the public interest.

First, as described above, RBMN's claim that the Board should reject the Notice is without foundation and therefore RBMN is unlikely to succeed on the merits. RBMN has failed to show that LRWY's Notice is false or misleading. Moreover, RBMN has a dispute about a *service* not subject to Board jurisdiction (haulage) arising under an *agreement* with NSR that is not subject to Board jurisdiction and concedes that it has no claim (contractual or otherwise) against LRWY. RBMN's petition to reject is triply, critically flawed.

Second, RBMN has failed to demonstrate that it will suffer irreparable harm. At most, it has a commercial contract claim against NSR for monetary damages. In the Petition, RBMN says "[a] damage claim against NSR ... would only be able to be measured after the fact, and after RBMN was required to pay the inflated haulage rates." RBMN Petition at 8. RBMN here concedes that it has a money damages remedy, but complains that it could only be measured "after the fact." *Almost all* money damage claims are measured after the fact and that does not constitute irreparable harm, except if the breaching party is judgment proof. RBMN could accept the haulage rate that LRWY is offering right now. It could then commence movement of cars by way of the haulage. It could pursue its purported contract claim against NSR and if it prevails, it could collect money damages from NSR for the difference between the rate paid to LRWY and the rate it would have paid if NSR had met its supposed contractual obligation to RBMN. NSR is far from judgment proof, so it is inconceivable that RBMN would not collect any damages to which it claims it is entitled. Money damages simply are not irreparable harm.

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*Chaplaincy of Full Gospel Churches, Et Al., v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006)(internal citations omitted).

Third, RBMN has failed demonstrate that a stay is in the public interest. RBMN argues that the “public interest clearly warrants instituting a stay ... to ensure that the Amended Lease does not take effect until all of the required preconditions have been met.” RBMN Petition at 8. There are no unmet “required preconditions.” The haulage condition is for the benefit on RBMN not the public. To the contrary, a stay is exclusively in the private commercial interest of RBMN.

Having failed to meet three of the four criteria for a stay, the fact that LRWY might not be harmed by a stay until the expiration of the term of the Original Lease is of no consequence. RBMN is the proponent of the stay and has not sustained its burden.

Even a housekeeping stay is not warranted. The Board often will grant a housekeeping stay if it requires additional time or information (before a notice becomes effective) to consider the issues presented in the housekeeping stay request.<sup>8</sup> Here, there are no disputed facts or difficult legal or policy issues presented. RBMN obviously wants to use the Board’s good offices for commercial leverage and the Board does not need more time to consider RBMN’s improper and spurious claims.

## CONCLUSION

For the foregoing reasons, LRWY respectfully requests that the Board deny the Petition to Reject or Stay filed by RBMN in this proceeding.

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<sup>8</sup> *General Railway Corp., D/B/A/ Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – in Osceola and Dickinson Counties, IA*, STB Finance Docket No. 34867, slip op at 2 (STB Served May 25, 2006).

Respectfully submitted,

A handwritten signature in blue ink that reads "Justin J. Marks". The signature is written in a cursive style with a large initial "J" and "M".

