

HARKINS CUNNINGHAM LLP

Attorneys at Law

232729

13

David A. Hirsh
202.973.7606
dhirsh@harkinscunningham.com

1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804
Telephone 202.973.7600
Facsimile 202.973.7610

August 13, 2012

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

FEE RECEIVED

AUG 13 2012

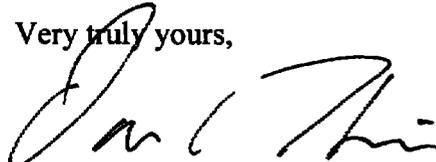
**SURFACE
TRANSPORTATION BOARD**

**Re: Grand Trunk Western Railroad Company – Acquisition of Operating
Easement – In Shelby County, Tennessee (Docket No. FD 35661)**

Dear Ms. Brown:

Enclosed please find an original and 10 copies of the Petition for Exemption for filing in the above-referenced docket. Also enclosed are a CD containing the text of this filing in Microsoft Word and PDF formats and a check for the filing fee of \$6,600, as required under 49 C.F.R. § 1002.2(f)(41)(vi).

Very truly yours,



David A. Hirsh

Enclosures

**ENTERED
Office of Proceedings**

AUG 13 2012

**Part of
Public Record**

FILED

AUG 13 2012

**SURFACE
TRANSPORTATION BOARD**

232729
AUG 13 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35661

GRAND TRUNK WESTERN RAILROAD COMPANY
- ACQUISITION OF OPERATING EASEMENT -
IN SHELBY COUNTY, TENNESSEE

PETITION FOR EXEMPTION

ENTERED
Office of Proceedings

AUG 13 2012

Part of
Public Record

FILED

AUG 13 2012

SURFACE
TRANSPORTATION BOARD

FEE RECEIVED

AUG 13 2012

SURFACE
TRANSPORTATION BOARD

Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 347-7840

David A. Hirsh
James M. Guinivan
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, DC 20006-3804
(202) 973-7600

Thomas J. Healey
Michael A. Matteucci
CN
17641 South Ashland Avenue
Homewood, IL 60430-1339
(708) 332-4381

Counsel for Grand Trunk Western Railroad Company

August 13, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35661

GRAND TRUNK WESTERN RAILROAD COMPANY
– ACQUISITION OF OPERATING EASEMENT –
IN SHELBY COUNTY, TENNESSEE

PETITION FOR EXEMPTION

Grand Trunk Western Railroad Company (“GTW” or “Petitioner”) hereby petitions the Surface Transportation Board (the “Board”), pursuant to 49 U.S.C. § 10502(a) and 49 C.F.R. Part 1121, for an exemption from the approval requirements of 49 U.S.C. §§ 11323-11325 regarding GTW’s proposed acquisition from CSX Transportation, Inc. (“CSXT”) of an operating easement over approximately 2.1 miles of CSXT’s Memphis Terminal Subdivision, extending from milepost 00F371.4, at or near Leewood, Tennessee, to milepost 00F373.4, at or near Aulon, Tennessee (“Leewood-Aulon Line”), including the right to use the ballast, rail, ties, bridges, culverts, signals, gates, and other railroad operating structures and fixtures located on that property. GTW’s affiliate, Illinois Central Railroad Company (“IC”), currently operates between Leewood and Aulon pursuant to trackage rights from CSXT. CSXT and GTW have agreed to an easement swap, whereby, subject to STB approval, CSXT would grant the easement over the Leewood-Aulon Line in exchange for an easement over the Elsdon Subdivision, a line in the Chicago area owned by GTW.¹

¹ The Agreement for Exchange of Perpetual Easements between CSX Transportation, Inc. and Grand Trunk Western Railroad Company was executed on

Maps of the Leewood-Aulon Line are attached as Exhibit A to this Petition.

DESCRIPTION OF TRANSACTION

GTW is an indirect, wholly owned subsidiary of Canadian National Railway Company (“CNR”). CNR and its affiliates (together, “CN”) operate a rail system of approximately 20,000 route miles in the United States and Canada. Most of CN’s operations in the United States are conducted by the railroad subsidiaries of Grand Trunk Corporation (“GTC”), which is a non-carrier holding company and a direct subsidiary of CNR. Among GTC’s subsidiaries are GTW and IC. GTW operates in Illinois, Indiana, Michigan, and Ohio. IC, which CNR acquired in 1999,² operates in Alabama, Illinois, Kentucky, Louisiana, Mississippi, and Tennessee.

