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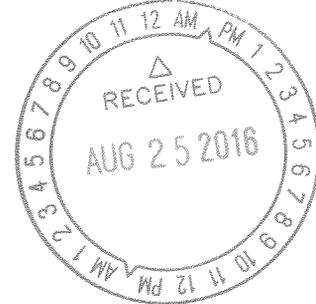
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ENTERED
Office of Proceedings
August 25, 2016
Part of
Public Record

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August 25, 2016



VIA FEDERAL EXPRESS

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20006

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:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of a **Verified Notice of Exemption of Grand Elk Railroad, Inc. Pursuant to 49 C.F.R. § 1150.41** (the "Notice"), a **Petition to Partially Revoke Class Exemption** ("Revocation Petition"), and **Petition for Waiver** ("Waiver Petition"), all dated August 25, 2016. A check in the amount of \$2,800.00, representing the aggregate fees for the Notice (\$1,900.00), the Revocation Petition (\$300.00), and the Waiver Petition (\$600.00), and a disc containing the text of each filing and the *Federal Register* caption summary (for the Notice) in MS Word 2010 format are attached.

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

Respectfully submitted,

A handwritten signature in cursive script that reads "R. A. Wimbish".

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

RAW:tjl
Enclosures
cc: Craig Richey
Garrett Urban

FEE RECEIVED
August 25, 2016
SURFACE
TRANSPORTATION BOARD

FILED
August 25, 2016
SURFACE
TRANSPORTATION BOARD

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

**VERIFIED NOTICE OF EXEMPTION
OF
GRAND ELK RAILROAD, INC.
PURSUANT TO 49 C.F.R. § 1150.41**

Robert A. Wimbish
Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

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

Dated: August 25, 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

**VERIFIED NOTICE OF EXEMPTION
OF
GRAND ELK RAILROAD, INC.
PURSUANT TO 49 C.F.R. § 1150.41**

Pursuant to 49 C.F.R. § 1150.41, et seq., Grand Elk Railroad, Inc. (“GDLK”), a Class III rail carrier, hereby files this Verified Notice of Exemption for authority to acquire by assignment from Norfolk Southern Railway Company (“NSR”) trackage rights over approximately 3.3 miles of railroad line (the “CSXT Line”) in Grand Rapids, Michigan, owned by CSX Transportation, Inc. (“CSXT”). The subject trackage rights conveyance was incidental to GDLK’s 2009 lease and operation of NSR-owned railroad lines extending generally from Grand Rapids to Elkhart, Indiana, but was inadvertently omitted from GDLK’s notice of exemption for that transaction.¹ GDLK is filing this notice to obtain proper agency authority for the prior assignment to it of NSR’s trackage rights over the CSXT Line. See Saginaw Bay Southern Railway Company – Acquisition and Operation Exemption – Rail Line of CSX Transportation, Inc., Docket No. FD 34729 (STB served May 5, 2006) at 2.

Simultaneously herewith, GDLK is filing a petition to partially revoke the class exemption of 49 C.F.R. § 1150.41 as necessary to allow the Board to grant the authority sought

¹ See Grand Elk Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company, Docket No. FD 35187 (STB served November 17, 2008) (“GDLK Lease”).

herein retroactively to January 30, 2009. GDLK operated pursuant to the CSXT Line trackage rights from its start-up in 2009 until August 10, 2016, when CSXT denied GDLK access to the line. After 7 years of operations, and roughly 2 years after the assigned trackage rights agreements expired on their terms, CSXT now disputes the 2009 assignment. GDLK is addressing CSXT's contractual arguments in state court, and seeks retroactive Board authorization to assure that the court is fully able to address the matters before it.

In accordance with the requirements of 49 C.F.R. § 1150.43, GDLK submits the following information:

Name and Address of Applicant: 49 C.F.R. § 1150.43(a)

The full name and address of the rail carrier applicant herein is as follows:

Grand Elk Railroad, Inc.
75 Mills Street
Kalamazoo, Michigan 49048
(269) 343-3461

Applicant's Representative: 49 C.F.R. § 1150.43(b)

GDLK's representative to whom correspondence regarding this transaction should be sent is as follows:

Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

Statement Concerning Agreement: 49 C.F.R. § 1150.43(c)

Consolidated Rail Corporation ("Conrail"), predecessor of NSR, and The Chesapeake & Ohio Railway Company ("C&O"), predecessor of CSXT, entered into agreements

dated February 6, 1980 (as supplemented per an agreement dated July 6, 1993) and January 24, 1984, which together provided for Conrail's acquisition of trackage rights over the CSXT Line. Pursuant to the Grand Rapids Assignment and Assumption Agreement dated of as March 5, 2009, NSR assigned the 1980, 1984 and 1993 agreements to GDLK. The 1980 and 1984 agreements expired by their terms in 2014, and CSXT now disputes their assignment to GDLK prior to their expiration. GDLK has initiated state court litigation in Michigan to confirm the validity of the 2009 assignment, as is discussed in GDLK's simultaneously-filed petition for partial revocation.