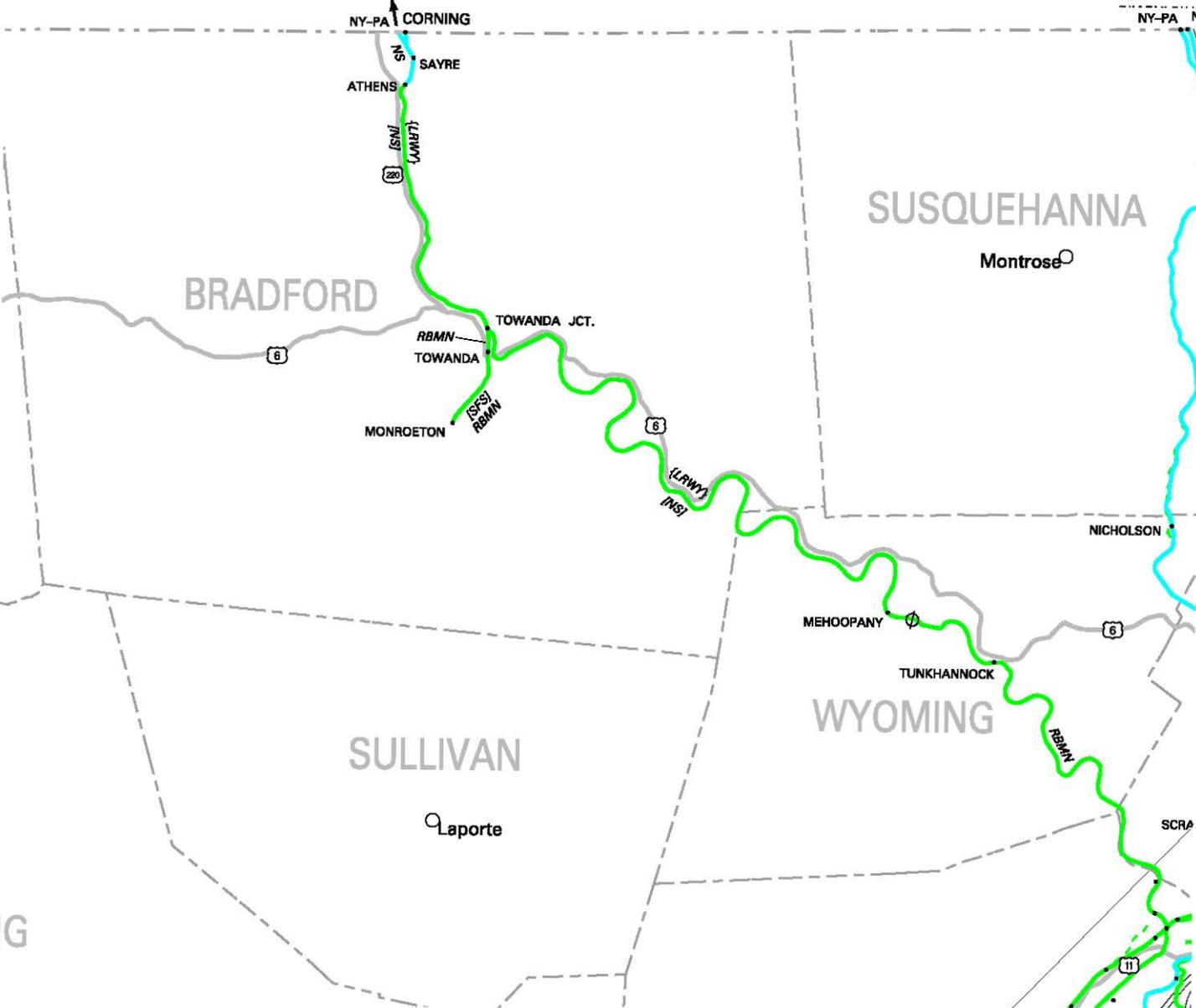
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*Counsel for Lehigh Railway, LLC*

Dated: October 12, 2016

# Exhibit A

## Map of Rail Line



NY-PA CORNING

NY-PA

SAYRE

ATHENS

(L)RWY  
(S)S  
28

BRADFORD

6

RBMN  
TOWANDA  
(S)S  
RBMN

TOWANDA JCT.

MONROETON

6

(L)RWY  
(S)S

SUSQUEHANNA

Montrose

NICHOLSON

6

MEHOOPANY

TUNKHANNOCK

WYOMING

RBMN

SULLIVAN

Laporte

SCRA

11

G

**CERTIFICATE OF SERVICE**

I certify that on October 12, 2016, a true copy of the foregoing Lehigh Railway, LLC, Reply to the Petition of Reading Blue Mountain & Northern Railroad Company to Reject Notice of Exemption or for Stay of Effective Date of Exemption was served via email upon the following counsel of record:

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