CN’s principal north-south route is owned and operated by IC and runs between Chicago in the north and New Orleans in the south, via Champaign, Illinois, Memphis, Tennessee, and Jackson, Mississippi. That line splits at Woodstock, Tennessee, north of Memphis, into two parallel lines that extend to the south and join again at West Junction, Tennessee, south of Memphis. The westernmost of these parallel lines runs through downtown Memphis and is used for CN traffic moving to or from yards, origins and destinations, and interchange points located along that line. The easternmost of the parallel lines runs around Memphis and is used for the remainder of CN’s traffic around Memphis, including most of CN’s north-south through traffic, as well as most traffic

August 13, 2012. The draft easement grant itself that is the subject of this Petition is Exhibit F to that Agreement (entitled “Leewood Easement Agreement”). Both documents are found in Volume 2 of CSXT’s application for approval of its acquisition of the Elsdon easement, filed simultaneously herewith in *CSX Transportation, Inc. – Acquisition – Grand Trunk Western R.R.*, Docket No. FD 35522.

² See *Canadian Nat’l Ry. – Control – Ill. Cent. Corp.*, 4 S.T.B. 122 (1999).

moving to or from Harrison Yard (CN's principal rail yard in the Memphis area).³ For approximately 2.1 miles, this easternmost line runs over the Leewood-Aulon Line, which is owned by CSXT, but which CN uses pursuant to trackage rights granted to IC's predecessor in 1907 by CSXT's predecessor. Under the trackage rights agreement, CSXT maintains and dispatches the line, even though CN is now its primary user. CN and IC have long wished to assume operational control of the Leewood-Aulon Line, as it is an essential link for CN north-south traffic.

As part of an exchange of easements that will better align CN's and CSXT's use and control of their lines, CSXT has agreed to grant to CN's affiliate, GTW, an exclusive, perpetual, non-assignable railroad operating easement over the Leewood-Aulon Line. CN has agreed that CSXT would retain trackage rights over that segment. Under the parties' agreement, GTW would assume responsibility for dispatching, track maintenance, and capital improvements for the Leewood-Aulon Line, including all interlockings, control points, and connections, including those at Leewood and Aulon themselves. While GTW, as owner of the easement, would have the legal right to operate over the Leewood-Aulon Line, it expects rail operations on behalf of CN will continue to be provided by IC, under its existing 1907 trackage rights agreement and/or under a further agreement with GTW.⁴

³ Amtrak runs over the westernmost of these parallel lines, but not over the easternmost.

⁴ In order for an exchange of property to qualify as a like-kind exchange under the U.S. Internal Revenue Code, the exchange must be between the same parties. Therefore, because GTW is conveying the easement for its Elsdon Subdivision to CSXT, it is necessary for CSXT to convey the easement for the Leewood-Aulon Line to GTW, rather than IC.

ENVIRONMENTAL AND HISTORIC REVIEW

A petition for exemption must comply with the Board's environmental reporting requirements, if applicable. 49 C.F.R. § 1121.3(b). Under 49 C.F.R. § 1105.6(c)(2), GTW's proposed acquisition of the Leewood-Aulon Line is exempt from environmental reporting requirements. The proposed acquisition would not result in any operational changes that would exceed the thresholds of 49 C.F.R. § 1105.7(e)(4) or (5), and it would not result in any action that would normally require environmental documentation (such as a construction or abandonment). The only operational change that is planned is that CN has agreed to construct additional non-jurisdictional trackage along the main line that would be used for CSXT's local switching and would provide head room at the west end of CSXT's Leewood Yard, allowing CSXT to operate in and out of the yard without fouling the main, and significantly reducing congestion on the main line, to the benefit of shippers, CSXT, and CN.

Under 49 C.F.R. § 1105.8(b)(1), the proposed acquisition of the Leewood-Aulon Line by GTW is exempt from historic preservation reporting requirements. GTW's acquisition of the line is for the purpose of continuing rail operations, further Board approval would be required for any abandonment or discontinuance of service, and there are no plans in connection with this transaction to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older.