Operation of the Property: 49 C.F.R. § 1150.43(d)

GDLK will be the operator of the trackage rights on the CSXT Line. CSXT will also continue to conduct operations on the line.

Summary of the Transaction: 49 C.F.R. § 1150.43(e)

GDLK is a Class III common carrier by rail and an indirect subsidiary of Watco Companies, Inc. See Watco Companies, Inc. – Continuance in Control Exemption – Grand Elk Railroad, L.L.C., Docket No. FD 35188 (STB served November 17, 2008). GDLK commenced operations in 2009 upon leasing the Grand Rapids-Elkhart main line and a number of secondary line segments from NSR. GDLK Lease, supra. Two of those secondary segments – the Kalamazoo Industrial Track and the Comstock Industrial Track² – are “island” trackage reached solely via trackage rights over the CSXT Line. This situation resulted from a 1980s joint relocation project that removed the tracks of NSR's predecessor from downtown Grand Rapids and replaced those lines with trackage rights over the adjacent CSXT Line. Consolidated Rail Corporation – Trackage Rights Exemption – Over Chesapeake and Ohio Railway Company,

² See GDLK Lease at 1-2 (line segments 3 and 10).

Docket No. FD 30385 (ICC served February 7, 1984); Consolidated Rail Corporation – Trackage Rights Exemption – Over Chesapeake and Ohio Railway Company, Docket No. 30449 (ICC served April 24, 1984). The trackage rights also permit a direct interchange connection with the Grand Rapids Eastern Railroad and service to shippers in the formerly shared rail corridor.

In the 2009 lease transaction with NSR, GDLK obtained via assignment NSR's trackage rights over the CSXT Line in Grand Rapids, which extend from the connection with the NS/GDLK Hughart Running Track at approximately CSXT milepost CH 151.3± at Pleasant Street through milepost CH 151.6/CGE 0.0 to milepost CGE 3.0± north of Ann Street, a distance of approximately 3.3 miles. That trackage rights assignment, however, was inadvertently omitted from the notice of exemption that GDLK filed in GDLK Lease. This notice of exemption is submitted to correct that oversight and obtain the requisite authorization for the trackage rights.

GDLK operated pursuant to the CSXT Line trackage rights without interference or dispute for 7 years. Recently, however, CSXT has objected to GDLK's continued operations and, as of August 10, 2016, has denied GDLK access to the CSXT Line. Contrary to CSXT's contentions, GDLK believes the underlying trackage rights agreements between the predecessors of CSXT and NSR (which subsequently expired by their terms in 2014) were properly assigned to GDLK in 2009, and is pursuing that position in state court litigation in Michigan. Pursuant to the petition to partially revoke submitted herewith, GDLK seeks retroactive authorization for the 2009 trackage rights assignment so that, should the court determine that a contractual assignment occurred, the Board's jurisdiction to prevent unjustified interruptions in rail service and to

oversee as necessary the development of new trackage rights compensation and other terms would be preserved.³

The complete name and address of the rail carrier assigning the CSXT Line trackage rights to GDLK is as follows:

Norfolk Southern Railway Company
Three Commercial Place
Norfolk, Virginia 23510-9241

The complete name and address of the rail carrier that owns the CSXT Line is as follows:

CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

A copy of this notice of exemption and the related petition to partially revoke has been served on counsel for CSXT.

If GDLK's petition to partially revoke is granted, then the subject notice would take effect retroactively as of the date ordered in that decision. Otherwise, the authority sought herein for GDLK's 2009 acquisition by assignment of trackage rights over the CSXT Line will become effective on September 24, 2016.

³ GDLK acknowledges that the authority invoked hereby – whether prospective in nature only or made retroactive pursuant to a grant of GDLK's simultaneously-filed petition for partial revocation – is permissive, and that issuance of the notice under either circumstance is neither determinative of the disputed trackage rights contract issues, nor, by itself, does it mandate the restoration of trackage rights operations by GDLK. Under the circumstances, GDLK is amenable to the Board clarifying that the authorization granted through this exemption does not constitute a ruling on the parties' contractual rights. See, e.g., Wisconsin Central Ltd – Trackage Rights Exemption – Lines of Union Pacific Railroad Company and Illinois Central Railroad Company, Docket No. FD 35992 (STB served Mar. 4, 2016) slip op. at 1-2; Rock & Rail, Inc. – Acquis. & Operation Exemption – Burlington N. & Santa Fe Ry., FD 33738 (STB served Apr. 30, 1999) slip op. at 2 n.2.

