

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Docket No. FD 36062

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

**PETITION OF READING BLUE MOUNTAIN & NORTHERN RAILROAD
COMPANY TO REJECT NOTICE OF EXEMPTION OR
FOR STAY OF EFFECTIVE DATE OF EXEMPTION**

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Dated: October 7, 2016

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Reading Blue Mountain & Northern Railroad Company (“RBMN”) hereby petitions the Board to reject the Notice of Exemption (“Notice”) filed by Lehigh Railway, LLC (“LWRY”) in this proceeding on September 15, 2016, or alternatively to stay the effective date of the Notice.¹

LWRY is seeking authority to enter into an amended lease (the “Amended Lease”) with Norfolk Southern Railway (“NSR”) for the rail line between milepost IS 269.5 at Athens, PA, and milepost 213.5, at Mehoopany, PA (the “Rail Line”). According to the Notice, the Amended Lease seeks to extend the term of and make other changes to the original lease (“Original Lease”) that was entered into in October 2008. Because NSR agreed with RBMN not to renew the LWRY lease unless LWRY agreed to provide haulage for RBMN under standard industry terms, and because LWRY has not yet agreed to do so, RBMN is requesting that the Board not allow the Amended Lease to take effect until and

¹ As set forth by the Board in its notice served September 30, 2016, the effective date of the exemption is October 15, 2016 (30 days after the exemption Notice was filed). Petitions for a stay may be filed no later than October 7, 2016. *Id.*

unless the haulage agreement is finalized – either by rejecting the Notice without prejudice to LWRV filing a new Notice once the preconditions have been satisfied, or by staying the effective date of the Notice. Because LWRV will continue to have authority to operate the Rail Line under the Original Lease for several years, there will be no effect on LWRV's ability to continue to provide service.

BACKGROUND

As noted, LWRV became the lessee and operator of the Rail Line in late 2008. RBMN understands that the Original Lease was for an approximately 10-year term through December 31, 2018. The Rail Line connects with RBMN at Mehoopany. While RBMN and LWRV interchange traffic with one another, they also are competitors for traffic that originates and terminates in the northeastern Pennsylvania / Mehoopany area.

In late 2009, RBMN acquired a 4.7 mile line between Monroeton and Towanda that connects with the Rail Line at Towanda, approximately 41 miles from Mehoopany. *See Reading Blue Mountain and Northern Railroad Company - Acquisition and Operation Exemption - Towanda-Monroeton Shippers' Lifeline, Inc.*, STB Finance Docket No. 35309 (served December 4, 2009). Currently, RBMN has no way to move traffic directly between its tracks south of Mehoopany, and its line at Towanda. All of the Towanda-Monroeton traffic must be interchanged with LWRV, adding an additional carrier to the route.

In 2014, RBMN and NSR entered into a confidential agreement that addressed a number of commercial issues between the parties. The relevant portions of the agreement are being filed under seal as a confidential appendix.² As relevant here, NSR agreed that in

² RBMN is filing a separate motion for a protective order to protect the confidentiality of documents that have been or will be submitted in this proceeding (outside

connection with any renewal of the Original Lease, it would require LWRV to haul cars for RBMN between Mehoopany and Towanda on standard industry terms. It was expected that the haulage might not take effect until the expiration of the Original Lease on December 31, 2018. However, based on the Notice, NSR and LWRV (without notice to RBMN) agreed to renew the Original Lease early. While RBMN has been advised that LWRV has agreed in the Amended Lease to provide haulage for RBMN, the commitment does not start until January 1, 2019, instead of immediately upon the renewal, and NSR has not required, and LWRV has not agreed, to provide the haulage at a standard industry rate.³ The rate suggested in the form is substantially higher than standard, and in fact is higher than LWRV would likely receive if it were a carrier participating in the move.⁴ RBMN has proposed a rate that it believes to be in line with industry standards, but LWRV has rejected the rate proposed by RBMN. Through the RBMN-NSR agreement, NSR restricted its authority to enter into any lease renewal with LWRV without first satisfying the requirements of the agreement with RBMN. If LWRV is not required to agree to a standard haulage rate as a precondition to the Amended Lease becoming effective, then there will be no reason for LWRV to agree to a standard haulage rate later. Treating the haulage agreement as a precondition to the effectiveness of the Amended Lease is the only

of the requirements for disclosure of interchange commitment information which does not require a protective order).

³ RBMN has been advised that the Amended Lease, a confidential copy of which was filed with the Notice, included a form of haulage agreement, the terms of which, other than the rate, are standard industry terms and acceptable to RBMN.

⁴ By comparison, the rate suggested in the form is more than twice the per mile haulage rate that NSR charges Delaware & Hudson Railway Company (“D&H”) under the Direct Short Line Access Agreement entered into in connection with NSR’s acquisition of certain lines of the D&H in STB Finance docket No. 35873.

way to enforce both the agreement between NSR and RBMN, and LWRV's obligations under the Amended Lease.

ARGUMENT

1. The Board should reject LWRV's Notice of Exemption because the preconditions of the Amended Lease have not been satisfied.

While the haulage itself is an arrangement that is not subject to Board jurisdiction, the obligation of LWRV to grant the haulage is because that obligation is included in the Amended Lease that is subject to the Board's jurisdiction.