DISCUSSION OF EXEMPTION STANDARDS

GTW's acquisition of the Leewood-Aulon Line constitutes the "purchase ... [of] property of another rail carrier by any number of rail carriers" and therefore ordinarily would require authorization by the Board. 49 U.S.C. § 11323(a)(2).⁵

The Board, however, is statutorily required to exempt a proposed transaction from regulation under a provision of 49 U.S.C. §§ 10101-11908 whenever it finds that (1) application of that provision is not necessary to carry out the Rail Transportation Policy of 49 U.S.C. § 10101 ("RTP"); and (2) either (a) the transaction is of limited scope, or (b) application in whole or in part of the provision is not necessary to protect shippers from the abuse of market power. 49 U.S.C. § 10502(a). Because the proposed acquisition of the Leewood-Aulon Line is fully consistent with the RTP, is limited in scope, and would not lead to an increase in market power that could allow the abuse of shippers, the Board should exempt the acquisition from the approval requirements of 49 U.S.C. §§ 11323-11325.

I. IMPOSITION OF THE REQUIREMENTS OF 49 U.S.C. §§ 11323-11325 IS NOT NECESSARY TO CARRY OUT THE RAIL TRANSPORTATION POLICY OF 49 U.S.C. § 10101.

In determining whether to exempt a transaction under 49 U.S.C. § 10502(a) from formal regulation under a provision of 49 U.S.C. §§ 10101-11908, the Board must "study . . . the relationship between the statutory provisions ordinarily applicable and relevant facets of [the RTP]." *Ill. Commerce Comm'n v. ICC*, 787 F.2d 616, 630 n.100

⁵ The Board has found that acquisition of an operating easement constitutes the acquisition of "property" for purposes of section 11323(a)(2). *Mass. Coastal R.R. – Acquisition – CSX Transp., Inc.*, STB Finance Docket No. 35314, slip op. at 3-4 (STB served Mar. 29, 2010).

(D.C. Cir. 1986). In this case, because the relevant facets of the RTP are those protecting competition,⁶ and because the proposed acquisition would have no adverse effects on competition, formal regulation is unnecessary to implement those elements.

Because the proposed acquisition does not involve the merger or control of more than one Class I rail carrier, if it were the subject of a formal application under 49 U.S.C. §§ 11323-11325, the Board would evaluate it under the approval criteria set forth in 49 U.S.C. § 11324(d). Under those criteria, the Board would be required to approve the transaction unless it found that:

(1) as a result of the transaction, there [would] likely ... be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction [would] outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11324(d). Thus, if the Board finds that a transaction (not involving merger or control of two Class I rail carriers) would not have substantial anticompetitive effects, the agency's "analysis is at an end" and it "must approve the transaction." *Ill. v. ICC*, 687 F.2d 1047, 1053 (7th Cir. 1982) (emphasis omitted).

In this case, CSXT will retain trackage rights, for both overhead and local traffic, over the Leewood-Aulon Line. Thus, it will retain the ability to serve all routes and shippers that it serves today. Further, IC will have full operational rights on and over the

⁶ In particular, subsections (1), (4), (5), and (12) of 49 U.S.C. § 10101 (declaring it the policy of the United States Government "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail," "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense," "to ensure effective competition and coordination between rail carriers and other modes," and "to avoid undue concentrations of market power").

Leewood-Aulon Line and would continue to provide local and overhead service. The proposed acquisition will therefore cause no diminution in competition, much less a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation. Accordingly, the formal approval provisions of 49 U.S.C. §§ 11323-11325 need not be applied in order to implement the pro-competitive elements of the RTP.⁷

II. THE PROPOSED ACQUISITION IS LIMITED IN SCOPE.

The Leewood-Aulon Line at issue here is only 2.1 miles long, or well within the range of rail lines that have been the subjects of transactions found by the Board to be of limited scope.⁸ The transaction would be transparent to shippers, who would continue to

⁷ In addition, the requested exemption would further other elements of the RTP by minimizing the administrative expense of considering the proposed transaction and by expediting regulatory decisions and reducing barriers to entry and exit. See 49 U.S.C. § 10101(2), (7). Moreover, the transaction would help promote a safe and efficient rail transportation system, foster sound economic conditions, and encourage efficient management. See 49 U.S.C. § 10101(3), (5), (9).