Map: 49 C.F.R. § 1150.43(f)

A map showing the CSXT Line, connecting rail lines and the surrounding area is attached as Exhibit A.

Certificate of Compliance: 49 C.F.R. § 1150.43(g)

A Certificate of Compliance with the provisions of 49 C.F.R. § 1150.43(g) is attached as Exhibit B.

Interchange Commitments: 49 C.F.R. § 1150.43(h)

GDLK's prior acquisition by assignment of trackage rights over the CSXT Line does not involve any provision or agreement that would limit future interchange with a third-party connecting carrier.

Advance Notice: 49 C.F.R. § 1150.42(e)

While GDLK's annual rail-related revenues exceed \$5 million, GDLK has conducted rail operations pursuant to the CSXT Line trackage rights for the past 7 years and no employees would be affected by the Board's retroactive authorization of those trackage rights today. GDLK provided the required notice to NSR employees and relevant national labor organizations at the time of the underlying lease transaction in 2009. GDLK is thus filing concurrently herewith a petition for waiver of the 60-day notice requirement.

Environmental and Historic Preservation Data: 49 C.F.R. § 1105

Under 49 C.F.R. § 1105.6(c)(2), GDLK's acquisition by assignment of the CSXT Line trackage rights is exempt from environmental reporting requirements. That assignment has not and will not result in significant changes in carrier operations, *i.e.*, changes that exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5).

Under 49 C.F.R. § 1105.8(b)(3), GDLK's acquisition of the CSXT Line trackage rights also is exempt from historic preservation reporting requirements. GDLK's continued exercise of the trackage rights will not substantially change the level of maintenance of any railroad property.

Caption Summary: 49 C.F.R. § 1150.44

A caption summary in appropriate form is attached as Exhibit C.

Respectfully submitted,

By:  _____

Robert A. Wimbish
Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

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

Dated: August 25, 2016

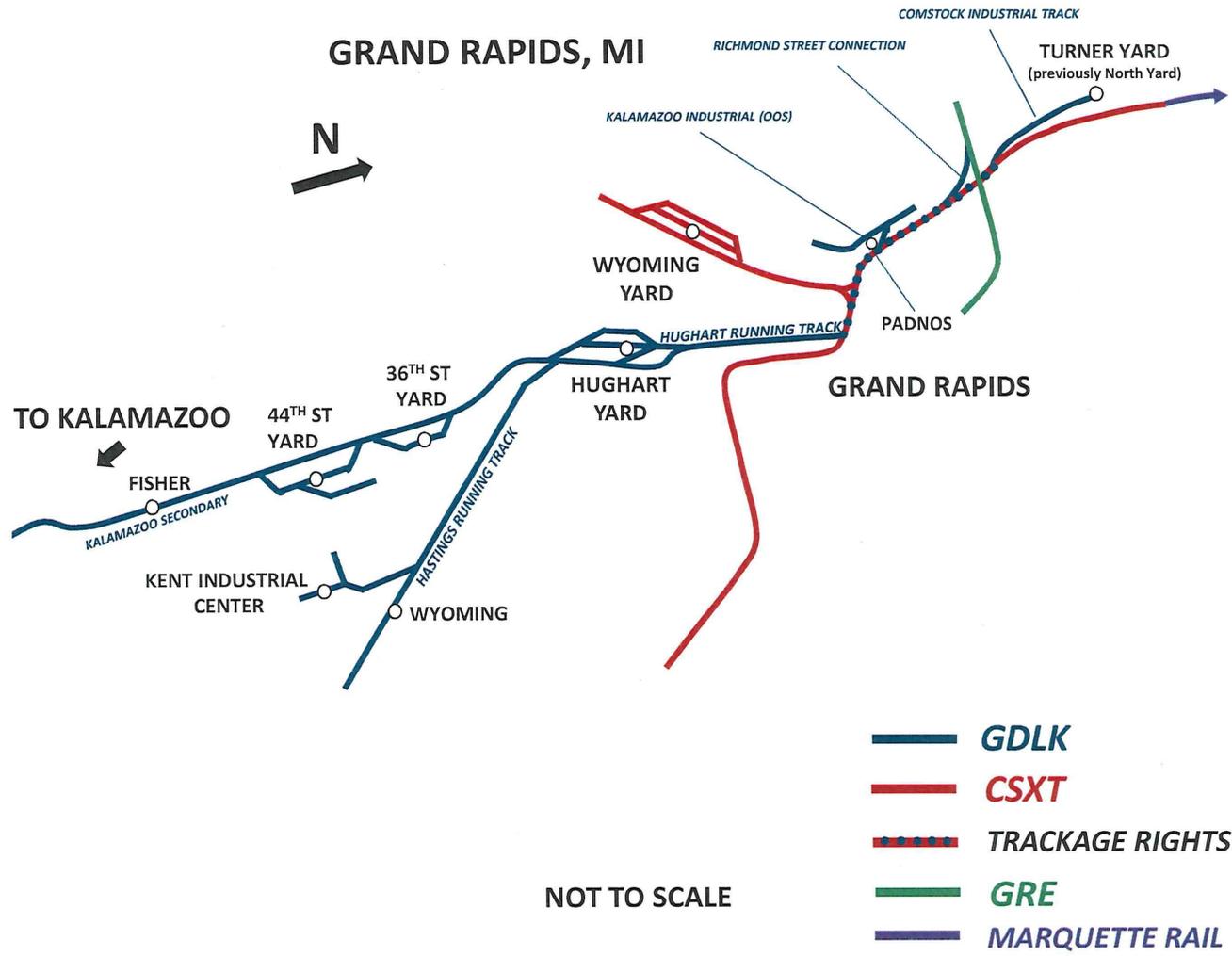
**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