The Board has authority to reject a notice of exemption where it is clear that the filing party does not have all of the necessary rights in place to effectuate the requested authority. The Board's regulations (in particular 49 C.R.R. §1150.33(c)) contemplate that the party seeking authority either has, or is in the process of acquiring, an agreement with the underlying power to provide that service. *See Jersey Marine Rail, LLC – Operation Exemption – Lines of Railroad Owned by Consolidated Rail Corporation in the City of Linden, NJ (“Jersey Marine”)*, STB Docket No. FD 36047 (served July 21, 2016). Here, NSR and LWRV have evidently entered into the Amended Lease, but there is an issue about whether NSR was authorized to enter into the Amended Lease since NSR has not arranged for LWRV to provide haulage under standard industry terms, including a standard industry rate. There is also the issue of whether the Amended Lease is yet effective because LWRV has not yet satisfied the condition of the Amended Lease to grant haulage to RBMN. For these reasons, the Notice should be rejected as being filed prematurely. *See*

*Jersey Marine, supra; Midwest Railroad Company – Lease and Operation – Chicago Rail Link, LLC.*⁵

2. Alternatively, the Board should stay the effective date of LWRV's Notice until the preconditions of the Amended Lease have been satisfied.

As an alternative to rejection of the Notice, the Board could issue a stay of the effective date of LWRV's Notice until LWRV and RBMN have had the opportunity to enter into a haulage agreement that satisfies the conditions of the NSR's agreement with RBMN. Once that condition has been satisfied, the Notice would no longer need to be rejected, and could be permitted to take effect.

The Board should stay the effective date of LWRV's Notice at least long enough to permit the Board to act on the instant Petition. A stay is appropriate and justified to protect the integrity and efficiency of the Board's regulatory processes, and to allow full consideration of the Petition. At the very least, the Board should institute a housekeeping stay so that the exemption cannot take effect until the Board has sufficient information and time to deliberate fully upon the issues presented in this Petition. *See, for example, Connex Railroad, LLC – Lease and Operation Exemption – Line of Buzzi Unicem USA in College Park, GA*, STB Docket No. FD 35986 (served January 19, 2016) (stay granted to provide sufficient time for Board to fully consider the arguments presented on the rights of the various parties to enter into the proposed lease); *Burlington Northern & Santa Fe Railway Company - Acquisition and Operation Exemption - South Dakota*, STB Finance Docket No. 34645 (served December 29, 2004).

⁵ LWRV would be free to re-file once the haulage agreement between LWRV and RBMN has been finalized.

A stay also is justified under the Board's traditional stay criteria. As the Board has often held:

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits (here, of a request for revocation); (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).

BNSF Railway Company – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, IL, STB Docket No. AB 6 (Sub-No. 470(X)) (served July 2, 2010), at 2.

All of the requirements of a stay are satisfied.

A. RBMN is likely to succeed on the merits.

For the reasons set forth in Section 1 above, RBMN is likely to succeed on the merits of its Petition to reject LWRV's Notice. As discussed above, the Notice is not timely because NSR has not yet required LWRV to grant haulage to RBMN under standard industry rate and other terms, and LWRV has not satisfied the preconditions of the Amended Lease to grant such rights. Accordingly, it would not be appropriate for the Board to give authority to the Amended Lease, or to grant LWRV authority to operate thereunder. Given a full review of the issues and the terms of the Amended Lease, it is thus likely that the Board will reject LWRV's Notice.

B. RBMN will suffer irreparable harm in the absence of a stay.

If the Board does not grant a stay, LWRV will begin operating under the Amended Lease which extends the term until 2023. LWRV will have no incentive to agree to a standard industry rate for the haulage (as opposed to the inflated rate set forth in the draft haulage agreement), and RBMN may not have any direct way to force LWRV to do so. A

damage claim against NSR would not substitute for the specific performance of a long-term haulage at a standard industry that RBMN needs to develop the business on the Towanda-Monroeton line, and would only be able to be measured after the fact, and after RBMN was required to pay the inflated haulage rates.

C. No other interested parties will be substantially harmed by a stay.

A stay of the effective date of the exemption will not cause substantial harm to any interested party as LWRV currently is operating under the Original Lease, and RBMN understands that the Original Lease will not expire until December 31, 2018. Thus, neither LWRV, NSR nor any shippers would be affected by a stay.

D. A stay will be in the public interest.

The public interest clearly warrants instituting a stay which will allow the Board to allow the Board to have sufficient time to review the issues raised in the Petition, and to ensure that the Amended Lease does not take effect until all of the required preconditions have been met.

CONCLUSION

For all the foregoing reasons, the Board should reject LWRV's Notice of Exemption as premature, or should stay the effective date of the Notice until the preconditions of the proposed lease amendment have been satisfied.

Respectfully submitted,



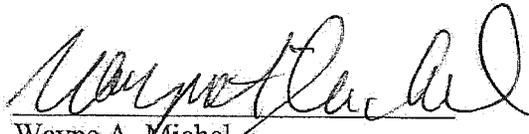
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Attorneys for Reading Blue Mountain
& Northern Railway Company

Dated: October 7, 2016

VERIFICATION

I, Wayne A. Michel, verify under penalty of perjury that I am authorized to make this verification on behalf of Reading, Blue Mountain & Northern Railroad Company, and that the information included in the foregoing Petition to Reject or for Stay is true and correct to the best of my knowledge and belief.


Wayne A. Michel
President

Dated: October 7, 2016

CERTIFICATE OF SERVICE

I hereby state that on this 7th day of October, 2016, I caused a copy of the foregoing

Petition to Reject or for Stay to be served by first-class U.S. Mail and by email on:

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