⁸ See, e.g., *Kansas City S. Ry. – Acquisition & Operation Exemption – Columbus & G. Ry.*, STB Finance Docket No. 35094 (STB served Dec. 13, 2007) (acquisition of 2.23 miles); *Portland & W. R.R. – Trackage Rights Exemption – BNSF Ry.*, STB Finance Docket No. 34951 (Sub-No. 1) (STB served Mar. 12, 2007) (trackage rights over 13.31 miles); *Land Conservancy of Seattle & King County – Acquisition & Operation Exemption – Burlington N. & S.F. Ry.*, STB Finance Docket No. 33389, slip op. at 12-13 (STB served May 13, 1998) (abandonment of 12.45 miles); *Bay Line R.R. – Abandonment Exemption – In Jackson & Holmes Counties, FL*, Docket No. AB-454X (STB served May 14, 1996) (abandonment of 9.19 miles); *Ga. & Fla. R.R. – Abandonment Exemption – In Mitchell & Colquitt Counties, GA*, Docket No. AB-453 (Sub-No. 1X) (STB served Mar. 27, 1996) (abandonment of 5.45 miles); *Union Pac. R.R. – Abandonment Exemption in Sutter County, CA (Yuba City Branch)*, Docket No. AB-33 (Sub-No. 90X) (STB served Mar. 29, 1996) (abandonment of 5.20 miles); *Claussen – Continuance in Control Exemption – Live Oak, P. & Ga. R.R.*, STB Finance Docket No. 32813 (STB served Mar. 29, 1996) (control of 83.05-mile railroad); *RailTex, Inc. – Acquisition of Control Exemption – Dallas, G. & N.E. R.R.*, Finance Docket No. 32742 (ICC served Oct. 10, 1995) (control of 91.5-mile railroad); *Genesee & M.V. R.R. – Acquisition & Operation Exemption – Consolidated Rail Corp.*, 10 I.C.C.2d 824 (1995)

receive the same or improved service and have access to the same competitive rail options after the acquisition as they do at present. The proposed transaction is therefore of limited scope, satisfying the criterion of 49 U.S.C. § 10502(a)(1).

III. REGULATION UNDER 49 U.S.C. §§ 11323-11325 IS NOT NECESSARY TO PROTECT SHIPPERS AGAINST THE ABUSE OF MARKET POWER.

For the proposed acquisition to qualify for an exemption under 49 U.S.C. § 10502(a)(2), it needs to be demonstrated *either* that the transaction is of limited scope or that formal regulation is not necessary to protect shippers from the abuse of market power. *Village of Palestine v. ICC*, 936 F.2d 1335, 1340 (D.C. Cir. 1991). Because the proposed transaction is clearly of limited scope, there is no need for any finding regarding the need to protect shippers from abuse of market power. Nevertheless, it is apparent, as discussed above, that the proposed acquisition would cause no diminution of competition, as shippers would continue to enjoy all competitive options for rail service currently available to them. CSXT would continue to provide local and overhead rail service, by means of the trackage rights that CSXT is retaining, and IC would have full operational rights on and over the Leewood-Aulon Line and would continue to provide local and overhead service. The transaction would neither create nor increase the market power of any railroad, nor would it create or increase any risk to shippers of the abuse of such power.

(control of 16-mile railroad); *WFEC R.R. – Construction & Operation Exemption – Choctaw & McCurtain Counties, OK*, Finance Docket No. 32607 (ICC served Sept. 1, 1995) (construction of 14-mile rail line).

LABOR PROTECTION

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of otherwise applicable statutory obligations to protect the interests of its employees. Under applicable precedent, the Board is required by 49 U.S.C. § 11326(a) to impose *New York Dock* labor protective conditions, as set forth in *New York Dock Ry. – Control – Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

CONCLUSION

The Petition for Exemption should be granted, subject to *New York Dock* labor protection conditions.

Respectfully submitted,



David A. Hirsh
James M. Guinivan
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, DC 20006-3804
(202) 973-7600

Theodore K. Kalick
CANADIAN NATIONAL RAILWAY
COMPANY
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 347-7840

Thomas J. Healey
Michael A. Matteucci
CN
17641 South Ashland Avenue
Homewood, IL 60430-1339
(708) 332-4381

Counsel for Grand Trunk Western Railroad Company

August 13, 2012

VERIFICATION

I, Paul E. Ladue, declare under penalty of perjury that I am Region Director Contracts and Administration, Southern Region, for Grand Trunk Railroad Company, that I have read the foregoing Petition for Exemption, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to provide this verification on behalf of Grand Trunk Railroad Company

Executed on August 13, 2012


Paul E. Ladue

EXHIBIT A

MAPS