EXHIBIT A

MAP



**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**

**EXHIBIT B
CERTIFICATION**

CERTIFICATION

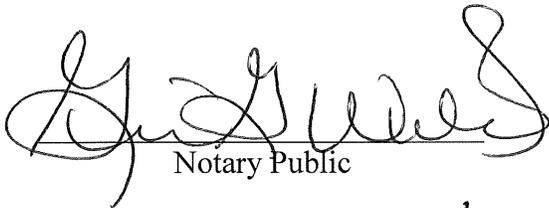
State of Kansas)
)
County of Crawford) SS:

Arthur E. McKechnie III, being duly sworn, hereby certifies that the projected annual rail revenues of Grand Elk Railroad, Inc. as a result of the transaction proposed herein will not result in the creation of a Class II or a Class I rail carrier under the provisions of 49 C.F.R. § 1201 (1-1).



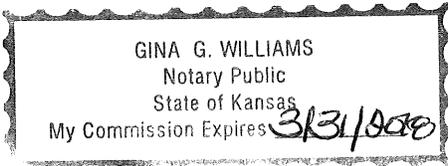
Arthur E. McKechnie III
Chief Commercial Officer
Grand Elk Railroad, Inc.

SUBSCRIBED AND SWORN TO
before me this 22 day
of August, 2016.



Notary Public

My Commission expires: 3/31/2018



**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**

EXHIBIT C

CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

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

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

Grand Elk Railroad, Inc. (“GDLK”), a Class III rail carrier, has filed a Verified Notice of Exemption to acquire by assignment from Norfolk Southern Railway Company (“NSR”) trackage rights over a rail line of CSX Transportation, Inc. (“CSXT”) extending from milepost CH 151.3± at Pleasant Street through milepost CH 151.6/ CGE 0.0 to milepost CGE 3.0± north of Ann Street in Grand Rapids, Michigan, a distance of approximately 3.3 miles.

The trackage rights are incidental to a prior transaction in which GDLK leased NSR rail lines extending generally between Grand Rapids and Elkhart, Indiana, but they were inadvertently omitted from the notice of exemption authorizing that transaction. Grand Elk Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company, Docket No. FD 35187 (STB served November 17, 2008).

GDLK has concurrently filed a petition to partially revoke the applicable class exemption as necessary to allow the Board to retroactively authorize the assignment of trackage rights from NSR to GDLK. If the petition granted, the requested authority would take effect retroactively as of the date ordered in that decision. Otherwise, the authority sought will become effective on September 24, 2016.

Comments must be filed with the Board and served on:

Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

This Notice is filed under 49 C.F.R. § 1150.41. If the Notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Dated: August __, 2016

By the Board

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings

**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**

VERIFICATION

VERIFICATION

State of Kansas)
) ss:
County of Crawford)

Arthur E. McKechnie III, being duly sworn, deposes and says that he is Chief Commercial Officer of Grand Elk Railroad, Inc., that he has read the foregoing Notice of Exemption and knows the facts asserted therein, and that the same are true as stated.



Arthur E. McKechnie III

SUBSCRIBED AND SWORN TO
before me this 22 day
of August, 2016.



Notary Public

My Commission expires: 3/31/2018

